Expropriation in Private International Law

Michael Bogdan

Studentlitteratur

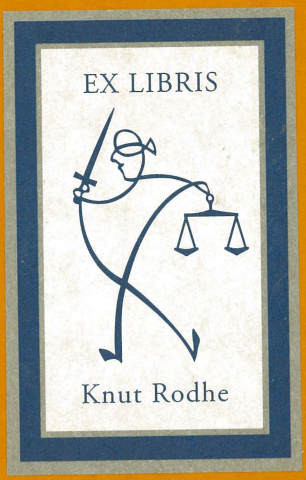
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TABLE OF CONTENTS

FOREWORD

The Faculty of Law of the University of Lund, Sweden, has provided the facilities and economic assistance without which my work would not have been possible.

This paper has been written as a doctorate thesis under the direction of Professor Lennart Pålsson who has helped me with invaluable advice and criticism.

I have been privileged to receive the criticism by Dr. Ulrich Drobnig, Hamburg.

Part of the research work has been done at the Max-Planck–Institute for Foreign and International Private Law in Hamburg which has generously placed its library at my disposal.

The English of the thesis has been reviewed by Paul V. Carlin, J.D., Pennsylvania.

The thesis would not have been written without the encouragement and sacrifices on the part of my wife.

I wish to extend my sincere gratitude to all the abovementioned, as well as to all the others who have helped and encouraged me during my work.

In order to make the publication of the thesis possible, I was forced to shorten substantially the original manuscript. It is, however, my hope that I shall be able to return to various aspects of the problem on some later occasions.

Lund, December 1974

Michael Bogdan

SOME ABBREVIATIONS

A.	Atlantic Reporter (U.S.A.)
A.C.	Appeal Cases
A.D.	Annual Digest and Reports of Public International Law Cases
A.F.	Annuaire français de droit international
AG	Amtsgericht (West Germany)
A.J.C.L.	American Journal of Comparative Law
A.J.I.L.	American Journal of International Law
All.E.R.	All England Law Reports
A.M.C.	American Maritime Cases
ArchV	Archiv des Völkerrechts
AWD	Aussenwirtschaftsdienst des Betriebsberaters
BAG	Bundesarbeitsgericht (West Germany)
BB	Der Betriebsberater
BG	Bundesgericht (Switzerland)
BGE	Entscheidungen des schweizerischen Bundesgerichtes
BGH	Bundesgerichtshof (West Germany)
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen
C.A.	Court of Appeal, Court of Appeals, Cour d'appel, Corte di appello, Gerechtshof, Hovrätt, Appelations-gericht
Cass.	Cassation Court, Cour de cassation, Corte di cassazione
C.C.	Civil Code
Ch.	Chancery Division (Reports)
Clunet	Journal du droit international
D.C.	District Court
E.R.	English Reports Reprint
F. (Fed.)	Federal Reporter (U.S.A.)
F.Supp.	Federal Supplement (U.S.A.)
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
HD	Högsta Domstolen (Swedish Supreme Court)
HG	Handelsgericht
H.L.	House of Lords
HR	Hooge Raad (Netherlands Cassation Court)
I.C.L.Q.	International and Comparative Law Quarterly
I.L.A.	Reports of the International Law Association
I.L.M.	International Law Materials
I.L.Q	International Law Quarterly
I.L.R.	International Law Reports
IPRspr.	Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts

IzRspr.	Sammlung der deutschen Entscheidungen zum interzonalen Recht
JBl	Juristische Blätter
JCP	Juris-Classeur Périodique. La semaine juridique
JIR	Jahrbuch für internationales Recht
JR	Juristische Rundschau
JZ	Juristenzeitung
K.B.	King's Bench Division (Reports)
KG	Kammergericht (Berlin)
LG	Landgericht (Germany)
Ll.L.R.	Lloyd's List Law Reports
L.Q.R.	Law Quarterly Review
L.T.R.	Law Times Reports
MDR	Monatschrift für deutsches Recht
n.	footnote
N.E.	North Eastern Reporter (U.S.A.)
NedTIR	Nederlands Tijdschrift voor Internationaal Recht
NJ	Neue Justiz
NJA	Nytt Juridiskt Arkiv (Sweden)
NJW	Neue Juristische Wochenschrift
NordTIR	Nordisk tidsskrift for international ret
Nw.U.L.R.	Northwestern University Law Review
N.Y.S.	New York Supplement
ObLG Bayern	Bayerisches Oberstes Landesgericht
OG	Obergericht (Switzerland)
OG DDR	Entscheidungen des Obersten Gerichts der DDR in Zivilsachen
OGH	Oberster Gerichtshof (Austria)
ÖJZ	Österreichische Juristenzeitung
ØL	Østre Landsret (Denmark)
OLG	Oberlandesgericht (West Germany)
P.	Probate, Divorce and Admiralty Division (Reports)
P.C.	Privy Council
Q.B.	Queen's Bench Division (Reports)
RabelsZ	Zeitschrift für ausländisches und internationales Privatrecht
RC	Recueil des cours de l'Academie de droit international de La Haye
RG	Reichsgericht (Germany)
RGZ	Entscheidungen des Reichsgerichts in Zivilsachen
Rev.	Revue critique de droit international privé (until 1933 Revue de droit international privé; between 1934 and 1946 Revue critique de droit international)

Rev.gén.dr.int.	Revue générale de droit international public
Rev.trim.dr.com.	Revue trimestrielle de droit commercial
Revue belge	Revue belge de droit international
Rt	Norsk retstidende
s.	section
S.C.T.	Ships Claim Tribunal (England)
SH	Sø- og Handelsreten (Denmark)
So.	Southern Reporter (U.S.A.)
Sup.Ct.	Supreme Court
SvJT	Svensk Juristtidning
TCiv	Civil Tribunal
TCom	Commercial Tribunal
TfR	Tidsskrift for rettsvitenskap
T.L.R.	Times Law Reports
Trib.	Tribunal, Tribunal de grande instance
UfR	Ugeskrift for retsvæsen
U.S.	United States (Reports)
U.S.C.C.A.	U.S. Circuit Court of Appeals
U.S.D.C.	U.S. District Court
VL	Vestre Landsret (Denmark)
VWGH	Verwaltungsgerichtshof (Austria)
W.L.R.	Weekly Law Reports
WM	Wertpapier-Mitteilungen
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZfO	Zeitschrift für Ostrecht
ZüR	Blätter für zürcherische Rechtsprechung

PART ONE

PRELIMINARY AND GENERAL PROBLEMS

CHAPTER ONE

INTRODUCTION

1. Confiscation, expropriation, nationalization, etc.- The purpose of this thesis is to examine the position taken by courts towards seizures of property by *foreign* states.

Various terms have been used to denote forced transfer of proprietary rights to the state. Although there is considerable confusion as to the use of these terms, it seems that there are certain differences in their meaning.

Confiscation is a measure of penal nature. It can be pronounced by a court in an individual case or enacted as a general measure against whole groups of owners, for example because of their race or nationality. The term is, however, often used to denote any taking without indemnity.

Expropriation is not penal and the owners are normally offered compensation. It is resorted to when the state needs some particular property, for example land for the purpose of a public road. Whereas a confiscation is directed against certain owners, expropriation concerns a distinct piece of property regardless of the owner.

Nationalization (socialization) is often confounded with the two first mentioned categories, although it has been more and more recognized as a distinct concept. The aim of a nationalization is a partial or total reform of the economic structure of the country. It differs from confiscation in that it has no punitive intention, compensation is often provided and the property is taken not because it belongs to certain owners but because it is of a certain type. It also differs from expropriation as compensation is not always provided and the aim is not to vest in the state a particular object but rather to bring about changes in the economic system.

In addition to the abovementioned three types of takings there are many "mixed" forms, e.g. agrarian reforms, discriminatory nationalizations. Some authors[1] see a difference between "socialist" and "capitalist" nationalizations: whereas the latter only replace one owner with another, the former are said to change the nature of ownership itself.

For the purpose of this thesis, it is not essential to differentiate between the various types of seizures since the position of courts to all these foreign measures is, as we shall see, the same[2]. The same reason makes it necessary to choose a term covering all the types of takings. In addition to the terms *"seizure"* and *"taking"*, the term *"expropriation"* will also be used with such a wide meaning. As the genuine expropriations (see *supra*) very seldom give rise to problems in the conflict of laws area, such use of the term should not cause confusion. The terms "confiscation" and "nationalization" will be used

only when the nature of the taking is to be stressed. The terms may, of course, have a different meaning in direct quotations from other sources.

An expropriation need not be limited to rights *in rem* to tangibles: it may as well involve claims, intellectual property, etc.[3] An expropriation can be concealed: some expropriators have shown great ingenuity in finding other names for expropriatory measures. As examples of "covered expropriations"[4] we can mention bankruptcy proceedings[5], appointment of an administrator[6], abolition of inheritance rights[7] and coerced "sale"[8]. Sometimes, there is no declared legal measure at all and the owners are simply treated as if they were not owners any more[9]. It has to be stressed that, in most cases, the courts take the foreign measure for what it really is and the concealed expropriations will be handled in this thesis together with the open ones.

2. Selection of the material.- There is an enormous amount of case law relevant to the subject of this thesis. It is quite out of the question to include all the existing cases. The scope of the thesis is not geografically limited, but a certain indirect tendency to that effect can no doubt be detected as American, English, French, German and Scandinavian decisions are the best available. An effort has been made to concentrate upon leading cases, cases representative for the judicial practice and those illustrating some legal reasoning of interest. In addition to expropriation cases, decisions involving related groups of laws, e.g. foreign revenue or exchange control decrees, will also be mentioned often. These laws, too, confer prerogative rights on the state and analogies can be drawn to a large extent.

The legal literature on the subject is also voluminous. So much has been written that one may doubt whether it is possible to contribute anything original to the discussion. A closer study reveals, however, that the attention of writers has been focused mainly on certain aspects of the problem, whereas other aspects have often been neglected. Besides, a great part of the existing literature was written in the years of the "cold war" after the huge expropriations in Eastern Europe and traces of emotional involvement of the authors can often be seen. The size of the thesis has made it necessary to make a selection also among articles, notes and books; it is not the ambition of the thesis to provide a complete list of all what has been written on the subject.

The admirable books of Prof. Lars *Hjerner* and Prof. Ignaz *Seidl-Hohenveldern* have proved to be of great help in my search for relevant literature and case material.

3. Structure of the thesis.- The thesis is divided into three main parts.

The first part is devoted to preliminary and general problems. The introduction (Chapter One) is followed by an examination of the requirements

imposed on the courts by the law of nations (Chapter Two). Chapter Three contains a general discussion of the special status of foreign expropriatory laws in private international law.

The second part of the thesis concerns the problem of the foreign expropriator's right to the property affected by the expropriation. The study of the question of recognition of the expropriator's title to property which has already been effectively seized (Chapter Four) is followed by the study of the question of enforcement of foreign expropriatory laws (Chapters Five and Six). This part includes also the review of some special grounds occasionally invoked against the recognition or enforcement of foreign expropriations, in particular that the expropriation is illegal under international law or that the expropriator has not been recognized by the forum state (Chapter Seven).

The focus of the thesis is on its third part, which handles the problems arising in connection with the partition of the loss caused by foreign expropriations. Although very many lawsuits have concerned the question of which of the usually quite innocent parties is to carry the consequences of the foreign expropriatory measure, these problems have been discussed much less in legal literature than the expropriation's validity and the expropriator's rights. For this reason, this part is more detailed than the previous ones. After an introduction into the problem of loss partitioning (Chapter Eight), there is a review of the case law in this field (Chapter Nine). Finally, an attempt to propose solutions is made (Chapter Ten).

1) *Bystrický*, Problemen 96; *Szászy* 232.
2) *Beemelmans* 8–10; *Kegel* 444.
3) On "nationalization of women", see in Clunet 1919, 105, 503.
4) *Seidl-Hohenveldern*, BB 1953, 837; *Schulze* 162.
5) E.g. *Molnár v. Wilsons AB* (Sweden HD 1954).
6) E.g. *Weiss v. Simon* (Sweden HD 1941).
7) E.g. *Swerintzeffs arvingar v. Nilsson-Åkers* (Sweden HD 1937).
8) E.g. *Novello v. Himrichsen* (England C.A. 1951).
9) E.g. West German BGH Feb. 20, 1961.

CHAPTER TWO

LIMITATIONS IMPOSED BY THE LAW OF NATIONS

I. Right of the expropriator to enforce the taking

4. It is sometimes asserted that an expropriation is contrary to international law if it goes beyond the jurisdiction of the expropriator, i.e. if the expropriator attempts to take over assets located beyond his territory[1]. The view that the enactment itself of such an expropriation constitutes an international tort has, however, no support in international practice. States feel free to legislate as to property abroad, for example by exchange control rules affecting all assets of their residents, and there seem to have been no diplomatic or other actions indicating that such laws are considered to violate international law. When states legislate on property abroad this property has practically always some kind of close connection to the legislating country, e.g. it belongs to that country's nationals or residents.

The question of the expropriator's possibilities to enforce his decrees is more important. It arises when the original owners of the property refuse to comply voluntarily with the taking. There is no doubt that states are to execute their laws, even by force, in their own territories. But what are the ways open to the expropriator when the property is beyond his immediate reach, i.e. when it cannot be effectively seized by his instrumentalities in his territory? The special case of enforcement on high seas disregarded, there are three conceivable methods of enforcement.

The expropriator could, first of all, send his police or army to the foreign country in order to compel the original owner to comply with the expropriation decree. Such use of force in foreign territory is, however, forbidden by international law as violating the territorial sovereignty of the foreign state[2].

Another way of enforcement open to the expropriator is the use of force in his own territory in order to compel the owner to transfer the property from abroad to the expropriating state[3]. *Mann*[4] seems to be of the view that even such indirect enforcement violates international law. He invokes the protests by several nations against the practice of American courts in enforcing the American antitrust law. This form of enforcement is, however, not unusual; in many countries the residents are required by exchange control laws, under threats of punishment, to bring their foreign assets "home". Such pressure in the legislating country seems, at least in expropriation cases, to be consistent with international law.

The third way how the expropriator may attempt to enforce the seizure is to go to the courts of the foreign country and ask for their assistance with the enforcement. According to some authors even such a demand is a violation of international law[5]. As *Mann* puts it[6]:

"The state which tries to recover . . . within the territory of another state purports to exercise extraterritorial enforcement jurisdiction. This is so, whether it sends troops . . . or institutes proceedings in the courts of the forum, thus using the latter's system of judicial administration and machinery. Even the last mentioned method involves . . . the infringement of sovereignty of the state of the forum and therefore is contrary to international law."

It is hard to agree with this opinion. The expropriator must not use force in foreign territory, but this is not the case when he goes to foreign courts and asks for their assistance. By his demand, he recognizes, in effect, the territorial supremacy of the forum state. The expropriator, like any other person, may go to the courts with any demand and the courts may, in turn, reject it. No case is known where the forum state protested after a foreign expropriator had instituted an action in the forum. What is more, there are cases (s. 46-47 *infra*) where the forum has accorded the demanded assistance by helping to carry out the foreign measure.

II. Forum's right to enforce and not to enforce foreign takings

5. Right to enforce.- According to one view, the law of nations prohibits the forum to enforce a foreign expropriation[7]. The majority of writers take, however, the freedom to enforce foreign takings as so natural that only few care to confirm it explicitly[8]. If the expropriation involves property belonging to nationals of the forum or of the expropriator, neither state will complain. But even if property of nationals of third countries is involved, their home state cannot protest as long as the expropriation itself is lawful under international law. If the forum state itself can seize the property without violating international law, it can also help other states to carry out similar takings without incurring international responsibility[9]. It is different when the expropriation is unlawful under the law of nations, as active support of such measure by its enforcement could amount to an international tort[10].

6. Right not to enforce.- Several writers in the socialist countries condemn the usual refusal of Western courts to help in enforcing foreign nationalizations as a violation of international law[11]. The sole case where a Western court declared that it was its duty to enforce foreign takings did not, however, involve a nationalization but a measure of punitive nature. In the Dutch case of *Belgium v. E.M.J.C.H.* (C.A. Hague 1953), the court enforced a Belgian seizure directed against persons who had collaborated with the German enemy, stating that there was an accepted principle of international law under which states should assist each other in securing extraterritorial effect to their legislation concerning their subjects unless such legislation conflicted with public policy. The majority of courts and writers are, however, of the view that there is, in absence of a treaty, no duty under international law to enforce foreign expropri-

ations. The courts normally refuse to enforce foreign takings and the writers consider the right of the courts to do so as self-evident[12]. There seem to have been no diplomatic steps by expropriating states against the refusal of foreign courts to enforce the expropriations.

III. The act of state doctrine

7. Doctrine.- According to the act of state doctrine, adhered to by some while rejected by others, the courts are prohibited to review actions of a foreign state done within its territory, however objectionable they might seem. For expropriation cases, this would mean that the forum must not judge upon the validity of foreign seizures which had been carried out in the territory of the foreign expropriator. The act of state doctrine is often compared to jurisdictional immunity and the term "immunity *ratione materiae*" is sometimes used to illustrate that foreign state acts are immune in the sense that their validity is not to be questioned by the forum. The doctrine is thus a rule of procedure rather than of substantive law.

The act of state doctrine is sometimes considered to be a rule of international law, sometimes of municipal constitutional law, sometimes of both. Thus, *Re* wrote that the doctrine is "one of international law as applied by the Anglo-American courts"[13], but also that its function is to prevent constitutional conflicts between the Judiciary and the Executive in matters having international implications[14].

8. England.- In the leading English case of *Luther v. Sagor* (C.A. 1921), a Soviet taking was upheld on the grounds that the validity of the acts of an independent sovereign government in relation to property and persons within its jurisdiction could not be questioned in English courts. The doctrine was pushed aside by the British court in Aden in *Anglo-Iranian Oil Co. v. Jaffrate* (Aden Sup. Ct. 1953) where the court found an Iranian taking to be contrary to international law and thus invalid, but it was again confirmed in the case of *Helbert Wagg* (Ch. 1956) where it was stressed that every civilized state must be recognized as having power to legislate in respect of movables situated within that state and that such legislation must be recognized by other states as valid and effectual.

Among English authors the act of state doctrine has many critics opposing, in particular, its application when the foreign expropriation is contrary to international law[15]. The doctrine is, nevertheless, a part of English law as well as of other legal systems originating in English law.

9. U.S.A.- The act of state doctrine is a part of American federal law. The most frequently invoked older precedent is the case of *Underhill v. Hernandez* (U.S. Sup. Ct. 1897) where it was said that the courts of one country would not sit

in judgment on the acts of the government of another, done within its own territory. The doctrine has been applied in numerous decisions. An interesting case is *Fields v. Predionica I Tkanica* (N.Y. App. Div. 1942) where a Yugoslav expropriation had been carried out in Brazil with the consent of Brazilian authorities. The court said that the seizure should, under the circumstances, have the same force as if it had been accomplished in Yugoslavia. American courts - the court said - have been refusing to inquire into the legality of such takings. This case shows that an act of state need not be enforced within the territory of the enacting state.

The acts of Nazi Germany were also recognized in the U.S.A. because of the doctrine[16]. Subsequently, the U.S. Department of State declared that the courts had a free hand to judge upon such acts ("Bernstein letter") and the practice of courts changed[17].

In recent years much attention has been paid to the act of state doctrine in connection with the Cuban expropriations. Even here the doctrine was at first upheld[18], the most important case being

Sabbatino No. 1 (U.S. Sup. Ct. 1964): An American company bought sugar from a Cuban - but American-owned - company C.A.V. While the sugar was still in Cuba and property of the C.A.V., this company was expropriated by the Cuban Government. The buyer signed a new contract, this time with the expropriator, and the sugar was taken out of Cuba. The purchase price was now demanded by both the expropriator and the original owners of the C.A.V. The U.S. Department of State refused to state its position towards the application of the act of state doctrine in this case, saying that it would be improper to comment on a case pending in courts. The U.S.D.C. and C.C.A. considered this to be a granting of a free hand and refused to recognize the expropriation as they found it to be contrary to international law. The U.S. Sup. Ct. decided in the opposite way. It admitted that the act of state doctrine was not a part of international law as it was evidenced by the practice of nations. The doctrine had, however, constitutional underpinnings based on the division of powers between the Executive and the Judiciary. The doctrine and the expropriation were upheld.

10. Sabbatino Amendment.- The criticism caused by the *Sabbatino No.1* judgment brought about a legislative step by the U.S. Congress in 1964, the so-called *Sabbatino* or *Hickenlooper* Amendment to the Foreign Assistance Act of 1961[19]. This law was limited to one year, but it was re-enacted in 1965 with minor alterations on a permanent basis[20]. It stipulated, with certain exceptions, that:

" . . . no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim of title or other right to property is asserted by any party including a foreign state (or any party claiming through such state) based upon (or traced through) a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principles of compensation . . . "

In the *Sabbatino No.2*, on remand from the *Sabbatino No.1*, the demands of the expropriator were consequently rejected.

It has to be kept in mind that the Amendment is only a very narrow exception from the act of state doctrine. The Amendment is not applicable when the taking is lawful under international law[21] or when other issues than the right to the expropriated property is involved. Thus the doctrine may still protect the expropriator from having to pay compensation[22] and requires recognition of e.g. a Cuban "suspension" of redemption of bonds[23].

11. Executive v. Judiciary.- In the *Sabbatino No.1*, the U.S. Supreme Court stated that the act of state doctrine is not a rule of international law but an American constitutional rule based on the division of powers between the Executive and the Judiciary. This division of powers was discussed recently in *Banco Nacional de Cuba v. First National City Bank No.1, No.2* (U.S.Sup. Ct. 1971, 1972):

Citybank tried to use the value of its expropriated assets in Cuba for a set-off against the debt it owed to the Cuban state. C.C.A. decided in favor of the expropriator relying on the act of state doctrine. The State Department expressed the view that the doctrine should not be applied in this case ("Stevenson letter"). The U.S. Sup. Ct. granted certiorari and remanded the case without deciding on the merits for reconsideration in light of the views of the State Department. The C.C.A. decided that the doctrine was applicable notwithstanding the views of the Department. This was new as the courts had traditionally recognized the primacy of the Executive in forming relations to other nations.
To apply the doctrine against the wishes of the Executive was, according to the dissenting Judge, to ignore the purpose of the doctrine itself and a deviation from the judicial function of the court. The C.C.A. decision was followed by a letter to the U.S. Sup. Ct. from the U.S. Sollicitor General who, as *amicus curiae*, criticized it for impairing the power of the Executive. The U.S. Sup. Ct. reversed the judgment and allowed the set-off. Three Justices in this 5:4 decision said through Justice *Rehnquist* that the act of state doctrine had no roots in the Constitution but rather in international comity. The Executive has primacy in conduct of foreign relations and when it represents to the court that the doctrine would not advance the interests of U.S. foreign policy, it should not be applied. Two Justices concurred on different grounds. Justice *Powell* seems to oppose the doctrine as such and Justice *Douglas* allowed the set-off as it was Cuba that asked for judicial aid and fair dealing required recognition of the counterclaim; he added that the position of the Executive should not be decisive as otherwise the court would be a mere errand boy for the Executive. The four dissenting Justices were of the view that the doctrine was to be applied regardless of the views of the Executive.

Although the set-off was allowed, the majority of Justices stated that the position of the Executive was not decisive. The standing of the act of state doctrine in American courts is thus unclear.

12. Europe.- On the European Continent, the act of state doctrine has not gained any wide recognition. The courts usually recognize the title of the expropriator to already seized property, but they do not feel bound to do so

when they find the taking to be contrary to public policy or international law. There are, nevertheless, few decisions where the court invoked principles resembling the act of state doctrine[24]. Dutch and Italian courts have explicitly rejected the doctrine[25], but most European courts do not even discuss it when examining the validity of foreign expropriations. Practically all writers reject the compulsory character of the doctrine[26], although there are exceptions[27].

Scandinavian authors usually consider the act of state doctrine to be nothing more than a speciality of Anglo-American law[28], but also here there are exceptions[29]. In the Swedish case of *Weiss v. Simon* (HD 1941) it was said that the money for goods expropriated abroad and sold to Sweden "could not" be denied to the expropriator, but this should not be interpreted to mean that it was beyond the power or right of the court to examine the validity of the seizure.

13. Conclusions.- The act of state doctrine is undoubtedly part of the law of some countries, e.g. England and the U.S.A. It seems to have some support in Japan[30].

When the doctrine was discussed at international conferences of lawyers, it was found to be not binding under international law[31].

The Resolution on Permanent Sovereignty over Natural Resources of the U.N. Trade and Development Board of October, 1972, seems to support the doctrine as a rule of international law:[32]

"Measures of nationalization as states may adopt in order to recover their natural resources are the expression of a sovereign power in virtue of which it is for each state to determine the amount of compensation and the procedure for these measures, and any dispute which may arise in that connection falls within the sole jurisdiction of its courts . . . "

The Resolution speaks only about nationalizations of natural resources, but there are no reasons why any other taking should be less an expression of sovereign power. The Resolution is, however, of no binding character and it does not reflect any generally accepted principle (it was adopted by 39 votes against 2, but with 23 abstentions).

In view of the practice in various countries, as well as of the prevailing view in legal literature, it appears that the act of state doctrine is not a binding rule of international law. In absence of an international treaty to the contrary[33], the courts are free to deny recognition to foreign expropriations which have been executed in the territory of the expropriator.

IV. Jurisdictional immunity

14. The expropriator is practically always a state. As such, it is protected by immunity from being sued in foreign courts and its property is protected from

seizure or attachment. This means that the depossessed owner cannot sue the expropriator in foreign courts and demand restitution of the expropriated property or payment of compensation.

We shall not deal here with the numerous problems arising in connection with immunity like waiver of immunity, immunity and set-off, immunity of unrecognized stated and governments, etc., although these may be of relevance also in expropriation cases. Only the aspects which are specific for expropriation cases will be mentioned.

There are two concepts of immunity. The first one is that of absolute immunity saying that foreign states enjoy immunity regardless of the nature of the lawsuit. The other concept prefers limited (functional) immunity, accorded to foreign states only in lawsuits involving their activities *iure imperii* but not in lawsuits where the foreign state acts *iure gestionis*, i.e. not as a sovereign but rather as a private merchant. States are divided on this issue, but this does not normally cause any difficulties in expropriation cases, as it is recognized that the expropriation is always an act *iure imperii*[34].

If an action against the expropriator is rejected because of his immunity, this does not imply that he is considered to be the rightful owner of the expropriated property. Immunity is only a procedural obstacle. When it disappears, the right of the original owner may be recognized[35]. Sometimes the court finds a way how to help the original owner despite the expropriator's immunity:

Lake Lucerne (Sweden HD 1948): A Swedish debtor, ignoring who was his rightful creditor, paid to an official custody. The original creditor could not sue the other claimant, the Soviet expropriator, because of the latter's immunity. The court decided that the original creditor should be allowed to dispose of the money unless the U.S.S.R. filed a lawsuit within a year. As plaintiff, the expropriator would not be protected by immunity.

Foreign expropriators have in numerous cases been accorded immunity as to vessels peacefully seized in the harbors of third states [36] or even of the forum country[37]. According to *Seidl-Hohenveldern*, immunity should have been denied in the latter case because of the violation of the forum state's sovereignty[38]. This view could be accepted if the expropriator used violence in the forum's territory: here the court could deny immunity as a reprisal. But when the seizure is peaceful, with the consent of the shipmaster and crew, there will be no reasons to do so.

Seidl-Hohenveldern is further of the view that invoking immunity is superfluous if the property has been seized in the territory of the expropriator, reference to *lex rei sitae* being sufficient[39]. Also this view is hard to accept, as immunity is a procedural obstacle which prevents the court from examining the merits. It happens that courts reject the action on the grounds of immunity but add various dicta on the merits[40]. Legality of such practice under international law is dubious.

Voices against the recognition of immunity in expropriation cases were heard at the 1958 Conference of the International Law Association. According to the Swiss branch, the immunity should never bar any substantial claim by the original owner of the expropriated property[41]. This proposal is, however, incompatible with the contemporary law of nations.

1) *Adriaanse* 158; *Behrens*, RabelsZ 1973, 405-6; *Kronfol* 24; OLG Hamburg Nov. 13, 1957; *cf. Jungfleisch* 22-3; *Heiz* 187. *But, Castberg* 352; *Heiz* 289; *Stöcker*,WM 1964, 533.
2) *Oppenheim and Lauterpacht* I 288; *Doehring*, ZaöRV 1968, 588; *Lotus Case* (P.C.I.J. Ser. A, No. 10, 18).
3) E.g. *McCarthy v. Reichsbank* (N.Y. Sup. Ct. 1940).
4) *Mann*, 111 RC 145 ff. (1964).
5) *Seidl-Hohenveldern*, RabelsZ 1964, 194; *Mann*, 111 RC 141-2 (1964) and 132 RC 168 (1971).
6) *Mann*, 132 RC 168 (1971).
7) *Mann*, 111 RC 144 (1964).
8) *Heiz* 287; *Philip* 389.
9) *Contra, Verzijl*, ZaöRV 1958, 539.
10) *Drost*, ArchVR 1949-50, 303-4.
11) *Bystrický*, Problemen 121; *Lunc* 176; *Pereterski and Krylow* 116; *Zourek*, Clunet 1959, 683.
12) *Castberg* 352; *Jungfleisch* 28; *Schulze* 191-2; *Verzijl*, ZaöRV 1958, 538.
13) *Re* 162.
14) *Re* 169.
15) *Oppenheim and Lauterpacht* I 268; *Mann*, 132 RC 145 ff. (1971); *Wortley*, 67 RC 424-5 (1939), 71 RC 80 (1947) and 94 RC 250 (1958).
16) *Bloch v. Basler Lebensversicherungsgesellschaft* (N.Y. Sup. Ct. 1947); *Bernstein v. Van Heyghen* (U.S.C.C.A. 1947).
17) *Bernstein v. Ned.-Am. Stoomvaart* (U.S.C.C.A. 1954).
18) *Pons v. Cuba* (U.S.C.C.A. 1961); *Rich v. Naviera Vacuba* (U.S.C.C.A. 1961); *National Institute v. Kane* (Florida District C.A. 1963).
19) 59 A.J.I.L. 380-1 (1965).
20) 22 U.S.C. § 2370 (e)(2)(1966 Supp.); quoted in *Hollweg*, ZaöRV 1969, 319; 35 I.L.R. 49-50; 59 A.J.I.L. 899-908 (1965).
21) *Palicio v. Brush* (U.S.D.C. 1966).
22) *Banco Nacional de Cuba v. First National City Bank No.1, 2* (U.S. Sup. Ct. 1971, 1972), decided against the expropriator on other grounds; *cf. Pons v. Cuba* (U.S.C.C.A. 1961).
23) *French v. Banco Nacional de Cuba* (N.Y.C.A. 1968).
24) *Cementos Resola v. Larrasquitu* (C.A. Poitiers 1937); *Reynolds v. Ministre des affaires étrangères* (Trib. Seine 1965); *Petroservice v. El Aguila* (C.A. Hague 1939); *Propetrol v. Cia Mexicana* (TCiv Antwerpen 1939); see also *Lafuente v. Llaguno y Duranona* (C.A. Bordeaux 1938); *Poortensdijk v. Latvia* (C.A. Amsterdam 1942); *Bank Indonesia v. Senembah* (C.A. Amsterdam 1959).
25) *De Nederlanden van 1845 v. Escompto Bank* (HR 1964); *U.S.A. v. Bank voor Handel en Scheepvaart* (HR 1969); *Anglo-Iranian Oil Co. v. S.U.P.O.R.* (Trib. Venice 1953).
26) *Adriaanse* 140; *Baade*, 3 JIR 140 (1950-1); *Batiffol* I 422; *Bayer*, ZaöRV 1965, 43; *Behrens*, RabelsZ 1973, 434; *Combacau*, Rev. gén. dr. int. 1973, 36; *Kegel* 55; *Kollewijn*, Clunet 1969, 985; *Magerstein* JBl 1954, 426; *Morgenstern*, 4 I.L.Q. 329 (1951);

Münch, 98 RC 444-6 (1959); *Niederer*, Schw. JIR 1954, 100; *Sarraute and Tager*, Clunet 1952, 551; *Sauveplanne*, NedTIR 1960, 47; *Schaumann*, Schw. JIR 1953, 176-7; *Seidl-Hohenveldern*, 56 A.J.I.L. 508-9 (1962) and Clunet 1967, 940; *Van Hecke*, Les effets 571; *Verzijl*, ZaöRV 1958, 541-2; *Vischer*, IPR 658.

27) *Heiz* 164, 180-2; *Seidl-Hohenveldern* used to be of the same view, ÖJZ 1947, 410-1.

28) *Eek*, Folkrätten 391; *Hjerner* 436-9; *Madsen-Mygdal* 348; *Philip* 387.

29) See *Dennemark*, SvJT 1950, 46-7; *Gihl* 347; *Jägerskjöld*, SvJT 1945, 90.

30) *Anglo-Iranian Oil Co. v. Idemitsu Kosan* (Tokyo High Ct. 1953).

31) Resolution of the 3rd Congress of the Int. Academy of Comp. Law in 1950, ÖJZ 1951, 345 ff., Rev. int. dr. comp. 1950, 535; Resolution of the 50th Conference of the I.L.A. in 1962, I.L.A. 1962, xiv.

32) 11 I.L.M. 1474-5 (1972); 7 Journal of World Trade Law 383-4 (1973).

33) *Italian Black Sea Co. v. Russian Soviet Government* (C.A. Milano 1922).

34) *Van Hecke*, Les effets 572; *Victory Transport v. Comisaria General* (U.S.C.C.A. 1964); *Pauer v. Hungary* (Italy Cass. 1956); OLG Frankfurt May 30, 1963; *Urrutia and Amollobieta v. Martiarena* (C.A. Brussels 1937); *Poortensdijk v. Latvia* (C.A. Amsterdam 1942); *Indonesia v. Van der Haas* (D.C. and C.A. Hague 1958); *The Charente* (Sweden HD 1942).

35) *The Jupiter* (England C.A. 1924, 1925, 1927): the action of the original owners was rejected because of immunity, but when the property was later sold by the expropriator to a third person it was restituted by the court to the original owners; *El Condado* (Scotland Ct. of Sessions 1939): the action of the original owners was rejected because of immunity, but the expropriator's demand for damages was also rejected as he was not the rightful possessor.

36) *Fields v. Predionica I Tkanica* (N.Y. App. Div. 1942); *The Kabalo*(England P. 1940); in *The Navemar No.1* (U.S. Sup. Ct. 1938) the Spanish consul in Buenos Aires had endorsed the ship's papers with the statement that the vessel had become the property of Spain, but apparently had not reduced her to actual possession by the Spanish Government - the court held that there was no possession sufficient for granting of immunity.

37) *Ervin v. Quintanilla* (U.S.C.C.A. 1938); *Yokohama Bank v. Chengting* (U.S.C.C.A. 1940); *The Jupiter* (England C.A. 1924); *The Cristina* (H.L. 1938); *El Condado* (Scotland Ct. of Sessions 1939); *The Rigmor, The Charente, The Solgry* (Sweden HD 1942); *The Toomas* (Sweden HD 1944); in *The Ramava* (Ireland Sup. Ct. 1942) immunity was not granted although the shipmaster had signed a "certificate of delivery" to the expropriator - the physical possession had not been transferred.

38) *Seidl-Hohenveldern* 135-6.

39) *Seidl-Hohenveldern* 10.

40) *The Rigmor* (Sweden HD 1942); *Hertzfeld v. U.S.S.R.* (TCiv Seine C.A. Paris 1938); *Stchoukine Case* (TCiv Seine 1954).

41) I.L.A. 1958, 202.

CHAPTER THREE

FOREIGN EXPROPRIATIONS AS FOREIGN PUBLIC LAW

I. Foreign public law in the conflict of laws

15. Public law.- Foreign expropriatory decrees belong to a larger group of foreign laws referred to as "public law" in the continental legal systems. In common law, the group is referred to by enumeration of the various types of rules belonging to it, e.g. penal, revenue, expropriatory, currency decrees. In both continental and common law countries, these laws are considered to have a special, restricted standing in the conflict of laws. In this thesis, the term "public law" will be used.

Great efforts have been made to define the concept of public law in the conflict of laws. It has to be remembered that the definition of public law for the purpose of private international law need not be the same as the definition used in other branches of law. The fact that certain legal rules are dealt with in a textbook with the title "Public Law" is hardly a sufficient reason for giving them special status in the conflict of laws.

There is a universal agreement that the classification of foreign law as public or private is to be done according to the concepts of *lex fori*[1]. A different method has been suggested by *Bystrický*[2] who considers the concepts in the legislating country to be decisive. In his view, laws of socialist states cannot be classified as public, because the difference between public and private law is not recognized in these countries. *Fedozzi*[3] contended that foreign law is to be considered public if it is so classified in the legislating country, even if it is private according to the concepts of *lex fori*. These two authors are, however, exceptions.

16. Interest theory.- The principal criterion used in the conflict of laws to distinguish private from public law is the interest the law serves. Private law is said to protect the interests of individuals, whereas public law protects the interests of the legislating state as such[4]. Against this theory it has been said that all laws serve the interests of the legislating state and that they all have some political function[5]. This is undoubtedly true. Even commercial, inheritance or family law serve the interests of the legislator as it is an interest and a function of a state to provide a basis for a functioning commercial and family life. But these interests are shared also by the forum country. The forum state is interested in stability of family relations and commerce so that a marriage concluded abroad or a title to movables acquired abroad will normally be recognized as valid. When the forum applies foreign law, it does so in the interest of the forum state and not in the interest of the foreign legislator (we can here omit the immediate interests of the parties involved in a particular lawsuit, their interests being on a different level; the interests of privates are protected by

the state to the extent they coincide with the interests of the state as expressed by the legislator)[6]. The Judiciary is an instrument of the forum state and it acts exclusively in the forum state's interest. To act in the interest of a foreign state would, if nothing else, be wasting taxpayers' money.

Although foreign family and commercial laws also serve the interests of the foreign legislator, their application is demanded by the interests of the forum state: otherwise the conflict rules of the forum would not demand such application. The interests of both countries coincide, since they both share an interest in the functioning of family and commercial life. There are, however, also foreign laws serving *exclusively* the *governmental* interests of the foreign legislator. Expropriation decrees are good examples of such laws.

17. Other theories.- Another criterion sometimes used in order to distinguish public from private law in the conflict of laws is the will of the parties: it is asserted that private law is applied because the parties so desire, whereas public law is applied even against their will. This makes public law synonymous with *jus cogens* and rules of, for example, family law (invalidity of a marriage between an uncle and a niece) are deemed to be public law[7].

Although expropriatory, revenue or exchange control laws cannot be contracted out, it is hardly correct to contend that all rules that cannot be contracted out are public and consequently have a special status in the conflict of laws. Most rules of family law cannot be contracted out; they have, nevertheless, never been put on the same footing as foreign expropriation or revenue laws.

According to another view, legal relationships are of a public law nature if one party is subordinated to the other, whereas in private law, the parties have equal legal standing. Thus contracts are said to be always of a private law nature[8].

The legal theory in socialist states is reluctant to admit any difference between public and private law[9]. Similar reluctance can be found in common law[10].

The difficulties encountered when looking for a criterion for distinguishing foreign public from private law have led many writers to doubt whether it is possible to find any generally valid criterion at all. They stress that there is no clear-cut line between private and public law and that the interpenetration between private and public law has brought about *"zones grises"*[11]. Some authors resign and propose that each foreign law should be studied separately for concrete reasons why it should or should not be applied[12]. *Mann*[13] writes that he does not attempt to define public law. We all know, he says, that public law comprises constitutional, administrative, criminal, revenue, antitrust, monetary, exchange control, social insurance and trading with enemy laws, but a general definition is difficult to find.

Despite these expressions of scepticism, it is an undeniable fact that there

is a group of laws treated in a special way in the conflict of laws. Whether or not we decide to call them "public" is only a terminological issue. It is, in any case, advantageous to have a term covering the whole group, because the common traits of these laws make it possible to discuss them together.

II. Principle of isolation

18. Lack of interest.- The reasoning of courts in cases involving foreign public laws varies: they invoke public policy, "territorial limitation" of public laws, etc. It is submitted here that the true *ratio decidendi* in most cases is to be found in the unwillingness of the forum to become an instrumentality of the foreign state by enforcing foreign laws exclusively in the foreign state's governmental interest. Many authors have stressed that it is no part of the task of any sovereign state to protect the interests of a foreign state in its position as a sovereign or to act as its bailiff[14]. This unwillingness will be called here "the principle of isolation"[15].

For the purpose of private international law, we can thus define foreign public law as foreign law which the court refuses to enforce as there is no interest in the forum country to have it enforced. There is no doubt that foreign expropriatory laws belong to this group.

The principle of isolation is composed of two elements closely connected with each other:

a) there is no public interest in the forum state to have the foreign law enforced and,
b) the forum refuses, consequently, to act as an instrument of the foreign state, as it would be incompatible with the sovereignty of the forum state to do so.

The forum is reluctant to help the foreign state in its status of a state. When the foreign state acts as a private person (merchant), there will be no reasons why its private claims should not be enforced by the forum. Foreign expropriatory, revenue and similar claims are, on the other hand, completely irrelevant to the interests of the forum state and the forum remains passive to them.

The situation may be different if there is an international treaty on the matter or if there is some kind of interest on the part of the forum state to see the foreign law enforced, but this is exceptional.

19. Changing attitude to foreign public law.- The reluctance to enforce foreign public law is not an expression of a generally negative attitude to such law. The foreign decree may be very reasonable or it may even be identical with decrees of *lex fori*. Nevertheless, the forum will normally refuse to enforce it. The fact that the forum country collects taxes, expropriates and imposes ex-

change control is no sufficient reason why it should enforce *foreign* expropriations, support *foreign* public treasury by enforcing its revenue claims or force parties of a contract to comply with *foreign* exchange control regulations. This attitude may, however, change. Many authors are of the view that whole groups of foreign public laws should be enforced.

It is not surprising that authors from the socialist states would like to see their nationalizations enforced by foreign courts[16]. Another interesting proposal has been made by *Sundberg*[17] who suggested a compromise: states should abstain from expropriating property of foreigners, whereas the courts should, he seems to suggest, enforce expropriations as to property belonging to the expropriator's nationals. As this proposal makes it impossible to expropriate foreign-owned assets, it would hardly be acceptable for most states.

Of greater value is the view that courts should enforce some foreign public laws because such enforcement is in the interest of the forum state. Not infrequently, the courts study the interest in enforcement of a foreign public law in a wider context: it is felt that violations or evasion of foreign public law are, as such, contrary to good morals and public policy in the forum country[18]. It is possible to agree with *Carter* who expressed doubts as to the wisdom or a rule which countenances the avoidance of payment of non-penal foreign taxes[19] and with *Kronstein* who writes that the antitrust fight can be efficient only if the states begin to enforce each other's antitrust laws[20]. Closer co-operation between states in enforcement of social insurance laws is demanded by many[21], arguing that it is desirable also from the standpoint of the forum that persons who had cheated foreign social authorities repay the amounts unduly obtained or that a wrongdoer restitutes to such foreign authorities the sums they had paid his victim. After the recent monetary crises, nobody can believe that the balance of payment of foreign countries is inconsequential. Certain limited co-operation in implementing foreign exchange control laws has already been achieved within the International Monetary Fund (s. 38 *infra*). *Ehrenzweig*[22] is perhaps right when he predicts that courts in the near future will enforce foreign public laws "as representing a true governmental interest of a friendly nation". Certain steps in that direction have indeed already been made in the form of agreements between closely co-operating states like the Scandinavian countries or the members of the E.E.C. Such direct co-operation in the field of expropriation laws is, however, hardly conceivable.

The conflict rules of *lex fori* sometimes order the court to give effect to certain foreign public laws, e.g. foreign nationality laws must be considered in order to establish the *lex patriae* of an alien. It is obvious that the foreign public law is in these cases not enforced in the interest of the foreign legislator.

It is not the purpose of this thesis to give any general recommendations as to the extent of enforcement of foreign public laws, which is more a political than a legal issue. It can be said that when the forum feels that the foreign

decree's enforcement would serve the interests of the forum state, it should not be hindered by the decree's public law nature, since the very reason why foreign public laws are normally not enforced will here be out of place. It will be shown (s. 46-47 *infra*) that the courts are ready to enforce even foreign expropriations in the exceptional cases when the interests of the forum country so demand. It can, however, be said that no trend towards a closer co-operation between states in the field of enforcement of expropriations can be traced in the contemporary practice of courts.

20. Enforcement.- In order to avoid misunderstanding, it has to be said that the term "enforcement", as used here, is not synonymous with "application" or "giving effect". Enforcement is understood as carrying out or executing the foreign measure. In expropriation cases, enforcement as a rule means taking the property from its original owner and delivering it to the expropriator. In the cases concerning revenue laws, it means collecting the amounts for the foreign public treasury. To enforce exchange control laws means to force the parties to abide by them. For example, the court refuses to enforce a contract violating such rules, considers it invalid or even holds the parties liable to pay damages to the foreign state.

The question of enforcement appears in courts only when the foreign legislator is unable to enforce his decrees himself, e.g. because the expropriated property is beyond his reach, the revenue debtor owns no property in the legislating country or the debtor of an obligation violating exchange control rules owns property abroad where the creditor can demand payment.

The enforcement need not be demanded by the foreign state itself, it may as well be demanded by a debtor as a defense. This is usual in cases involving foreign exchange control rules:

West Germany BGH Dec. 17, 1959: The case concerned a loan between two East German residents. The debtor moved to the West. The creditor assigned the claim to a person living in the West. The debtor refused to pay to his new creditor, invoking the invalidity of the assignment under East German exchange control laws. The BGH found the assignment valid as it would not enforce East German public law.

Similar situations may also arise in expropriation cases, such as when the debtor asserts that the claim no longer belongs to his original creditor, but to the foreign expropriator. As long as the expropriator is unable to put power behind his decrees, the court will not give them any effect. To allow the debtor to use the foreign expropriation as a defense under such circumstances would imply a recognition of the expropriator's right to a claim which he could not collect himself. Besides, the debtor usually has no intention to pay to the foreign expropriator. Instead, he tries to avoid paying at all. This would lead to undue enrichment of the debtor at the expense of his creditor. The situation is, of course, different when the debtor faces a serious risk of double liability (s. 132 *infra*).

The courts are reluctant to enforce foreign expropriations in any form, but this does not mean that they never apply foreign expropriatory decrees or that they never give them any effect. The decrees may appear in the forum also after they have been enforced by the expropriator. Different rules should be formulated for the different, typical situations in which foreign public, especially expropriatory, law appears in courts.

III. Rules of the "international public law"

21. Special connection.- The efforts to formulate rules for the practice of courts in relation to foreign public law meet with difficulties already on the title page. The special standing accorded by courts to foreign public law has induced many to believe that there is, or should be, a special "international public (administrative) law" distinct from private international law and not to be confused with the law of nations. This "international public law" is said to contain conflict rules for public law in the same way as private international law sets conflict rules for private law. This view seems to have won acceptance in West Germany, but it is in no way limited to that country[23].

The question whether a special branch of law is to be created is only of theoretical or pedagogical importance and the answer depends on how we define private international law[24]. It is more important to note that the adherents of the "international public law", together with many others[25], want to apply special connection rules for foreign public law (*Sonderanknüpfung*).

Some of the proposals of special connection rules put forward by various authors can be mentioned as examples:

Wengler[26] wanted foreign public law to be considered in the interest of reciprocity and harmony, provided that the case had a sufficiently close relationship to the foreign state.

Nial[27] demands for application of foreign public law that the relationship which the law intends to modify has such connection to the legislating country that application appears to be natural and logical from the point of view of the court. Different types of public laws should have different standing.

Zweigert[28] wrote about foreign war legislation: "Ausländische Leistungsverbote sind dann anzuwenden, wenn sie nach ihrem eigenen Geltungskreis angewendet werden wollen und wenn die den Leistungsvorgang vermittelnde Wertbewegung sich ganz oder zum Teil im Gebiet des Verbotslandes abspielt."

K.H. Neumayer[29] wants to apply foreign public law "wenn der vom Normzweck angeschaute Tatbestand sich in der vom Gesetzgeber des Erlasstaates innerhalb der durch Völkerrecht abgesteckten Grenzen seiner Gesetzgebungsmacht zu ordnenden Sozialsphäre in wesentlichen Teilen verwirklicht hat."

Hjerner[30] has formulated several principles which together should determine the approach to foreign expropriations and to other foreign public laws, e.g. exchange control decrees. Among the principles we can find the principle of isolation (see n. 15 *supra*), of protection of the depossessed owners, of efficiency and stability in legal relations. He does not say which principle should prevail in case of conflict.

Fickel[31] seems to favor an open discussion of application where there are no clear rules at all but rather a free balancing of interest of the foreign legislator, of the forum state and also of other states interested in the outcome. The legitimate interests of the foreign

legislator appear to *Fickel* to be not less relevant than those of the forum state. *Schulze*[32] proposes the "power limits" of the legislating state as the principal connecting factor.

The common feature of most of the mentioned special connection rules is their vagueness. What is "a sufficiently close relationship" and when is the application of the foreign public law natural and logical? The proposals do not provide solutions, they only indicate the general approach.

22. Lex causae approach.- Several authors speak in favor of a pure *lex causae* approach. They suggest that foreign public law should be applied when it is a part of the applicable law as established by private international law, but not otherwise. It has, however, to be said that these authors usually do not have in mind foreign expropriation, but rather foreign exchange control laws[33]. This approach has strong backing in England[34].

It is of interest to note that some of the authors favoring the *lex causae* approach are, at the same time, conscious of the principle of isolation as defined in this thesis. Thus, *Mann*[35] opposes any enforcement of foreign exchange control laws and points out that such enforcement may have many forms, e.g. it may be demanded by a private person and by way of defense rather than attack. The same author[36] criticizes the judgment of the West German BGH of Dec. 17, 1959 (s. 20 *supra*), and reproaches the court that it did not enforce the East German exchange control law although East German law was the proper law of the contract. These two views appear to be incompatible.

23. Combined approach.- The third group of authors would like to combine special connection factors with the usual conflict rules of private international law. *Philip*[37] is in favor of special connection, but he says that less should be required for the application of foreign exchange control laws if they belong to *lex obligationis* than otherwise. According to *Madsen-Mygdal* and *Hjerner,* the "connexity" (the fact that the exchange control law is a part of the *lex causae*) is a minimum condition for the application of such law, although not a sufficient condition[38]. *Heiz* [39] writes that foreign public law may win application as a part of the normally applicable law and also as a foreign act of state which must be respected under the law of nations. *Toubiana*[40] writes that foreign public law is applicable as part of the *lex causae*, but even other foreign public law should be considered under special connection rules.

Also authors in socialist states combine the *lex causae* approach with special connection rules. They demand that foreign *lex causae* should be applied, including expropriation or exchange control laws. They assert, for example, that a seizure of a company should be treated as e.g. a merger and that it is governed by the personal law of the company including the expropriation decrees. In this way, the expropriation should include also the property abroad[41].

This is complemented by the assertion that foreign expropriation laws should be applied and enforced even when not a part of the normally applicable law. A typical example is the demand that such decrees should be enforced also as to property belonging to physical persons of the expropriator's nationality and situated outside of the expropriating country[42].

24. Suggestions.- It is submitted that special connection should be used for foreign public laws.

Foreign public law is, first of all, intended by the foreign legislator to be applied regardless of the normally applicable law. Thus, exchange control laws of *lex fori* are applicable regardless of the proper law of the contract and if property of enemy nationals is seized, this includes also debts governed by foreign law[43]. *Seidl-Hohenveldern* explains this by saying that the imperative rules of *lex fori* have priority over conflict rules according to the principle of *lex posterior*[44]. *Mann*[45] writes that contracts governed by foreign law are invalid if forbidden by British exchange control laws and he explains this by asserting that such contracts are contrary to English public policy. Opinions have been voiced that the forum's own public law is applicable anly when *lex fori* is also *lex causae*:

The argumentation of *Denning L.J.* in the case of *Boissevain v. Weil* (England C.A. 1949) is of particular interest. In his view, the British war decrees forbidding Britons to enter certain contracts applied only to contracts governed by English (or other British) law, "for those are the only contracts whose validity they can affect".[46] Foreign courts should also use the *lex causae* approach and the contract governed by English law and contrary to English war decrees should, in his view, be invalid everywhere.

Denning's view, if generally accepted, would lead to the absurd result that exchange control laws of the forum state could easily be avoided by choice of a foreign proper law of the contract, which is obviously not the intention of the legislator. It is a self-evident fact that the courts are bound to apply *lex fori* so long as such application is intended by the legislator. One may say that exchange control or expropriatory laws contain an implied rule that they are to be applied also when foreign law is normally applicable. Explanations by lex posterior, public policy or by special conflict rules[47] are thus superfluous.

The intentions of the foreign legislator to have his decrees applied regardless of the *lex causae* are, of course, not a sufficient reason why the forum should accord them such wide application. There is, however, a much more weighty reason why the courts should consider also foreign decrees which do not belong to the *lex causae*. The foreign legislator has not only the intention, but often also the power to enforce his decrees regardless of the normally applicable law. For example, although the obligation is governed by a foreign law, he can seize the claim or prevent the transfer abroad of the payment.

To ignore such realities only because the decree does not belong to the *lex causae* would lead to undesirable results. The main reason speaking in favor of special connection rules for foreign public law is the need to provide for reasonable solutions in particular lawsuits.

Foreign public law appears in courts in three basic situations, each one of which can be subdivided into a number of variations. In none of the three groups of cases does the *lex causae* approach lead to acceptable results if upheld as a general rule.

25. Recognition.- In the first group of cases, the foreign state has enforced its decrees and the forum is asked to take a position to the result, e.g. to the title of the expropriator to already seized property. It will be shown that in these cases the courts are ready to apply the foreign public law, i.e. they recognize the title of the expropriator to be lawful. The *lex causae* is given no relevance. This is true also in relation to foreign revenue laws where there is no *lex causae* at all: after the taxes have been paid, the taxpayer cannot demand their restitution abroad, not even by a set-off. This is considered so self-evident that nobody even tries to obtain such restitution.

26. Non-enforcement.- In the second group of cases, the court is asked to enforce the foreign decree. This the court will normally refuse to do regardless of the *lex causae*, mainly because of the principle of isolation. An exception can be made when the enforcement is demanded also by the interests (in the widest meaning of the word) of the forum state, but even then no relevance is given to the fact that the decree is, or is not, a part of the *lex causae*. We can mention the Bretton-Woods Agreement of the International Monetary Fund which stipulates in Art. VIII(2)(b) that contracts violating exchange control laws of a member state are unenforceable in all the member states. The proper law of the contract is irrelevant, since it suffices that the contract involves the currency of the decreeing state. Of interest is also the Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations, submitted by the Commission of the European Communities[48], which stipulates in Art. 7 that if a contract is "connected" also with a state other than the state whose law is normally applicable to the contract and if the law of that other state contains mandatory provisions which govern the matter in such a way as to exclude the application of any other law, such provisions shall be "taken into account" insofar as their "character or particular purpose" justify such exclusion. Also the cases involving statutory assignment indicate that when the states want to enforce foreign public law, the *lex obligationis* becomes irrelevant[49].

27. Loss partition.- In the third group of cases, there is no question of enforcement of foreign public law. These cases presuppose that there is an existing

or potential loss caused by the foreign decree and the purpose of the lawsuit is to determine who is to bear it. A typical example: a foreign expropriator compels a debtor to pay the value of the debt to him and the question arises whether the debtor may invoke this payment as a discharge against the original creditor in the forum. It is obvious that the expropriator may compel the debtor to pay regardless of the proper law of the obligation, provided that the debtor owns property in the expropriating state. The *lex causae* approach would lead to purely accidental results.

28. Rules.- The special connection rules will be here formulated *de lege ferenda*, but it will be shown that they are already applied by the courts to a large extent, although the courts often invoke other grounds. The rules to be formulated can hardly be called rules of conflict. In private law there is a "collision" of legal systems, e.g. the capacity to marry may be governed by this or that law. There is never such conflict between expropriation, revenue or exchange control laws of a foreign state and those of *lex fori*. The question rather is under what circumstances the forum should give certain effects to foreign public law.

The special connection rules will be presented in this section as *theorems* to be proved and analyzed in the following chapters. They are focused on expropriation laws, but it is submitted that the problem is very similar also as to other public laws.

Very roughly, the special rules can be formulated as follows:

a) If foreign public, especially expropriatory, law has been enforced in a manner acceptable for the forum, the title or right of the foreign state will be recognized unless such recognition would violate the public policy of the forum. (Chapter Four)
b) If the foreign state is unable to enforce its public, especially expropriatory, law, the forum will normally not enforce it, unless the forum state is interested in the enforcement. (Chapter Five)
c) When the lawsuit does not concern the title or right of the foreign state as based upon its public, especially expropriatory, law, but rather the question who is to carry the loss caused by such foreign law, the forum will partition the loss according to the mutual relationship and behavior of the parties and circumstances of the case. (Chapter Eight, Nine and Ten)

1) *Halsbury (-Parry)* 8-9; *Vannod* 58; *Schulze* 112; *Heiz* 91-2; *Gutzwiller*, Schw. JIR 1954, 273; *Huntington v. Atrill* (U.S. Sup. Ct. 1892 and British P.C. 1893); *Zivnostenska Banka v. Wismeyer* (Swiss BG 1953). *But, Etat belge v. Etat suédois* (Belgium Cass. 1952).
2) *Bystrický*, Problemen 117.
3) *Fedozzi*, 27 RC 159 (1929).

4) *Arminjon*, Rev. 1930, 389; *Eek* 208; *Heiz* 90; *Hjerner* 417; *Mertens*, RabelsZ 1967, 386-7; *Neumeyer* 250-1; *Nial* 117; *Philip* 70; *Schulte-Ublenbrock* 11-2; *Schulze* 23-4; *Vannod* 59-60; Restatement (1st) § 610; *Ammon v. Royal Dutch* (Swiss BG 1954); *Hardtmuth* (Belgium Cass. 1960).

5) *El-Kocheiri*, Rev. 1967, 255; *Fickel*, AWD 1974, 71; *Gihl* 368; *Heiz* 89; *Krispis*, 120 RC 283 (1967); *Koeppel* 74; *Vallindas* 514-5; *Wesenberg*, JR 1951, 435.

6) *Koeppel* 151.

7) *Mann*, 132 RC 123, 132 (1971); *Valladão* 540.

8) *Koeppel* 75; *Zivnostenska Banka v. Wismeyer* (Swiss BG 1953); *but Union Nasic* (BG 1968); *cf. Loeber*, Der hoheitlich gestaltete Vertrag (Berlin - Tübingen 1969).

9) *Bystrický*, Problemen 117. *But*, the same author, 123 RC 433 n. 23 (1968).

10) *Halsbury (-Lawson, Davies and Slade)* 187. *But James*, Introduction to English Law (London 1972); see *Mann*, 132 RC 116 (1971).

11) *Batiffol* I 303; *Eek* 205-6; *Fedozzi*, 27 RC 154 (1929); *Gutzwiller*, Schw. JIR 1954, 274; *Heiz* 90; *Hjerner* 415; *Lalive*, Schw. JIR 1971, 117; *Mann*, RabelsZ 1956, 10 and in 132 RC 116-7 (1971); *Mertens*, RabelsZ 1967, 387; *Philip* 70-1; *Rigaux* 71; *Ripbagen*, 102 RC 219 (1961); *Vischer*, IPR 537; *Freyria* and *Lepaulle* in Travaux du Comité français de d.i.p. (1962-4) 118-20.

12) *Frank*, RabelsZ 1970, 74; *Nial* 122; *Philip* 71.

13) *Mann*, 132 RC 116 (1971).

14) *Batiffol* II 255; *Ernst* 3-4; *Frank*, RabelsZ 1970, 65; *Gihl*, 83 RC 249 (1953); *Kegel* 440; *Köhler* 166; *Mann*, RabelsZ 1956, 4; *Michaeli* 79; *Nial* 117; *Seidl-Hohenveldern*, 123 RC 37 (1968) and 7 A.J.C.L. 559-60 (1958); *Van Hecke*, Rev. belge 1969, 63 and 126 RC 484 (1969); *Wolff*, PIL 171.

15) This term has been proposed by *Hjerner* 253-4, 360, who explains, however, the principle mainly by the lack of confidence in foreign governmental actions.

16) *Bystrický* 228-232; *Katzarov*, Theory 311-2; *Lunc* 170-7; *Réczei* 217-26; *Szászy* 231-4.

17) *Sundberg*, NordTIR 1947-8, 99.

18) *Regazzoni v. Sethia* (H.L. 1958); *Spitzer v. Amunategui* (TCiv Seine 1956); Netherlands HR Nov. 16, 1956; W. German BGH Dec. 21, 1960, and May 24, 1962 and June 22, 1972; *Rabel* II 585-90; *Schulze* 177-83; *Toubiana* 234-41; *Mann*, 132 RC 195-6 (1971).

19) *Carter*, 45 B.Y.I.L. 404 (1971).

20) *Kronstein* 287.

21) *Eek* 206; *Frank*, RabelsZ 1970, 70; *Lagarde*, Rev. 1970, 697-8; *Mann*, 132 RC 173-5 (1971). In practice, foreign social insurance laws are usually denied enforcement in absence of a treaty: *Metal Industries Salvage v. Owners of "The Harle"* (Scotland Ct. of Sessions 1961); *Vve Dornier v. L. Dornier* (C.A. Besançon 1959); W. German LG Offenburg Dec. 30, 1960; C.A. Basel Dec. 27, 1967; *Caisse générale Julich v. S.A. des Ateliers* (TCiv Charleroi 1930). *But, Allemagne v. Bureau belge des assureurs* (Belgium Cass. 1969); *Reyes v. U.S.A.* (France Cass. 1970).

22) *Ehrenzweig* 165-6.

23) *Castberg* 339; *Dölle* 4-5; *Ficker* 65-71; *Jungfleisch* 15-6; *Kegel* 438 ff. and in Probleme 5-7; *König* 11; *Niederer*, Einführung 86-9; *Philip* 70; *Zweigert*, Rev. 1965, 666; see W. German BGH Dec. 17, 1959, and Jan. 28, 1965.

24) *Cf. Vallindas* 509-18.

25) *Bagge*, TfR 1937, 158 ff.; *Böse* 140; *Mertens*, RabelsZ 1967, 410; *Neumeyer* 249; *K.H. Neumayer*, Rev. 1957, 597-8, Rev. 1958, 70-6 and RabelsZ 1960, 655; *Nial* 121-2, 148; *Reithmann* 137; *Rheinstein*, RabelsZ 1934, 301-3; *Schulze* 266; *Van Hecke*, 126 RC 496 (1969); *Wengler*, Zeitschrift f. vergl. Rechtswissenschaft 1940-1, 185-97.

26) *Wengler*, Zeitschrift f. vergl. Rechtswissenschaft 1940-1, 197.

27) *Nial* 121-2.
28) *Zweigert*, RabelsZ 1942, 295.
29) *K.H. Neumayer*, RabelsZ 1960, 655.
30) *Hjerner*, Scandinavian Studies in Law 1958, 206-18.
31) *Fickel*, AWD 1974, 71-5.
32) *Schulze* 266.
33) *Aubin*, RabelsZ 1953, 453; *Batiffol*, Travaux du Comité français de d.i.p. (1962-4) 191-2; *Cheshire* 140; *Dicey and Morris (–Kahn-Freund)* 915; *Mann* 406; *Michaeli* 313; *Rabel* III 48; *Schnitzer* II 607, 610; *Vischer*, IVR 188-92; *Wolff*, PIL 175, 472-5.
34) *Frankman v. Anglo-Prague Credit Bank* and *Kahler v. Midland Bank* (both H.L. 1950); *Helbert Wagg* (Ch. 1956); *Rossano v. Manufacturers Life* (Q.B. 1963).
35) *Mann* 428-30 and 132 RC 166 ff. (1971).
36) *Mann*, 132 RC 161 (1971).
37) *Philip* 71, 290.
38) *Madsen-Mygdal* 154; *Hjerner* 222-3.
39) *Heiz* 132, 165 ff.
40) *Toubiana* 232, 334-5.
41) *Bystrický* 229; *Lunc* 176; *Réczei* 219-22; *Szászy* 232-3.
42) *Knapp*, I.L.A. 1960, 220; *Réczei* 223.
43) *Dicey and Morris (-Kahn-Freund)* 915-6; *Drobnig* 249, 262; *Hjerner* 197; *Koeppel* 26; *Neumeyer* 248; *Vischer*, IVR 189-90.
44) *Seidl-Hohenveldern*, 4 JIR 64 (1952-3).
45) *Mann* 408.
46) [1949] 1 K.B. 490 (C.A.).
47) See Austrian OGH June 24, 1959.
48) Text published in e.g. NordTIR 1972, 220-7.
49) *Allemagne v. Bureau belge des assureurs* (Belgium Cass. 1969); *Reyes v. U.S.A.* (France Cass. 1970). *Cf.* Art. 17 of the Draft Convention (n. 48 *supra*).

PART TWO

THE RIGHTS OF THE EXPROPRIATOR

CHAPTER FOUR

FOREIGN EXECUTED EXPROPRIATIONS

I. Recognition of the expropriator's title

29. Case law.- The question of the expropriator's right to property which has already been effectively seized arises usually in a lawsuit instituted by the dispossessed owner demanding restitution. A direct action against the expropriator is, in most cases, barred by immunity. The expropriator's title may, however, be examined when the original owner sues a person who bought the property from the expropriator or derives his title from the expropriator in some other way.

The right (title) of the foreign expropriator to property he has effectively seized is normally recognized[1]. In most cases, the expropriator has been able to enforce the taking because the property was within his reach, i.e. it could be seized by use or threat of force in his own territory. There have, however, also been cases where the seizure has been carried out outside the territory of the expropriator and even here the expropriator's title has normally been recognized when the expropriation had been enforced in an acceptable way, the main condition being that no violence or ruse had been used by the expropriator in foreign territory[2]. Sometimes the expropriator is able to enforce the expropriation without any "carrying out" being needed, e.g. when the taking consists of the expropriator's refusal to pay his own debts[3].

The rule that the expropriator's right to already seized property is normally acknowledged presents problems of interpretation sometimes. It may, for example, be difficult to establish whether and when the foreign expropriation has been enforced. The German seizures of Jewish-owned firms can be used as examples. Some of these firms exported goods abroad both before and after the take-over by the Nazi "administrator". In the eyes of the Swedish Supreme Court, the goods *delivered* after the take-over belonged to the expropriator, who was thus entitled to collect the purchase price[4]. A Norwegian court[5] and the Swiss Federal Tribunal[6] considered the *date of invoice* and the *date of conclusion of the contract* respectively to be relevant.

30. Grounds.- Several explanations have been suggested by writers as to why the rights of foreign expropriators to already seized property are normally recognized. This practice of courts is hardly to be explained by the act of state doctrine, as it prevails also in countries where that doctrine is not adhered to.

Some want to see the explanation of the judicial practice in the application of the *lex rei sitae*[7]. This approach can, however, be applied only to tangibles. Further, as it has been mentioned, expropriations of tangibles even outside the expropriator's country are often recognized, provided that they have been en-

forced by the expropriator in an acceptable way.

There have been efforts to explain the judicial practice as a more or less natural corollary of the refusal to enforce foreign expropriatory laws[8]. However, the refusal of enforcement could as well exist side by side with a refusal of recognition of already enforced takings.

Others explain the practice by pointing out the difference between "application" of law and "recognition of results of application that has taken place abroad"[9]. They assert that the recognition of the expropriator's title to already seized property is in no way an "application" of the foreign decree, but only a "recognition". It appears, however, that *Kegel* was right when he criticized the terminological distinction, "denn auch im zweiten Fall wird ausländisches Recht angewandt"[10]. But even if the distinction is upheld, it does not provide any explanation why foreign expropriatory law is "recognized", but not "applied"[11].

It is submitted that more importance should be attatched to another distinction: the distinction between *enforcement* of a foreign expropriation and the *recognition* of the expropriator's title to property already seized[12]. Enforcement implies active support of the foreign expropriator. This the court will not do. There are, on the other hand, usually no reasons why the forum should actively oppose the foreign measure by restituting the property to its original owner. The forum adopts the position of passive neutrality[13].

31. Interests of trade.- In expropriation cases, at least in some of them, there is an additional strong reason why the title of the foreign expropriator to already seized property should be recognized. A non-recognition of such title could entail damage for international trade. The buyers in the forum state would be afraid to import goods from countries which had gone through large expropriations. The security in international trade would suffer.

There have been voices asserting that the practical needs of international trade must not influence the courts. *Münch* wrote[14]:

"Il est inadmissible que le juge se laisse influencer par des considérations sur les conséquences politiques de sa jurisprudence; il ne doit pas fléchir devant les nationalisations par égard à la continuation du commerce extérieur. . ."

Similarly, in the Swedish case of *Gebrüder Heine* (Government 1952), the *Flyktkapitalbyrå*, an administrative authority, rejected as absurd allegations that Swedish courts had recognized German takings of Jewish property in Germany in order to protect the Swedish trade with that country. But the same authority argued, at the same time, that a non-recognition of such expropriations would make international trade suffer.

However, it happens that courts state quite openly that the recognition of the expropriation is demanded by interests of international trade[15] and these considerations seem to be acceptable also for most writers[16].

It would, of course, be undesirable to see the courts violate rules of law in order to protect commercial interests of the forum state. But it is quite natural that the rules themselves are formulated with a view to their practical effects. The interests of international trade have undoubtedly contributed to affirm the position of passive neutrality, as it is adopted towards foreign expropriations.

II. The depossessed owner's claim for compensation

32. In connection with the already enforced foreign seizures, some authors touch the problem whether the recognition of the expropriator's title to the seized property also implies that the dispossessed owner cannot claim compensation in the forum (it is assumed that he has not been given compensation by the expropriator). Such a claim for compensation will normally be barred by immunity[17], but it is quite conceivable that it may be invoked as a counterclaim, where the expropriator's immunity is not an obstacle.

The authors who mention this problem seem to be of the view that the recognition of the expropriator's title to the property also precludes the claim for compensation[18].

According to the American practice, not only the claim for restitution of the property, but also the compensation claim are precluded by the act of state doctrine[19]. The *Sabbatino* Amendment (s. 10 *supra*) has not changed anything here, as it concerned only the right to property. In *Banco Nacional de Cuba v. First National City Bank No.2, 3* (U.S. Sup. Ct. 1972, U.S.C.C.A. 1973), the American debtor was, nevertheless, allowed to use the value of his property seized in Cuba for the purpose of a set-off, but only after the Executive had declared that it did not want the act of state doctrine to bar consideration of the counterclaim (s. 11 *supra*).

Similarly, a Dutch court admitted the possibility for a Dutch debtor to use the value of his property seized in Czechoslovakia as a counterclaim to the expropriator's suit for payment of a debt[20].

It is submitted that the claims for compensation (or, rather, counterclaims) should be handled with certain flexibility.

Let us imagine a farmer who takes a loan from the state in order to improve his farm. The state expropriates the farm including the recent investments without any indemnity. The farmer (debtor) moves to the forum state where he is sued by the expropriator for repayment of the loan. It would be obviously unfair to allow the expropriator to collect the value of the claim twice: once in the form of the investments in the farm and then again from the dispossessed, personally liable debtor. The debtor could be given the right to use the value of the expropriated property for the purpose of a set-off. At the same time, the right *in rem* of the expropriator to the seized property could be recognized.

It is suggested that the original debtor should be allowed to use the value of the expropriated property as a counterclaim, if the debt he owes the foreign expropriator is connected in such a way with the expropriated property that it would be unjust to hold him liable after the expropriation[21]. It has to be remembered that in these cases the security of international trade is not endangered, since the title to the expropriated property is not in doubt. If the debt is is no way connected with the expropriated property, there will normally be no reasons to allow the set-off, unless there are reasons for the forum to actively oppose the taking, e.g. because of its incompatibility with public policy or international law.

III. The manner of enforcement and ordre public

33.Limits of the passive neutrality.- There are numerous cases where the courts have not assumed the position of passive neutrality towards foreign executed expropriations but instead decided to oppose them actively. This happens only when the forum has special reasons for such opposition and the result is that the right of the expropriator to the seized property is not recognized and the property or its value is, if possible, restituted to the original owner[22]. The courts usually invoke the incompatibility of the taking with international law or public policy, the non-recognition of the expropriator by the forum state or the way in which the taking has been executed. Expropriations violating the law of nations and those enacted by a non-recognized expropriator will be handled in a different chapter (Chapter Seven *infra*). Here we shall have a closer look at the manner of enforcement and at the question of public policy.

34. Manner of enforcement.- It has already been mentioned that the foreign seizure must, in order to be recognized, have been executed in a manner acceptable to the forum. Thus, a seizure by force will probably be recognized as valid only if it has been carried out in the expropriator's territory, on the high seas on vessels flying the expropriator's flag and in foreign territory with the consent of the territorial sovereign. An expropriation can, of course, also be carried out without the use of force, e.g. when the property is handed over to the expropriator by the original owner or by the immediate possessor. Of particular interest are the cases of peaceful seizures of vessels in foreign harbors or on high seas. In some of these cases, the title of the expropriator to the vessel was recognized[23], in other cases not[24]. The Swedish Supreme Court said in the case of *The Rigmor* (1942)[25]:

"It is true that the carrying into effect within the territory of another state cannot take place under compulsion and be legally binding. But if, as in the present case, it takes place with the consent of the immediate possessor and especially if the latter is a subject of the requisitioning state and holds the position of captain of the vessel affected

by requisitioning, it can only be regarded as not legally binding on the assumption that the decree on which the execution is based is such that because of its departure from the fundamental principles of the law of our country it ought not to be taken into account."

It has, however, to be said that even in the cases where the right of the expropriator to the vessel was not recognized, the seizure had taken place with the consent of the immediate possessor. It seems that the courts require for recognition not only that the seizure should be carried out without the use of force, but also that it should not be carried out by disloyal or fraudulent behavior[26]. The courts seem to be of the view that the shipmaster lacks authority to hand over the vessel to the expropriator. Thus, in the case of *The Jupiter No.3* (England C.A. 1927), it was said that the shipmaster had never been in possession of the vessel, but that he had merely been a custodian for the person who had been in actual possession (the owners).

The Swedish judgments in *The Rigmor* and *The Charente* (HD 1942) have to be seen in light of the special circumstances. In these cases, the consent of the owners to the requisition could, in fact, be presumed, although this was not mentioned in the decisions (s. 45 *infra*).

It can broadly be said that an expropriation, in order to be recognized as valid, must be executed with the consent of the territorial sovereign or with the consent of the original owners.

35. **Ordre public.**- Foreign expropriatory laws have frequently been alleged to be incompatible with the public policy of the forum. It lies beyond the frame of this thesis to analyze the instrument of public policy in all its complexity. It deserves, nevertheless, to be said that the courts regard only their own public policy and not foreign concepts of the same. This may seem self-evident, but it has been put in doubt. *Katzarov*[27] writes that foreign nationalizations should be scrutinized from the standpoint of the public policy of the expropriating state, and not of the forum country. Such scrutiny would, of course, be meaningless.

The public policy is only a "hat", i.e. in order to learn about its contents, we must study the various concepts it is used to protect. The standards imposed by the public policy vary from state to state. The discussion usually involves the issue of compensation for the expropriated property.

The French courts have been invoking public policy against all foreign expropriations without indemnity[28]. This practice has been criticized by some French authors[29] and it seems that the French courts at present do not require that full indemnity be paid to the dispossessed, but they are satisfied with indemnity which is not strikingly disproportional or indefinitely postponed[30]. In some cases, even seizures with no indemnity at all have been recognized, but special circumstances can be traced in these decisions[31].

The view that expropriations without indemnity should not be recognized

because of public policy can sometimes be found also in other countries than France[32]. But the courts in other states are usually more tolerant towards foreign takings and the title of the expropriator is normally recognized even if no compensation has been offered. In several decisions, it has been stated that the lack of compensation, in itself, is not a ground sufficient for refusing recognition to the foreign executed taking[33]. The desire to make business with the expropriating state is stronger than any compassion with the dispossessed owners.

It is also quite natural that the public policy is more sensitive to expropriations affecting the forum's own nationals than to dispossessions of foreigners[34].

IV. Bona fide acquisition from the expropriator

36. It has been shown that the forum sometimes for special reasons decides not to recognize the expropriator's title to the seized property. The persons who buy such property from the expropriator will in these cases have to defend their title against that of the dispossessed owners. As the title of the buyers is derived from the title of the expropriator, it depends on it. This disadvantageous position of the buyers is somewhat mitigated by the possibility of a *bona fide* acquisition of title, whether by a transaction in good faith or by a *bona fide* possession for a prescribed period of time.

The good faith should, it is submitted, be interpreted in a special way in expropriation cases. For example, the buyers know that the property has been expropriated, but they may ignore that the seizure has taken place without indemnity or in violation of international law. It happens that the dispossessed owners warn in advance all potential buyers of the expropriated goods in order to make it impossible for them to invoke later their good faith[35]. But even if the buyers know all this at the time of the transaction, they may ignore that the taking is, or would be, considered invalid in some states. It is true that ignorance of law excuses no man, but, on the other hand, the problem cannot be put on the same footing as purchases of stolen property. Whereas it is generally known that a thief is not the rightful owner, the same cannot be said about the expropriator, especially since some seizures are recognized and some not, depending upon the factors unknown to the buyer. The public policy is vague and often unpredictable. However, most buyers of expropriated property are not unexperienced private persons, but merchants who can be required to take a closer look to the title of the seller before they buy.

It happens that the buyers conclude an agreement with the expropriator to buy under the condition that the expropriator will compensate their loss if the property is restituted to the original owners by foreign courts[36]. Here there is no need to protect the buyer; the agreement itself is a proof that he was not *bona fide*. He will be compensated in any case and to protect his title would be assisting the foreign expropriator.

Various countries have various rules about *bona fide* acquisition[37]. According

to the usual conflict rules, the acquisition is to be governed by the *lex rei sitae*. The expropriated goods are, at the time of the transaction, usually situated in the territory of the expropriator. This means that the courts should apply the provisions of the expropriating legal system on *bona fide* acquisition, ignoring, at the same time, the expropriation decrees. There are cases where the court relied on the expropriator's law[38], but there are also cases where, it seems, the court relied on the provisions of *lex fori*[39]. Writers usually speak in favor of the law of the place of acquisition[40], although they sometimes show certain doubts[41].

The application of the law of the place of acquisition seems to be in accordance with private international law. The fact that this law is often the law of the expropriator need not make any difference. There is, of course, also the possibility that the buyer moves the goods from one country to another and that the *bona fide* acquisition is performed according to the latter's law[42].

1) Austria: OGH Dec. 22, 1965;
Belgium: *Propetrol v. Cia Mexicana de Petroleo* (TCiv Antwerpen 1939);
England: *Luther v. Sagor* (C.A. 1921); *Princess Palley v. Weisz* (C.A. 1929);
France: *Stchoukine Case* (TCiv Seine 1954); *Reynolds v. Ministre des affaires étrangères* (Trib. Seine 1965); see also *Stroganoff-Scherbatoff v. Bensimon* (Trib. Seine 1966);
Germany: LG Berlin Nov. 1 and Dec. 11, 1928; OLG Bremen Aug. 21, 1959; LG Hamburg Jan. 22, 1973;
Italy: *Federazione Italiana Consorzi Agrari v. Commissariat of the Soviet Republic and Stà Romana* (Cass. 1924); *Anglo-Iranian Oil Co. v. S.U.P.O.R.* (Trib. Venice 1953, TCiv Rome 1954); *British Petroleum v. SINCAT* (Trib. Siracusa 1973);
Japan: *Anglo-Iranian Oil Co. v. Idemitsu Kosan* (Tokyo High Ct. 1953);
Monaco: *Perrin-Jannès v. Masi* (TCiv 1948);
Netherlands: *Petroservice v. El Aguila* (HR 1941);
Norway: *Böhm v. Bergsland* (Byrett Oslo 1939);
Sweden: *Weiss v. Simon* (HD 1941); *Cotton Spinning Co. v. Trelleborgs Gummifabriks AB* (HD 1954); *Horovitz v. Lehner* (HD 1942);
U.S.A.: *Banque de France v. Equitable Trust* and *Banque de France v. Chase National Bank* (U.S.C.C.A. 1932); *Salimoff v. Standard Oil* (N.Y.C.A. 1933); *Shapleigh v. Mier* (U.S. Sup. Ct. 1937); *Bernstein v. Van Heyghen* (U.S.C.C.A. 1947); *Sabbatino No.1* (U.S. Sup. Ct. 1964); *Palicio v. Brush* (U.S.D.C. 1966); *French v. Banco Nacional de Cuba* (N.Y.C.A. 1968); *Menendez v. Faber* (U.S.D.C. 1972).
2) *Fields v. Predionica I Tkanica* (N.Y. App. Div. 1942); *Suikerfabriek Wono-Aseh v. Chase National Bank* (U.S.D.C. 1953); *The Navemar No.2* (U.S.C.C.A. 1939); *Cementos Resola v. Larrasquitu* (C.A. Poitiers 1937); *Lafuente v. Llaguno y Duranona* (C.A. Bordeaux 1938); *The Rigmor, The Charente* (Sweden HD 1942). *But, The Jupiter No.3* (England C.A. 1927); *The Cristina* (H.L. 1938); *El Condado* (Scotland Ct. of Sessions 1939); *The Toomas* (Sweden HD 1944); *Menendez v. Saks and Co.* (U.S.C.C.A. 1973).
3) *French v. Banco Nacional de Cuba* (N.Y.C.A. 1968).
4) *Weiss v. Simon* (HD 1941).
5) *Böhm v. Bergsland* (Byrett Oslo 1939).

6) *Böhmische Union Bank v. Heynau* (BG 1942).
7) *Michaeli* 81; *Münch*, 98 RC 495 (1959); *Wolff*, PIL 525-6.
8) *Drobnig* 209; *Seidl-Hohenveldern*, 7 JIR 382-3 (1957).
9) *Fedozzi*, 27 RC 181-2 (1929); *Gihl*, Two Cases 57 and 83 RC 233-5 (1953).
10) *Kegel*, RabelsZ 1964, 155.
11) *Hjerner* 430.
12) *Rotondi* 442; *Lalive*, Schw. JIR 1971, 126; *Anglo-Iranian Oil Co. v. S.U.P.O.R.* (Trib. Venice 1953); *cf. Neumeyer* 235, 252.
13) *Schulze* 191-2.
14) *Münch*, 98 RC 494-5 (1959).
15) *Sabbatino No.1* (U.S. Sup. Ct. 1964); W. German OLG Bremen Aug. 21, 1959; Austrian OGH Dec. 22, 1965..
16) *Fickel*, AWD 1974, 74; *Hjerner* 363; *Kegel* 443; *Nial* 131; *Philip* 388; *Sarraute and Tager*, Clunet 1952, 553; *Seidl-Hohenveldern* 12-3; *Vischer*, IPR 659.
17) *Anna Bolin v. U.S.S.R.* (Sweden HD 1934); *Wulfsohn v. R.S.F.S.R.* (N.Y.C.A. 1923).
18) *Münch*, 98 RC 495 (1959); *Nial* 131; *Seidl-Hohenveldern* 15.
19) *Pons v. Cuba* (U.S.C.C.A. 1961).
20) D.C. 's- Hertogenbosch Feb. 6, 1953.
21) *Cf.* the problem of loss partition under similar circumstances (s. 92-103, 117 *infra*).
22) Canada: *Juelle v. Trudeau* (Cour supérieure Québec 1968);
England: *The Jupiter No.3* (C.A. 1927); *The Cristina* (H.L. 1938); see *Anglo-Iranian Oil Co. v. Jaffrate* (Aden Sup. Ct. 1953);
France: *Héritiers Bouniatian v. Optorg* (TCiv Seine 1923); *Potasas Ibericas v. Bloch* (Cass. 1939);
W. Germany: AG Weiblingen June 26, 1948; AG Dingolfing Dec. 7, 1948; OLG Nürnberg Sept. 19, 1949; OLG München June 14, 1951; BGH Dec. 18, 1963; *cf.* OLG Nürnberg June 1, 1949 (criminal case);
Netherlands: *Bank Indonesia v. Senembah* (C.A. Amsterdam 1959);
Sweden: *The Toomas* (HD 1944); *Gebrüder Heine* (Government 1952);
Switzerland: *Böhmische Union Bank v. Heynau* (BG 1942);
U.S.A.: *Bernstein v. Ned.-Am. Stoomvaart* (U.S.C.C.A. 1954); *Menzel v. List* (N.Y. Sup. Ct. 1966); *Sabbatino No.2* (U.S.C.C.A. 1967).
23) *The Adriatic* (U.S.C.C.A. 1919); *The Navemar No.2* (U.S.C.C.A. 1939); *The Rigmor, The Charente* (Sweden HD 1942).
24) *The Jupiter No.3* (England C.A. 1927); *The Toomas* (Sweden HD 1944); *cf. The Maret* (U.S.C.C.A. 1944) where the non-recognition of the expropriator by the U.S.A. was, it seems, decisive.
25) 10 A.D. 244.
26) *Cf. Doehring*, ZaöRV 1968, 588.
27) *Katzarov*, Osteuropa-Recht 1961, 205.
28) *Batiffol* I 422; *Potasas Ibericas v. Bloch* (Cass. 1939); *Codelco v. Braden* (Trib. Paris 1972). *Cf.* Cass. April 23, 1969.
29) *Sarraute and Tager*, Clunet 1952, 545-61.
30) See *Bellet*, Rev. 1964, 604.
31) *Stchoukine Case* (TCiv Seine 1954): immunity and Art. 2262 C.C.;
Reynolds v. Ministre des affaires étrangères (Trib. Seine 1965): not the expropriator but the French state was the defendant;
Stroganoff-Scherbatoff v. Bensimon (Trib. Seine 1966): the claimant was not the rightful heir of the dispossessed owner.
32) E.g. *Niederer*, Schw. JIR 1954, 100.
33) *Luther v. Sagor* (England C.A. 1921); *Helbert Wagg* (Ch. 1956); *Hardtmuth* (Belgium Cass. 1960); Austria OGH Nov. 22, 1961.

34) W. Germany, OLG Bremen Aug. 21, 1959; LG Hamburg Jan. 22, 1973.
35) E.g. an advertisement by Nelson Bunker Hunt in The Times of July 5, 1973, page 22.
36) *The Jupiter No.3* (England C.A. 1927).
37) *Cf. Sauveplanne*, RabelsZ 1965, 651 ff.
38) *Anglo-Iranian Oil Co. v. S.U.P.O.R.* (Trib. Rome 1954).
39) *Héritiers Bouniatian v. Optorg* (TCiv Seine 1923).
40) *Michaeli* 345; *Nial* 91; see *Gihl*, 83 RC 240 (1953).
41) *Hjerner* 346-7.
42) *Koerfer v. Goldschmidt* (Swiss BG 1968).

CHAPTER FIVE

UNENFORCEABILITY OF FOREIGN EXPROPRIATORY LAWS

I. The main rule

37. Unenforceability.- The usual recognition of foreign enforced expropriations is contrasted by the attitude to foreign takings that have not been carried out, i.e. where the expropriator has not succeeded in seizing the property. The expropriator's right to such property is normally denied and the title of the original owner is upheld (n. 14, 35 *infra*). This does not mean that the foreign expropriation is deemed "invalid". When the expropriator is able to take possession of the property, he will become, in the eyes of the forum, its rightful owner. But as long as he is not able to do so, the forum will refuse to help him. In the eyes of the forum, the property remains vested in its original owner. It is thus possible to say that the rights of the expropriator are *unenforceable*. An unenforceable right is not null and void or non-existent. The court will, however, refuse to compel the obliged person to perform the obligation. If the debtor fulfills anyhow, he will not be allowed restitution. This is the position of courts to e.g. gambling debts.

At first sight, there seems to be nothing in common between a gambling debt and a demand of a foreign expropriator or a tax collector. It is, nevertheless, submitted that there is a common denominator. It has already been suggested that the forum refuses to enforce foreign public law because of the principle of isolation which originates from the lack of interest of the forum to support governmental prerogatives of a foreign state. This lack of interest, the legal (not necessarily the moral) indifference, is the common feature of all unenforceable claims. This can be said about both gambling debts and foreign governmental claims.

38. The Bretton-Woods Agreement and unenforceability.- A special type of unenforceability has been enacted by Art. VIII(2)(b) of the International Monetary Fund 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."

This Article has given rise to extensive case law and literature, penetration of which is not our purpose. While *Mann*[1] writes that the unenforceability under the Agreement means invalidity and voidness, the majority of authors think that the contracts are valid, but cannot be enforced in courts[2]. According to

Mann[3], the Article is substantive law, whereas the West German BGH calls the unenforceability under the Agreement a procedural obstacle[4].

From the point of view of this thesis, the Article has one interesting aspect. It stipulates that unlawful contracts are unenforceable. This is a step towards enforcement of foreign exchange control regulations, although these still remain unenforceable in principle. The two unenforceabilities need not be mutually incompatible, as illustrated by the folowing cases:

Lembaga and Indonesia v. Brummer et al. (C.A. Amsterdam 1959): Indonesia petitioned the court for annulment of a judgment allegedly violating Indonesian exchange control laws, relying upon the Bretton-Woods Agreement. The petition was rejected. The court admitted that Dutch courts must take account of Indonesian exchange provisions, but this did not imply that the foreign Government itself would be entitled to invoke the authority of Dutch courts to protect its foreign exchange rights and interests.

Banco de Brazil v. Israel Commodity Co. (N.Y.C.A. 1963): Banco, an instrumentality of Brazil, sued for damages for loss caused by a contract between the defendant and a Brazilian exporter in violation of Brazilian exchange control rules. The action was rejected. The majority admitted that the Bretton-Woods Agreement made the contract unenforceable. Private individuals were, however, free to enter into such contracts at their own risks without subjecting themselves to tort liability in American courts, as these courts would not enforce the foreign decrees.

39. Substantive or procedural law? - The unenforceability of foreign expropriatory and other public law is sometimes considered to be a rule of procedural law, even in countries where, for example, the unenforceability of obligations barred by time limitations is regarded as substantive law. The action of the foreign state is sometimes rejected because of the "lack of jurisdiction to handle such claims"[5] or because the foreign state is said to have no *locus standi* to present such claims to the forum[6]. The procedural approach is found also in Anglo-American law. According to *Dicey's* handbook[7]:

"The court has no jurisdiction to entertain an action . . . for the enforcement, either directly or indirectly, of penal, revenue, or other public law of a foreign state . . ."

From the American Restatement (1st), we can quote Section 610[8]:

"No action can be maintained on a right created by the law of a foreign state as a method of furthering its own governmental interest."

The procedural approach has supporters also among European writers[9]. It seems, nevertheless, that this approach is of little avail when the foreign decree is invoked as a defense[10] or as a preliminary question[11]. Here the court cannot refuse to entertain the action. It appears that the unenforceability conceived as a rule of substantive law is to be preferred.

The courts and authors usually invoke reasons other than unenforceability based on the pronciple of isolation as conceived in this thesis when they refuse enforcement to foreign expropriations. The most frequently used reasons are the incompatibility of foreign expropriations with the forum's public policy and their "territorial limitation".

II. Unenforceability of foreign expropriations and ordre public

40. Public policy approach.- There is a widely spread view that foreign expropriations are refused enforcement due to their repugnance to the public policy of the forum, for example because they provide for no compensation. A corollary to this view is the proposal that foreign "good" expropriations should be enforced[12]. Sometimes public policy is not expressly mentioned. For example, it is said that expropriations without indemnity ("confiscations") are "territorially limited"; this indicates that it is the lack of compensation which is the cause of non-enforcement[13]. The case law supporting this view is voluminous[14]. On the other hand, there seems to have been no instance where a court, after establishing that compensation had been offered, enforced the foreign taking. Such generous expropriations have been scarce and they usually lead to no litigations[15].

The majority of writers assert that foreign expropriations are to be denied enforcement regardless of whether compensation is offered by the expropriator[16]. This was also the prevailing view when the matter was discussed within the *Institut de droit international*[17] and International Law Association[18]. There are also judgments saying explicitly that compensation is irrelevant[19].

41. "Good" and "bad" expropriations.- It is submitted that the moral evaluation (e.g. whether indemnity is provided) of the foreign expropriation is irrelevant. The principle of isolation does not discriminate between good and bad takings, unless the taking is so "good" that its enforcement becomes a matter of the forum's own interest, like expropriations by an allied state in time of war. The courts do not distinguish between foreign good and bad revenue laws. All are refused enforcement. Why should there then be a difference between good and bad expropriations? The court will normally refuse to enforce even the most reasonable foreign tax law and there is no reason why its attitude towards expropriations should be more positive. Thus, it is possible to agree with authors who see a clear distinction between the unenforceability of foreign expropriatory laws and *ordre public*[20]. As *Madsen-Mygdal* put it[21], public policy is to be used against foreign laws that are exorbitant, whereas the attitude towards foreign expropriatory and other public laws is dictated not by their exorbitancy, but by their "heterogenity", i.e. by their different nature[22]. There are also other reasons to avoid invoking public policy against enforcement of foreign expropriations. Public policy has been compared to a ride on an

unruly horse: "once you get astride of it, you never know where it will carry you"[23]. It has, in effect, also been called an unruly ass[24]. It is vague and its application is often a matter of whim. As *Kollewijn* somewhat ironically puts its, public policy should be avoided "en dehors des thèses de doctorat"[25]. Whenever there is a possibility to formulate a clearer rule, the interests of legal security demand that such a rule be formulated and applied instead of the vague public policy. A frequent application of public policy raises, besides, doubts as to the main conflict rule itself. Another reason why public policy should be avoided is that it is an exceptional instrument presupposing that the foreign expropriatory law is in principle enforceable under some more general rules[26]. This is, however, not the case.

Some additional reasons against the application of the *ordre public* clause have been put forward in literature, but not all of them can be concurred with. *Seidl-Hohenveldern*[27] feared, for example, that the application of public policy would irritate the foreign expropriator. German courts were, further, prohibited to invoke public policy against the allied measures concerning German property[28] which made them rely more on the "territorial limitation". This has sometimes been considered a juridical trick intended to circumvent Germany's obligations[29]. Similar was the situation in France: after the Allied Powers in Potsdam recognized that each had the right to seize German assets, public policy could hardly be invoked against these measures by French courts[30]. These courts, although usually relying on public policy, preferred in these cases the argument of "territorial limitation"[31]. These are, of course, hardly strong reasons against applications of public policy.

It has sometimes been alleged that enforcement of foreign expropriatory, revenue, penal etc. laws cannot be contrary to *ordre public* when the forum's own legal system contains similar rules[32]. True, the forum can hardly criticize the contents of the foreign law when there are similar laws in *lex fori*. But since public policy is not invoked against the foreign law *in abstracto*, but rather against the effects of its application *in casu*, it is theoretically admissible to state that it is not the decree as such, but its enforcement that is contrary to an important policy of the forum (e.g. the principle of isolation)[33]. This makes the *tu quoque* objection fall, but there remains the question of why the principle of isolation is invoked via public policy and not directly. As it has already been said, unnecessary application of public policy is to be avoided.

III. Unenforceability and "territorial limitation"

42. "Territorial limitation".- After having discussed the public policy, we shall now study the second legal instrument used against enforcement of foreign expropriations: the "territorial limitation" of expropriatory laws. As created by legal theory and case law, the "territorial limitation" can be formulated as

follows:
"Foreign expropriations (and other public law measures) affecting private property are given no effect on assets that were not situated in the territory of the enacting state at the time of their enactment."

The "territorial limitation" is almost universally accepted by authors[34] and it has been invoked in innumerable judgments[35]. Both in theory and practice, it prevails over *ordre public*, although they sometimes are combined, e.g. into a "territorial limitation of takings without compensation".

The "territorial limitation" is conceived as a special connection rule which makes the situs of the property at the time of the expropriation decisive. The explanations of the importance of the situs vary.

According to some, the "territorial limitation" is an expression of the usual rule that title to tangibles is governed by the *lex rei sitae*[36]. Objection can, however, be made that the "territorial limitation" is used not only in relation to tangibles, but also as to claims and intellectual property, where *lex rei sitae* is inappropriate. Besides, even in the case of tangibles, the *lex rei sitae* is normally not applied when the title is not transferred *ut singuli*, but by changes in ownership of shares of an entire juridical person.

Some consider the "territorial limitation" to be a rule of international law[37]. There is, however, no rule of international law forbidding the court to enforce foreign takings (s. 5 *supra*).

An interesting theory is that of *Abrahams*[38] who sees the roots of the "territorial limitation" in the customary territorialism of feudalism as expressed in *d'Argentré*'s doctrine of "statut réel".

Still others see in the "territorial limitation" an instrument intended to protect the *territorial* sovereignty of the forum state[39]. *Seidl-Hohenveldern*[40] argues that the respect due to foreign sovereign acts and the respect due to private property are in balance so that they cancel each other and the slight push carrying the balance one way or the other is provided by a third element, the principle of territoriality based on the territorial sovereignty of the forum state.

43. "Territorial limitation" and unenforceability.- It is submitted that the "territorial limitation" is only an expression of the principle of isolation. It has little to do with territorial sovereignty or with the situs of the property (a situs which is, besides, often fictitious, e.g. in the case of intellectual property or claims). The territorial sovereignty and situs are not invoked when the courts refuse to enforce foreign revenue laws; why should they then be decisive when the courts do the same with expropriation decrees? If *territorial* sovereignty were the true *ratio decidendi*, the courts would not hesitate to enforce foreign expropriations as to property that had been in the territory of a third state at the time of the expropriation's enactment or that had been taken out of the expropriator's country by the original owner after that time. In practice, the courts handle all *unenforced* expropriations alike. They are,

further, ready to recognize *enforced* takings as valid even when the seizure has taken place in a third country or even in the forum state itself (s. 29 *supra*). It appears that the situs of the property is of no direct relevance. It is not the territorial sovereignty but the judicial function of the forum state that is protected when the courts refuse to become instruments of the foreign country.

Admittedly, in the cases involving expropriation of tangibles, the "territorial limitation" will, in most cases, lead to the same result as the unenforceability rules suggested here. Problems may, however, arise in connection with intellectual property or claims. As they have no physical situs, the adherents of the "territorial limitation" attribute to them a fictitious "situs" for the purpose of expropriation. Such "situs" is, of course, where the court wants it to be. It is of interest to note that several authors suggest that the "situs" should not be determined according to some rigid rules but solely with regard to the power of the foreign state to enforce the seizure[41], i.e. with regard to its borders of power[42]. From this, there is only a short step to saying that the expropriation has to be "efficient" in order to be recognized as giving valid title to the expropriator[43]. This is, in fact, the same as unenforceability. It is simpler to say that foreign expropriations are unenforceable than to manipulate with the fictitious "situs".

The power approach mentioned here is to be distinguished from the view of *Hjerner*[44] who uses the power of the *forum* as the starting point in his suggestions. It is undoubtedly right that the forum will judge on foreign expropriations only if it has power to do something about them. But if the forum has no such power, there will be no lawsuit at all, as the parties will not turn to such court.

It is of interest to mention that *Mann*[45] objected against the power approach as "it is necessary to protest against a legal doctrine which sanctions the test of physical power . . . It would be retrograde and parochial in character . . ." It is submitted that there in nothing retrograde in stating that foreign public law claims are unenforceable, although this rule attributes relevance to the power of the expropriator to enforce his decrees.

IV. "Proprietary asylum" and unenforceability

44. The term "proprietary asylum" was introduced by *F. Schmidt* in 1944[46]. He suggested that refugees should be given asylum not only as to their persons but also as to property they brought with them in connection with their escape. The problem can be formulated more generally. Should the foreign expropriator be given right to property that, although in the expropriating country at the time of the expropriation and perhaps even effectively seized there, has subsequently been taken out of that country by the original owner or on his behalf?

The question has been discussed in *The Jupiter No. 3* (England C.A. 1927)[47]:

The Russian vessel Jupiter was seized in 1918 by local Soviet authorities in Odessa. A short time later, it was restored to its original owners by the foreign troops that occupied the city. According to the court, the vessel had never been in Soviet jurisdiction and even if it had been in that jurisdiction, this would be irrelevant since the owners had obtained control over it again.

The expropriator was more successful in the Swedish case of

Morska Centrala v. Kozicki (HD 1951): The court refused to recognize the right of a refugee to vessels belonging to an expropriated Polish company originally owned by him. The vessels had been used by the refugee for his escape to Sweden.The court did not find the foreign decree to be of a expropriatory nature (the seizure of the company was disguised by bankruptcy proceeding qualified by the court to be private law).

The Swedish judgment has been criticized[48] and it seems that its outcome would have been different in case of an open expropriation.

The "proprietary asylum" has support in legal literature[49], although several writers criticize the term as such[50].

According to *Seidl-Hohenveldern*[51], the cases have to be handled differently depending on whether the original owner abducted the property before the seizure was carried out or only after the execution of the seizure. In the first type of cases there is, he writes, no expropriation at all and the property belongs to the original owner. In the second type of cases, the property should be delivered back to the expropriator. He writes that one can speak about expropriation only after the actual seizure and he criticizes the view of *Wolff*[52] who asserts that expropriation laws can transfer ownership already *ex lege.*

The concept of *Seidl-Hohenveldern* is to be seen in light of the "territorial limitation" he adheres to. In order to explain why property abducted before the seizure was carried out should not be given to the expropriator despite its situs in the expropriating state at the critical time, he declares that there is no expropriation at all. He supports his concept by a reasoning specific for Germany. The German courts could not use public policy against expropriations of German property by the Allies. The interpretation of the term "expropriation" by *Seidl-Hohenveldern* was intended to avoid "the highly unfair result that German refugees from the Eastern States, who would have succeeded in keeping a few meagre belongings, would have to be prosecuted for abducting and stealing property owned by a foreign State".[53]

A similar concept is adhered to by *Castberg* who writes that a foreign expropriation should not be recognized if not yet executed[54]. The expropriator should, however, be given the right to assets that have been seized, but later abducted by the original owner[55].

The usual motives given for the "proprietary asylum" are humanitarian. There is no doubt that courts often tend to protect a refugee from claims by his home country. It happens that the courts even modify contractual obli-

gations between the refugee and the foreign state in favor of the former[56]. This is, however, not the only motive, perhaps not even the principal one. One can agree with *Jägerskjöld*[57] who argues that the main motive is the unwillingness of courts to enforce the foreign expropriation. This is quite obvious when the property is abducted before the execution of the seizure.

The case where the expropriator had enforced the seizure, but the original owner recovered and abducted the property, is more complicated. It seems that the stability of the expropriator's possession should be of relevance here. If the possession was of a short duration only, e.g. a couple of hours or days, the immediate recovery by the original owner can be said to create a situation similar to that before the seizure. The expropriator will be denied the property because of the unenforceability of the foreign expropriation. The cases of "proprietary asylum" are thus confirmations of the general rule rather than exceptions. In this respect, the term "asylum" may be misleading as it makes the impression that humanitarian motives prevail.

V. Alleged consent of the owner and unenforceability

45. It lies in the nature of expropriation that it is carried out also against the will of the original owner of the property. Insofar as the expropriator is able to enforce the seizure, the consent of the original owner is irrelevant. The expropriator may, however, invoke the consent of the owner when asking the forum to enforce the measure.

The alleged consent of the dispossessed owner may be invoked in two ways. Sometimes the true character of the measure is camouflaged by a "sale", "donation", etc. On other occasions, the expropriatory nature is not concealed, but it is asserted that the owners have agreed to the taking. The co-operation of the owners is sometimes proved by the expropriator by presenting various documents, e.g. powers of attorney given by the owners.

The attempts to make foreign courts enforce the seizure by asserting the consent of the original owner have usually been unsuccessful[58], although there are a few cases constituting possible exceptions[59]. The alleged consent is often not genuine; otherwise there would usually be no lawsuit at all. Alone, the impossibility for the owner to leave the expropriating country indicates that the alleged consent may have been obtained under duress. It is obvious that if the forum comes to the view that the consent is not genuine, it must ignore it.

Due to the character of expropriations, it will be reasonable to presume that the owners do not welcome them. The burden of proof should consequently be put on the party invoking the consent, especially as the expropriator often can present proof, since the dispossessed owner is in his power. The credit given to documents signed by the owners in the expropriating state is, however, limited. It has happened that the forum invited the owners to

present their testimony outside of the expropriating state[60]. That there may be serious reasons to do so is illustrated by cases where the owners revoked the full powers given to the expropriator, when they succeeded to get abroad[61]. Sometimes the forum pointed out that the owners had lost their rights under the expropriation decrees and their consent could, consequently, not be invoked by the expropriator[62], or that the consent was so closely bound to the expropriation that it could not be given any separate value[63].

Let us, however, suppose that in some cases the consent of the owner is genuine. It may, for example, happen that a partial compensation is offered for the property and the owner, who is forbidden to leave the expropriating state, prefers such partial compensation to nothing at all. The consent can exceptionally be presumed. The Norwegian and Dutch expropriations during World War II were of a protective nature and the owners living in the occupied territories may have been presumed to support their exiled governments. True, Norwegian shipowners objected in Swedish courts against the requisition of their vessel by the exiled government[64], but they had probably been forced to do so by the German authorities[65]. Another type of cases where the consent of the owner may be presumed is characterized by the common economic interests of the expropriator and the owner. Exchange control laws can be used as an analogy. According to these laws, residents are often obliged to "bring home" their assets from abroad. The forum will not enforce such foreign laws and it will not send the property to the decreeing state against the will of the owner. But if the owner demands that the money be sent to him, there will usually be no reason to doubt that he complies with the decree of his own will. He lives in the decreeing country and it is there he needs the money in local currency[66].

A special problem in this connection are the statutes in several states of the U.S.A. concerning American inheritances belonging to heirs in countries where these are not given the equivalent value of the inheritance, e.g. because of confiscatory taxation or exchange rate[67]. According to the statutes, the inheritances are not sent to such countries and powers of attorney issued by heirs there are given no credit. These statutes may be intended to protect the heirs, but they are cruel to an heir who is denied the property although he would certainly prefer a very little part of it to nothing at all. The statutes have been criticized[68] and the U.S. Sup. Ct. declared a similar Oregon statute to be unconstitutional[69].

It is submitted that the will of the owner is to be complied with, provided that it can be shown that he really consents to the taking[70]. The legitimate interests of other persons, for example the creditors of the owner, have, however, to be protected. It is also important to realize that the consent must be given at the time of the lawsuit. Taking an analogy from other types of public law, a consent or promise of a taxpayer to pay taxes does not change the revenue claim into one of private law. The courts outside of

the decreeing country will hardly enforce the promise. The following two cases may illustrate this:

W. Germany LG Offenburg Dec. 30, 1960: The court refused to force an individual to pay certain sums to French authorities although the individual was obliged to do so by French social insurance laws and by his own promise, since the promise had not changed the public law nature of the claim.

Takvorian Case (Sweden HD 1961): Bulgaria asked the court to enforce certain Bulgarian clearing decrees. The action was rejected because of its public law nature, although the defendant had previously agreed to a payment via the clearing account.

VI. Cases where foreign takings have been enforced by the forum

46. Forum's own interest.- It has been submitted that foreign expropriatory laws are normally unenforceable because of the principle of isolation as there is no public interest in the forum state to support the foreign state's administration. There are, nevertheless, also cases where the forum executed foreign expropriations. A closer look shows that these cases, in effect, confirm the main rule of unenforceability. The special circumstances usually indicate that the expropriations were enforced not in the interest of the expropriator or, in any case, not only in his interest, but rather in the interest of the forum state itself.

The forum may be willing to enforce a foreign expropriation when there are very close political or even constitutional ties between the expropriator and the forum state[71]. It is also understandable that the courts are ready to enforce expropriations enacted by an ally during a war, especially when the expropriation is an element in the common war effort[72]. Such enforcement may be granted also after the end of the war[73].

There are also cases where the foreign expropriation was, one can say, enforced by mistake. It happens that the court misunderstands the true nature of the foreign measure[74], wrongly considers the expropriation to have already been enforced[75], etc.

47. Litvinov Assignment cases.- By the so-called Litvinov Assignment of 1933, the U.S.S.R. ceded to the American Government whatever claims it might have in the U.S.A. Relying upon this assignment, the U.S. Government went to the courts in order to collect funds deposited in the U.S.A. and belonging to juridical persons which had been seized and dissolved in Russia.

In *U.S. v. Belmont* (U.S. Sup. Ct. 1937), the court decided in favor of the U.S. Government. It was said that the American public policy, as defined in the constitutional protection of private proerty, could not be applied to acts of a foreign government concerning property of its own nationals. Similar was the outcome also in *U.S. v. Pink* (U.S. Sup. Ct. 1942). But while in the *Bel-*

mont case, there were no original owners claiming the money which could thus be considered *bona vacantia*, in the *Pink* case, there were also other claimants than the U.S. Government. Both judgments have been much discussed and interpreted in different ways.

According to *Hjerner*[76], the U.S. simply took over Russian assets in America to compensate Americans dispossessed in Russia, i.e. the judgments constituted an American expropriation rather than enforcement of a Russian one. It can, however, be objected that the court expressly relied on the Soviet expropriation laws and on the assignment of the expropriator's rights to the U.S. Government. This is also how American courts interpret the decisions:

U.S. v. National City Bank (U.S.D.C. 1950): The U.S. moved to collect sums deposited with the defendant by a Russian bank before its expropriation. The court decided that the Litvinov Assignment had vested in the U.S. valid title to the money, but it allowed the defendant to use its own claims against the U.S.S.R. for the purpose of a set-off. The U.S. tried to prevent the set-off by asserting that the assigned assets were to create a pool out of which all the American creditors of Russia might obtain at least a partial *pro-rata* compensation. The defendant would obtain preferential treatment if the set-off were allowed. The court rejected this argumentation. The President and the Congress had not intended to modify the rights of American creditors of Russia in order to make a more equitable distribution. The U.S. simply stepped into Russia's shoes by the assignment.

Tillman v. U.S. (U.S. Ct. of Claims 1963): The plaintiff sued for compensation for damages incurred by him due to the Litvinov Assignment. The action was rejected and the court said that the assigment had not constituted a taking of plaintiff's property because it had only assigned to the U.S. whatever rights the U.S.S.R. had acquired by virtue of its nationalization decrees. It was the Russian Government, not the U.S.A., that had taken property from the plaintiff.

According to the Soviet author *Koretzkij*[77], the *Belmont* and *Pink* judgments are to be explained by the support by the American masses of Roosevelt's policy in maintaining friendly relations to the U.S.S.R. The U.S. Supreme Court, in his view, had to accept the Soviet takings under threats of reorganization. *Khatib-Chahidi*[78] sees in the judgments an application of the maxim *mobilia sequuntur personam. Seidl-Hohenveldern*[79] writes that the assignment, being an international treaty, became U.S. law, which means that the court enforced American law and not Soviet expropriations. It must be said against this last view that the assignment contained no recognition of Soviet rights to assets in the U.S.A. It only transferred to the U.S. Government whatever rights the U.S.S.R. might have. It remains a fact that the courts enforced here the Soviet expropriations.

It is submitted that the principal reason why the courts here adopted a position which is in sharp contrast to the usual American practice is to be found in the fact that the U.S.A. was the plaintiff. The brotherhood-in-arms of the two countries at the time of the *Pink* judgment may also have played some role[80].

Certain expectations of courts[81] and authors[82] as to the wide applicability of the rule laid down in the judgments have not come true, as the rule was strictly limited to cases under the Litvinov Assignment[83].

The view that the main *ratio decidendi* can be found in the fact that the enforcement was in the interest of the forum state is confirmed also by similar decisions from other countries where the courts enforced foreign expropriations after the expropriator had assigned his claim to the forum state's government[84].

1) *Mann* 448.
2) *Böse* 117; *Drakidis*, Rev. 1970, 375-6; *Hjerner* 48-51.
3) *Mann* 450.
4) BGH April 27, 1970.
5) W. German LG Offenburg Dec. 30, 1960; in Swedish practice *Drätselkammaren i Åbo v. Fitinghof, Drätselkammaren i Nikolaistad v. Procopé* (both HD 1914); *Norge v. Bruhn* (HD 1924); *Bulgaria v. Takvorian* (HD 1961).
6) Austrian OGH Jan. 5, 1955; VWGH Oct. 1, 1959.
7) *Dicey and Morris (-Mann)* 75.
8) Omitted in Restatement (2d).
9) *Dennemark* 109; *Eek* 78 and in NJA 1961, 148-9; *Frank*, RabelsZ 1970, 65; *Hjerner*, SvJT 1963, 195. *But Jägerskjöld*, NJA 1961, 155; *Karlgren*, SvJT 1967, 518-9.
10) *Weiss v. Simon* (Sweden HD 1941).
11) *Schulze* 185.
12) *Abrahams*, Rev. de dr. int. dr. comp. 1962, 45; *Delson*, 57 Columbia L.R. 783 (1957); *El-Kocheiri*, Rev. 1967, 274; *Katzarov*, Theory 310-2; *W. Lewald*, RabelsZ 1956, 128; *Nybergh*, Tidskrift published by Juridiska föreningen i Finland 1942, 387-9; *Sarraute*, Clunet 1956, 891; *Van Hecke*, 4 I.L.Q. 350-1 (1951); *Vannod* 39; *Veith*, MDR 1951, 258; *Wengler*, 104 RC 442 n. 19 (1961); this was also the view of *Seidl-Hohenveldern* 184 and in ÖJZ 1947, 413.
13) *Schaumann*, Schw. JZ 1966, 40; *Schindler*, Schw. JIR 1946, 68; *Schlippe*, JR 1953, 57; Resolution of the 3d Congress of the International Academy of Comparative Law in 1950, Rev. int. dr. comp. 1950, 535 and ÖJZ 1951, 345 ff.
14) Austria: OGH July 9, 1948; May 31, 1951; Feb. 3, 1954; April 26, 1960; March 6, 1963; March 3, 1967;
Belgium: *Cie Lithuanienne d'Electricité* (C.A. Brussels 1947);
Brazil: *Bata* (Federal Trib. 1953);
Denmark: *Eismann v. Hafnia* (ØL 1939); first instance in *Banska a Hutni v. Hahn* (VL 1952);
England: *Frankfurther v. Exner* (Ch. 1947); *Novello v. Hinrichsen* (Ch. 1951);
France: *ROPIT* (Cass. 1928); *Hardtmuth No. 2* (C.A. Paris 1958);
W. Germany: KG Dec 15, 1950; BGH March 8, 1963 and Jan. 28, 1965;
Italy: C.A. Bologna April 28, 1956; *Hardtmuth* (Cass. 1960);
Lebanon: C.A. Beirut May 31, 1968;
Netherlands: *Zeiss* (C.A. Amsterdam 1957); *S.A. Banska* (C.A. Arnhem 1952); *Kjellberg* (HR 1965);
Norway: *Hardtmuth* (Byrett Oslo 1959);
Sweden: *Koh-I-Noor* (C.A. Svea 1960);
Switzerland: *Wilbuschewitsch v. Waisenamt Zürich* (BG 1925); *Pribyl v. Cotona* (Bezirksgericht Horgen 1952); *Hardtmuth* (BG 1955); Bezirksgericht Zürich Aug. 26, 1949 and March 12, 1958;

U.S.A.: *Merilaid v. Chase National Bank* (N.Y. Sup. Ct. 1947); *Gonzalez v. Industrial Bank of Cuba* (N.Y. Sup. Ct. 1961); *Ron Bacardi v. Bank of Nova Scotia* (U.S.D.C. 1961); *Iraq v. First National City Bank* (U.S.C.C.A. 1965); *Palicio v. Brush* (U.S.D.C. 1966); *Menendez v. Faber* (U.S.D.C. 1972); *Maltina v. Cawy Bottling* (U.S.C.C.A. 1972).

15) Thus, a rather insignificant property in France of the Southern Railway Co. was, after the nationalization of the company in Great Britain, vested in the expropriator without any legal dispute, *Seidl-Hohenveldern* 183 n. 21.

16) *Beitzke*, Enteignung 110; *Castberg* 364; *Dicey and Morris (-Mann)* 562; *Drobnig* 208; *Köbler* 169-70; *Niederer*, Schw. JIR 1954, 96; *Raape* 664; *Seidl-Hohenveldern*, 123 RC 36 (1968); *Van Hecke*, 126 RC 551-2 (1969); *Viénot* 220.

17) Annuaire de l'Institut de droit international 1952 II 251-321.

18) I.L.A. 1958, 203.

19) *Schw. Lebensversicherungs- und Rentenanstalt v. Elkan* (Swiss BG 1953); *Hardtmuth* (Belgium Cass. 1960).

20) *Adriaanse* 154; *Jungfleisch* 31; *Neumeyer* 251; *Niederer*, Schw. JIR 1954, 96-7; *Seidl-Hohenveldern* 61-2 and 123 RC 36 (1968); *Schulte-Uhlenbrock* 10; *Wolff*, IPRD 67.

21) *Madsen-Mygdal* 816-23.

22) *Neumeyer* 243 ff. used the term *"artfremde Eingriffe"*.

23) *Burrough J.* quoted from 49 Yale L.J. 1038 (1939-40).

24) Judge *McRuer* in [1961] Ont. R. 858 (Canada).

25) *Kollewijn*, Clunet 1964, 620.

26) *Adriaanse* 153-4.

27) *Seidl-Hohenveldern* 62.

28) BGBl 1955 II 405, Part VI Art. 3; *Seidl-Hohenveldern*, 123 RC 76-7 (1968); BGH Feb. 25, 1960.

29) *Lieberknecht*, NJW 1956, 936.

30) *Batiffol*, Travaux du Comité français d.i.p. 1962-4, 197.

31) *Sidney Merlin v. Directeur des domaines* (Cass. 1961).

32) *Eek* 207-8 and 139 RC 25 (1973); *Gihl*, 83 RC 219 (1953); *Nial* 145; *Seidl-Hohenveldern*, 123 RC 68 n. 37 (1968); *Van Hecke*, Revue belge 1969, 68.

33) *Heiz* 147.

34) *Adriaanse* 158; *Batiffol*, Travaux du Comité français d.i.p. 1962-4, 199-200, 207; *Bekeris* 242; *Beemelmans* 14; *Beitzke*, Spaltgesellschaft 29 and Enteigenung 110; *Bredin*, Clunet 1971, 307; *Burth* 12-3; *Castberg* 364; *Dicey and Morris (-M. Mann)* 558; *Domke*, 55 A.J.I.L. 600 (1961); *Eek* 209-10; *Jungfleisch* 29; *Karlgren* 48-51; *Kegel*, Probleme 33; *Köbler* 169-70; *Kollewijn*, Clunet 1964, 620; *König* 89; *W. Lewald*, Wirkungen 419; *Mann*, 11 I.C.L.Q. 477 (1962); *Münch*, 98 RC 495 (1959); *Nial* 132-3; *Niederer*, Schw. JIR 1954, 94-6; *Perret* 157; *Philip* 388 and Clunet 1954, 482; *Raape* 659 ff.; *Rabel* II 91; *Schindler*, Schw. JIR 1946, 68; *Schlippe*, JR 1953, 57; *Schulte-Uhlenbrock* 3-5; *Schulze* 266; *Seidl-Hohenveldern* 8; *Serick*, RabelsZ 1955, 92-3; *Solheid* 65; *Staudinger(-Weber)* 686; *Stöcker*, WM 1964, 531; *Van Hecke*, Les effets 573-4 and 126 RC 550 (1969); *Viénot* 220; *Vischer*, IPR 659; *Wolff*, IPRD 67-8; Resolution of the 3d Congress of the International Academy of Comparative Law (London 1950), Rev.int.dr.comp. 1950, 535 and ÖJZ 1951, 345; this is also the view of the Swedish Government, Government Bill 1946: 367, 8.

35) Austria: OGH May 10, 1950; May 31, 1951; Jan. 14, 1953; Feb. 3, 1954; Jan. 5, 1955; April 26, 1960; April 19, 1961; March 3, 1967; VWGH Sept. 14, 1955;

Oct. 1, 1959;
Belgium: *Eismann v. Melzer* (TCom Brussels 1938); *Hardtmuth* (Cass. 1960);
Canada: *Estonian State Line v. Elise* (Sup. Ct. 1949);
Denmark: *Eisner v. Nilwa* (SH 1939); *Banska a hutni v. Hahn* (VL 1952); *U.S.S.R.'s Representation v. Narva Flachs* (ØL 1955);
England: *Employers Liability v. Sedgwick Collins* (H.L. 1927); *The Jupiter No.3* (C.A. 1927); *Frankfurther v. Exner* (Ch. 1947); *Novello v. Hinrichsen* (Ch. 1951); *Bank voor Handel en Scheepvaart v. Slatford* (Q.B. 1953);
Finland: *Seitz v. Tuchmann* (C.A. Turku 1940);
France: *Affaire Venizelos* (TCom Le Havre 1935); *Hardtmuth No.1, 2* (C.A. Paris 1950, 1958); *Agfa* (C.A. Paris 1963); *Sidney Merlin v. Directeur des domaines* (Cass. 1961); *Zeiss* (Cass. 1966);
Germany: RG June 7, 1921; BGH July 11, 1957; May 5 and Oct. 6, 1960; Feb. 20, 1961; March 8, 1963; Jan. 28, 1965; Nov. 29, 1965; March 31, 1971;
Monaco: *Perrin-Jannès v. Masi* (TCiv Monaco 1948);
Netherlands: *Scheepvaarten v. Schneider* (C.A. Hague 1946); *Bank Indonesia v. Senembah* (C.A. Amsterdam 1959);
Sweden: *Swerintzeffs arvingar v. Nilsson-Åkers* (HD 1937); *Koci v. Trostli* (HD 1941); *Seitz v. Tuchmann* (HD 1941); *Bodack v. Stern* (HD 1941); *Weiss v. Simon* (HD 1941); *Horovitz v. Lehner* (HD 1942); *The Toomas* (HD 1944); *Hopf Products v. Paul Hopf* (HD 1944); *Narva Flachs v. Narva Flachs* (HD 1946); *Molnár v. Wilsons AB* (HD 1954); s. 52 n. 30 *infra*;
Switzerland: *Pribyl v. Cotona* (Bezirksgericht Horgen 1952); Bezirksgericht Zürich March 12, 1958; *Wichert v. Wichert* (BG 1948); *Hardtmuth* (BG 1955);
U.S.A.: *Estonian State Line v. U.S.* (U.S. Ct. of Claims 1953); *Tabacalera Jorge v. Standard Cigar* (U.S.C.C.A. 1968); *Zeiss* (U.S.C.C.A. 1970); *Maltina v. Cawy Bottling* (U.S.C.C.A. 1972).

36) *Abrahams*, Rev. de dr.int. et dr. comp. 1962, 47; *Adriaanse* 158; *Drobnig* 208; *Eek* 210; *Köhler* 170; *Kollewijn*, Clunet 1964, 620; *Philip*, Clunet 1954, 482; *Viénot* 220; *Vischer*, IPR 659.
37) *Domke*, 55 A.J.I.L. 600 (1961); *Friedrich*, Süddeutsche JZ 1948, 24; *König* 89; *W. Lewald*, Wirkungen 419; *Stöcker*, WM 1964, 531; *Vischer*, IPR 659; Austrian VWGH Oct. 1, 1959; Sup. Ct. British Zone of Germany March 31, 1949.
38) *Abrahams*, Rev. de dr. int. et dr. comp. 1962, 48 ff.
39) *Burth* 12; *Kuhn*, WM 1956, 2; *Raape* 659; *Schlippe*, JR 1953, 57; *Seidl-Hohenveldern* 59; *Stöcker*, WM 1964, 531.
40) *Seidl-Hohenveldern* 7-8.
41) *Adriaanse* 55, 145; *Jungfleisch* 61; *Niederer*, Schw. JIR 1954, 95-6 and Einführung 182; *Schulte-Ublenbrock* 14; *Seidl-Hohenveldern*, GRUR Int. 1958, 112 n. 2; *Van Hecke*, 126 RC 550-1 (1969) and in Les effets 570-1; *Vannod* 36, 86.
42) *Dölle* 5; *Ernst* 88; *Kegel* 443 and in Probleme 13; *Schulze* 266.
43) *Adriaanse* 157; *Heiz* 174-9; W. German BGH Dec. 17, 1959; Resolution of the 3d Congress of the Int. Ac. Comp. Law, ÖJZ 1951, 345.
44) *Hjerner* 357 and in Scandinavian Studies in Law 1958, 206-7.
45) *Mann*, RabelsZ 1964, 758 and 132 RC 121 (1971).
46) *Schmidt*, SvJT 1944, 609.
47) See also *Folliott v. Ogden* (H.L. 1789-92) and *The Alar* (England Ships Claims Tribunal 1950).
48) *Hjerner*, SvJT 1954, 112-5.
49) *Dicey and Morris(-Mann)* 80; *Eek* 210; *Gihl* 364; *Heiz* 248-9; *Hjerner* 358 and SvJT 1954, 111 ff.; *Jägerskjöld*, SvJT 1945, 89-93; *Karlgren* 51; *Nial* 132; *Philip* 388; *Schulze* 215.

50) *Hjerner* 358-9; *Jägerskjöld*, SvJT 1945, 93; *Schulze* 215.
51) *Seidl-Hohenveldern* 15 n. 28, 38-42 and in Clunet 1956, 387 n. 8.
52) *Wolff*, PIL 527.
53) *Seidl-Hohenveldern*, Clunet 1956, 387 n. 8; *cf.* LG Kassel July 20, 1948.
54) *Castberg* 355-6.
55) *Castberg* 349.
56) W. German BGH Jan. 28, 1965; *Steinberg v. Handelsbanken* (Denmark Sup. Ct. 1957). *But Konkel Cases* (Sweden HD 1952).
57) *Jägerskjöld*, SvJT 1945, 92.
58) *Frankfurther v. Exner* (Ch. 1947); *Novello v. Hinrichsen* (England C.A. 1951); *Wichert v. Wichert* (Swiss BG 1948); *The Toomas* (Sweden HD 1944); *The Signe, The Kuressaar* (both U.S.D.C. 1941); *The Kotkas* (U.S.D.C. 1940, 1941); *The Maret* (U.S.C.C.A. 1944); *Zwack v. Kraus Bros* (U.S.D.C. 1955); *cf. Union Nasic* (Swiss BG 1968).
59) *Zivnostenska Banka v. Wismeyer* (Swiss BG 1953); Austria VWGH Jan. 15, 1953; Austria OGH March 6, 1963; *Vve Philipoff v. Jaudon* (TCiv Seine 1935).
60) *The Signe* (U.S.D.C. 1941).
61) *The Maret* (U.S.C.C.A. 1944).
62) *The Kotkas* (U.S.D.C. 1940); *The Kuressaar* (U.S.D.C. 1941).
63) *The Toomas* (Sweden HD 1944).
64) *The Rigmor, The Charente, The Solgry* (HD 1942).
65) *Castberg* 356.
66) *Hjerner* 372.
67) See *Seidl-Hohenveldern* 169-70; *Berman*, 62 Columbia L.R. 257-74 (1962).
68) *Berman*, 62 Columbia L.R. 257-74 (1962).
69) *Zschernig v. Miller* (U.S. Sup. Ct. 1968); see also 43 I.L.R. 204 ff.
70) *Castberg* 356; *Hjerner* 359-60; *Nial* 133; *Schulze* 165.
71) *Rey v. Lecouturier* (TCiv Tunis 1907); *Consul of the R.S.F.S.R. v. Consul of Italy* (Georgia People's Trib. Batoum 1922).
72) *Anderson v. Transandine* (N.Y.C.A. 1942); *Lorentzen v. Lydden* (K.B. 1942); *Eulenburg* (Trib. Milano 1940).
73) *Direktion der Diskontogesellschaft v. U.S. Steel* (U.S. Sup. Ct. 1925); *Netherlands v. Federal Reserve Bank* (U.S.C.C.A. 1953); *Brown et al. v. Beleggings Societeit* (Ontario High Ct. 1961); *Belgium v. E.M.J.C.H.* (C.A. Hague 1953); *Belgium v. Wannijn* (C.A. 's-Hertogenbosch 1954); *De V. v. Belgium* (C.A. Hague 1955). *But Bank voor Handel en Scheepvaart v. Slatford* (Q.B. 1953) where the foreign decree was invoked against the British Custodian of Enemy Property.
74) *Manes v. Komm. Verwalter* (Netherlands Ct. Hilversum 1938); *Komotau Firm v. Komm. Verwalter* (Justice of the Peace Hague 1939); *Morska Centrala v. Kozicki* (Sweden HD 1951); *Zivnostenska Banka v. Wismeyer* (Switzerland BG 1953); *Latvian Shipping v. Montan Export* (D.C. Hague 1946, C.A. Hague 1950).
75) *Hardtmuth No.1* (C.A. Paris 1950); *Jabbour v. Israeli Custodian* (Q.B. 1953); *Petrolifera Muntenia v. Child* (C.A. Genua 1964).
76) *Hjerner* 290 and in Scandinavian Studies in Law 1958, 189.
77) In *Schütte*, Beurteilung 180.
78) *Khatib-Chahidi* 245.
79) *Seidl-Hohenveldern*, Clunet 1956, 403 and 123 RC 39 (1968).
80) *Domke*, 55 A.J.I.L. 599 (1961).
81) *U.S. v. New York Trust* (U.S.D.C. 1946).

82) *Borchard*, 31 A.J.I.L. 675-79 (1937); *Jessup*, 36 A.J.I.L. 282 (1942).
83) *Bollack v. Sté Générale* (N.Y. App. Div. 1942).
84) *Ministry of Interior v. Helperin* (Lithuania Sup. Ct. 1931);
Brownell v. Sun Life Ass. (Philippines Sup. Ct. 1954).

CHAPTER SIX

SOME PROBLEMS RELATED TO UNENFORCEABILITY OF FOREIGN EXPROPRIATIONS

I. Expropriation of the rights to juridical persons

48. Separation of assets.- The aim of an expropriation is to vest in the expropriator the right to some property. The property may be of various types: tangibles, claims, copyrights, etc. They may belong to natural or juridical persons.

In the case of property belonging to a juridical person, there are two ways open to the expropriator: he may expropriate the assets *ut singuli*, i.e. piece by piece, or he may expropriate the rights to the whole juridical person as such. The latter method may again take two forms.

The first form is sometimes referred to as "Russian" and consists of dissolution of the company. All its property is taken over by the state and sometimes vested in a *new* state-owned corporation. The state (the new corporation) considers itself to be the legal successor of the expropriated company.

The second method, sometomes called "Hungarian", leaves the company to exist in its original form. The taking is limited to the rights *to* the company so that the expropriator becomes its owner, e.g. as the only shareholder. Sometimes the rights of the original owners are not even formally abolished, but a governmental administrator is appointed with the same effect. The expropriator claims, through the company now under his control, the right to the company's assets asserting that no change in the identity of the company has taken place.

Both methods have the same aim: to vest in the expropriator the assets of the company. Juridical persons as such, without any assets of value, are worthless.

According to the usual rules of private international law, the personal matters of a company (e.g. who has the right to represent it, what are the rights of its owners) are governed by the company's personal law. The same company may be considered to have different personal laws by courts in different countries, provided that its seat does not lie in its country of incorporation, depending on whether the court adheres to the incorporation or seat theory. This is, however, rare and it has led to no problems in expropriation cases, since the courts practically always admit that the company has the expropriator's legal system as its personal law. The expropriator normally expropriates only rights to companies of his nationality. The property of foreign companies is affected only *ut singuli.*

The fact that the expropriation of the rights to the juridical person is enacted by its normally applicable personal law has been invoked by the writers who suggest that all property of the company should be delivered to the expropriator, at least when the taking has the "Hungarian" form[1]. The line of thought is as follows: when only the shares are expropriated, then the company continues to exist and to own all its property. Here, the courts are not asked to apply the foreign expropriation laws, but only to recognize the ownership rights of the company as they existed already before the seizure. The question who owns the company need not be considered since the property belongs to the company and not to its shareholders. This questions is, in any case, governed by the personal law of the company, i.e. by the law of the expropriator. This view is supported by few exceptional judgments[2].

The prevailing practice has gone in the opposite direction. The courts refuse to deliver to the expropriator the company's assets that are beyond his reach, relying normally on the "territorial limitation" or public policy[3]. This results in a *separation of property*. The expropriator takes over the company's assets within his reach, whereas the property beyond his reach is separated and, in some form, vested in the original owners of the company.

49. Grounds.- Many authors have tried to explain the practice of courts. According to *Martin Wolff*, the rights to juridical persons cannot be expropriated at all: "Juristische Personen können nicht enteignet werden; sie sind fähig Rechte zu haben, nicht Rechte zu sein"[4]. If juridical persons (their shares) can, however, be bought or inherited, why could they not be seized? What *Wolff* has in mind is probably something else. The juridical person is created by its members to promote their interests and its property belongs *economically* to them. What an example of alienation when the expropriator turns the juridical person against its members! In the expropriation of the rights to a company, some authors and courts see an abuse of the concept of a juridical person[5]; *Batiffol* goes even further by mentioning that it is not customary for the murderer to become the heir of the murdered[6].

Some authors[7] explain the practice by asserting that there is a direct legal relationship between the shareholders and the company's property. The shareholder's rights are said to be localized proportionally in each country where the company owns assets. These rights cannot, consequently, be expropriated as to assets outside of the expropriator's country because of the "territorial limitation". There are some judgements expressly supporting this theory[8]. It can, however, be objected that the shareholders are in no direct legal relationship to the company's assets. They have only rights as to the company as such.

Still another conceivable explanation of the prevailing practice is, surprisingly enough, found in the writings of the authors in the socialist states, although these usually criticize it. The Soviet expropriations transferred to the state the

assets, but not the debts, of the seized companies. According to the socialist legal theory, the right of the expropriator to the property was an independent and primary right which did not originate from the title of the former proprietors (companies)[9]. It is obvious that if the expropriator refuses to stand for debts arguing that his title is primary, then he can hardly invoke universal succession when demanding the assets. This is valid insofar as the "Russian" type of expropriation is concerned.

It is submitted that the main reason why the courts refuse to recognize the legal succession or legal identity of the expropriator to the original company in relation to assets beyond the expropriator's reach is to be found in the principle of isolation, i.e. in the unenforceability of the foreign takings. The expropriation has not been enforced by a declaration of the expropriator that he is the only shareholder or the legal successor of the company. The normally applicable personal law of the company is not decisive, due to the special rules for foreign expropriatory laws.

50. Juridical persons of public law and foundations.- Separation of assets has been applied also in relation to such types of juridical persons which have no dispossessed owners capable of claiming the property in the forum country.

Juridical persons of public law (e.g. municipalities, provinces, state banks) have no private owners. The practice of courts as to such persons has, nevertheless, been very similar to the practice involving private-owned companies. When dealing with property in West Germany, West German courts refuse to give effects to changes in public-law juridical persons abroad if the changes are deemed to be of expropriatory nature[10]. Universities, province banks, public insurance institutions are considered to exist and to own property in West Germany, although they had been dissolved and dispossessed in the country of their seat (East Germany, U.S.S.R., Czechoslovakia). The property of a Czechoslovak community was, however, attributed to that community also after the original inhabitants had been expelled by Czechoslovak authorities to Germany[11]. The court said that the expulsion had not constituted an expropriation.

The courts did not want to deliver the property to the foreign expropriator, but who was then to be its owner? The beneficial owner of, for example, the State Bank of Thüringen before its dissolution was the population of Thüringen. But the bank was said to have been seized by the same province, i.e. by its own beneficial owners. According to a special West German law[12], property of principally East German public-law juridical persons was taken into "treuhänderische Verwaltung des Bundes", i.e. it was placed under state administration.

When the expropriator is identical with the benficial owner of the assets, it is dubious whether one can speak of expropriation. The effects on property in the West of, for example, the East German reorganization of the banking

system should be recognized, provided that one state-owned bank was simply merged with another. The same should be valid also for other types of public-law juridical persons, if the foreign state makes changes in property which directly or indirectly already belonged to it.

Foundations present a similar problem. Also here, the case law is mainly West German and the courts adopted the same position, not only in respect of foundations with original seat in East Germany, but also with original seat in, for example, pre-revolutionary Russia[13]. The best known example is, however, the notorious *Carl Zeiss Stiftung*[14]. According to a special law[15], property of foundations formed under German law but with seat outside of West Germany (i.e. in East Germany or territories lost to Poland, U.S.S.R., etc.) is to belong to the same foundations operating in West Germany under the supervision of West German authorities which may move the seat of a foundation without being bound by its charter or statute. The Supreme Court of East Germany classified this law as an act of legal aggression[16].

For a foundation, it is decisive whether it is operated according to the wishes of its founder for the purpose determined by him. This purpose is the "beneficial owner" of the assets. It seems that the West German courts and legislature believed that delivering the assets in the West to the foundation in the East would be to enforce a foreign expropriation. There appears to have been a suspicion that the assets would not be used for the purpose of the foundation, but for the needs of the foreign state[17]. Indeed, knowing that almost all means of production had in East Germany been put under direct government control, the courts must have found it difficult to believe that property of foundations would constitute an exception.

51. Partial expropriation of the rights to juridical persons.- The rights to juridical persons can be expropriated also in part. The expropriator may, for example, seize only shares belonging to certain persons. The company will continue to exist not only in its original form and under its original name, but it will also be partially owned by its original shareholders and perhaps even represented by the original managers.

The separation of assets (s. 48 *supra*) may hamper the activities of the company. Let us imagine an airline company separated from most of its planes situated in foreign airports at the time of the expropriation. When only a minor part of the shares are expropriated, the court will face a dilemma. It may deliver the property to the company, which amounts to enforcement of the foreign expropriation, or it may refuse to do so, which can lead to substantial damage for those shareholders who have not been dispossessed. These shareholders are, together with the dispossessed ones, given the right to the separated assets, but the separation itself may cause damage the extent of which depends on the activities of the company and on the value and type of the separated property.

According to one view, even a seizure of one single share must lead to separation of assets, since even such expropriation is always "territorially limited"[18]. Others believe that partial seizures of juridical persons should be enforced, i.e. the expropriator (the company co-owned by him) should be given the right also to assets in the forum state[19]. Still others want to separate the property only if more than few shares are expropriated and the property in the forum country is of more than a little value[20] or if the expropriator has taken over a number if shares sufficient for controlling the company[21] or a major part of shares[22]. According to *Mann*, expropriation of 75 or even 90 per cent of shares should be required for separation[23]. The West German Federal Tribunal stated recently that separation is to take place only if the expropriator has seized such a number of shares that he controls the company as if he has seized it directly[24]. If the expropriator owned some shares in the company already before the expropriation, his interests as a not dispossessed shareholder need not be protected[25].

Several authors oppose the separation and suggest that the dispossessed shareholders should be bought out, i.e. that they should obtain compensation from the company for "their" part of the assets in the forum country[26], or even for "their" part of all the assets of the company[27]. This solution has certain disadvantages. Even an expropriation with compensation remains a public-law measure which is unenforceable, unless the dispossessed shareholders accept the offer of indemnity. One has also to keep in mind that the payment of compensation simply transfers the loss from the dispossessed shareholders to all the other shareholders, not only to the expropriator. The company as such is not enriched by the expropriation and if it has to pay compensation, its wealth will diminish.

If the assets in the forum country are *de facto* administered by the management representing also the expropriator, the seizure can, especially if the number of expropriated shares is relatively small and there is no change in the management, be recognized as an already executed foreign taking. This can be illustrated by several cases involving the Dutch validation of shares after World War II[28].

According to Dutch law, shares of Dutch companies had to be presented for validation. Shares not presented within a certain time period were invalidated and the rights incorporated in them were expropriated by the Netherlands Government. Royal Dutch, a Dutch company with large assets abroad, was sued by several such dispossessed shareholders who demanded that their rights should be recognized. French and Swiss courts found the Dutch measure to be compatible with public policy and serving more private than public interests, with the result that the dispossessed were found to have lost their rights. The courts did not mention that the expropriation was a partial one. It can, nevertheless, be guessed that the outcome would probably have been different if all the shares of the company had been expropriated.

The problem is more difficult when the disputed property is in the hands of the dispossessed shareholders or of third persons. The principle of isolation opposes enforcement of a foreign expropriation in the interest of the expropriator. The expropriator's interest in the disputed assets can be evaluated. For example, if he seizes 10 per cent of the company, his interest will be 10 per cent of the value of the disputed assets. This amount could be compared to the loss that would be incurred by the not dispossessed shareholders in the case of separation of the property. This potential loss can only be ascertained approximately. It is submitted that the property is to be separated when the interest of the expropriator in it is greater than the loss that will be incurred by the not dispossessed shareholders and not otherwise. It is not reasonable to determine a rigid limit in per cent of the total number of shares that would be required for separation.

In cases of partial expropriation, there is a good chance that the company will reach an agreement with the dispossessed shareholders which will give the latter compensation for their part of the assets in the forum state and thus will eliminate litigation.

52. Fate of the separated assets.- It has been shown that the courts refuse to enforce foreign expropriations and that this applies to expropriations of the rights to juridical persons as well. But what is to be done with the separated assets? It lies in the nature of a juridical person that the members have no direct right to its property. From a strictly legal standpoint, it is a natural consequence of the disappearance of the original juridical person without any liquidation procedure that its property becomes *bona vacantia*. The courts do not, however, reason in a strictly legal way. In the conflict between the economic identity of the company and its members on one side and their legal distinction on the other side, the courts in expropriation cases give more weight to the former. The company is the *legal* owner of its assets, but the members are the *beneficial* owners. Although the legal owner in its original composition disappears by the expropriation, the beneficial owners remain and the courts vest the separated assets directly or indirectly in them, according to their respective shares in the original company.

The task to collect and distribute the separated assets is not a simple one. The assets may, for example, consist of claims to be collected from debtors and there may also be debts owed to creditors. It is often necessary that the entity of separated property can sue and be sued in courts. This problem can be solved in two different ways.

The first method consists of recognizing the changes in the person of the company. The separated assets are considered to belong to a co-ownership of members who are thus at the same time legal and beneficial owners. In the view of Austrian courts, the assets belong to the members forming a *communio incidens (einfache Rechtsgemeinschaft*, community of interests) with no juridi-

cal personality of its own[29]. The Swedish Supreme Court has declared that foreign companies, expropriated and dissolved in their home countries, could no longer be recognized as existing in Sweden. The Swedish assets are vested in the shareholders[30], who form a relationship similar to the Swedish concept of a simple association (*enkelt bolag*), which enjoys no legal personality of its own[31].

The second method uses a different approach. The company is deemed to exist in the forum state in its original composition in spite of all the changes or even a dissolution in its home country. It is considered to be the legal owner of the separated assets and it can be party to lawsuits. It might seem impossible to consider as existing a juridical person which has been dissolved or transformed by its personal law. This is, however, not quite correct. Juridical persons are in their very nature a legal fiction[32]. This is always a fiction of *lex fori*, even when the company is deemed to be of a foreign nationality. It is not difficult to prove this. It may, for example, happen that the court of country A considers a company to be of nationality B, whereas the courts in B find the same company to be of nationality A. The only link between the company and the foreign legal system is the conflict rule of the forum[33]. The dissolution or transformation of a foreign company abroad does not make it physically impossible for the forum to consider it to exist and even to be governed by its original personal law. It may be that the forum in this way violates its private international law, but this can be repaired by formulating special conflict rules for expropriation cases. However, a quite different question is whether such continued existence of the company is necessary and desirable from the standpoint of an efficient administration and distribution of the separated aseets. In some countries, the continued existence of the foreign companies was confirmed by a special legislation, e.g. in the United Kingdom and in the State of New York[34]. In France, the courts developed the concept of the *de facto* company (*société de fait*)[35]. In West Germany, the seized juridical person survives in its original composition as a "split company" (*Spaltgesellschaft*)[36]. The view that the company retains a *de facto* existence beyond the territorial reach of the expropriating government seems to be accepted also in the U.S.A.[37]. In most countries, the juridical person is, however, considered to exist only for the purpose of its liquidation.

It is submitted that the position of the beneficial owners is similar to that of heirs. In order to administer and distribute the inheritance, some legal systems attribute it a legal personality of its own, whereas other systems manage without it. It is important to keep in mind that this is only a question of method, the ultimate aim being the same. The method should be criticized using practical criteria (protection of creditors, interests of owners, costs of liquidation, etc.) and not from theoretical standpoints. It seems that the co-ownership is a good solution for companies with a relatively small number of members[38]. For companies with a great number of members and companies with unknown or absent members, the revivification of the company for the

purpose of liquidation appears to be advantageous, especially if it is regulated by law and accompanied by appointment of a liquidator[39].

The company may have assets in more than one country and the question may arise whether the distribution and administration should be done separately in each country or together. It is submitted that a universal administration is a better solution than separate proceedings in each country, provided that there are guarantees that the interests of the members and creditors are protected. An international treaty could be of use here. The American rule on receivership (section 386 of Restatement 2d) could be used as a model:

"A court will order the transfer of local assets to a foreign receiver who applies for the transfer if it deems such transfer conducive to the convenient settling of the estate."

Whether the foreign company is deemed to exist in its original composition in the forum state or the assets are vested in a co-ownership composed of the beneficial owners, it has to be decided who is to represent the company or the co-owners. In many cases, there are no difficulties, but often it is not clear whether the persons claiming the assets really represent the beneficial owners. Sometimes the property is claimed by a minority shareholder, a member of the company's board before the expropriation, a holder of (often expired) powers of attorney, etc. Due to the special circumstances often accompanying large-scale expropriations, many persons that may have legitimate interests in the assets are absent or unknown. The only criterion that should be decisive seems to be that the claimant has to convince the court that the property will really come into the hands of the beneficial owners. In several countries, the courts can appoint a special administrator (receiver, liquidator, etc.) to carry out the liquidation. Another possibility is to give limited rights. The person claiming the assets can be given the right to take steps necessary for the preservation of the property, but no other rights. Thus it can be given *locus standi* to demand payment of a claim which would otherwise be lost by time limitation, but the money is to be paid to a depositum.

II. Expropriation of negotiable instruments

53.- Negotiable instruments (bearer share certificates, bonds, bills of lading, bills of exchange, etc.) deserve special attention, although they are only a type of tangibles. The value of these papers consists not of the paper itself, but of the property to which it gives the right. Two types of rights have to be distinguished: the right to the paper and the right emanating from the paper.

A negotiable instrument can be physically seized like any other tangible. The expropriator may then present the instrument and ask the forum to enforce his claim based on the possession of the paper. In practice, such claims have been rejected[40] and most writers argue that the seizure gives the expropri-

ator only a scrap of paper[41]. Some write that, for example, a share is for purposes of expropriation "located" in the home country of the company so that only this country and no other can expropriate it[42]. *Mann* is an exception: he feels that it is impossible to justify a practice which would recognize foreign expropriation of a painting situated abroad, but would withhold recognition of expropriation of an English bearer share warrant also situated abroad[43]. There is, however, a fundamental difference between the painting and the share. In the first case, there is no question of enforcement of the foreign expropriation, whereas helping the expropriator to collect the value of the instrument would amount to such enforcement. The possession of the instrument will not give the expropriator the right to the assets "incorporated" in the paper if these assets are beyond his reach. There might be reasons to modify this position if the actual possessor of the instrument had obtained it *bona fide* from the expropriator.

Although the expropriator is denied the rights derived from the paper, its original owners are in a difficult position since they are unable to present the instrument. To replace the seized document requires a special procedure which may be impossible when the law does not envision foreign expropriations[44]. There have been proposals to order restitution of the document by the expropriator to the original owner,[45] but this is usually impossible because of immunity. In West Germany, special legislation has made it possible to invalidate certain instruments seized abroad and to replace them by new ones[46].

The rights to the paper are separated from the rights emanating from the paper also when the expropriator succeeds in seizing the assets "incorporated" in the document without possessing the paper itself. The title of the expropriator to the seized assets will normally be recognized and the original owner will be left with a scrap of paper in his hand[47].

III. Expropriation of intellectual property

54. Intellectual property.- The term "intellectual property" is here used to denote a group of different rights, e.g. patents, copyrights, models, trademarks, commercial names. Such property, too, can be expropriated, both *ut singuli* and as part of assets of a whole juridical person.

The protection accorded to intellectual property is territorial. Whereas a buyer of a tangible is normally recognized as its owner in all countries, registration of a patent or mark gives protection only in the country of registration unless international treaties provide otherwise. The protection accorded to a piece of intellectual property in one country can be considered as an asset independent from the protection accorded to the same intellectual goods in other countries. The same patent or trademark may consequently be owned by different persons in different countries. It follows that the expropriator will be able to control the use of an intellectual right in his territory, but it

will be beyond his power to "seize" the protection accorded to that right by foreign states. Legal authors assert that the rights outside of the expropriating state remain vested in their original owners and support this view invoking public policy or "territorial limitation"[48].

When discussing expropriations of intellectual goods, we have to consider the difference between trademarks and commercial names on the one hand and the remaining types of intellectual property on the other. As far as copyrights, patents, models, etc. are concerned, there are usually no problems: the expropriator is given no right to the protection accorded to these rights in the forum country[49]. The expropriation abroad may, nevertheless, influence the protection in the forum country indirectly, e.g. when such protection is bound by *lex fori* or by a contract to the protection in the "home country" of the right[50].

In the following, we shall concentrate on trademarks and commercial names. The term "mark" will be used to denote also commercial names unless otherwise indicated.

55. Trademarks.- The only purpose of a trademark is to distinguish products and services of various enterprises. Its only value is as a link between the enterprise and the products or services. In expropriation cases, the question arises whether the expropriator can be allowed to use the expropriated trademark without controlling the enterprise or whether the original owners may use the mark after they have lost the enterprise itself. The law of many countries expressly forbids transfers of trademarks without the transfer of the enterprise. The aim of these provisions is to protect the consumers from being cheated by abuse of the goodwill incorporated in the mark. The law usually allows the owner of a mark to authorize others to use it under a license contract. Such authorization is normally followed by a close co-operation and supervision in order to guarantee the quality standards. Similar co-operation between the expropriator and the dispossessed owners is improbable.

Trademarks can be expropriated *ut singuli* or as a part of the whole enterprise. The *ut singuli* expropriation is usually connected to measures against enemy property in time of war. Enemy-owned marks have been seized in several countries. The production factors (raw materials, machines, know-how) remained in the enemy state. It deserves to be mentioned that according to French and Belgian law, the expropriated marks were to be sold, but only to their original German owners[51]. When the expropriator or his licensee tried to export goods carrying the mark to other countries, especially to the country against which the seizure had been directed, the courts there stopped such attempts[52]. The expropriator was given no right to use the mark in territory other than his own.

The expropriation of trademarks is, however, usually included in the taking of a whole enterprise. The expropriator carries on the production and attempts

to export the products to other countries under the original mark. The dispossessed owners claim the right to use the mark beyond the territory of the expropriator for themselves. Any presentation of case law has to start with the *Chartreuse* cases[53]:

France expropriated monk orders. Monks of the Chartreuse order left France and settled in Spain where they continued to produce their renowned liquor according to a secret recipe. Courts in many states had to take a position to the expropriator's claim as to the trademark and in all cases but one (in the French-governed Tunisia) they decided in favor of exiled monks. The courts relied mainly on "territorial limitation", "situs" of the mark, political character of the taking, etc.

The *Chartreuse* cases were not typical. The monks were in possession of the secret recipe and the public identified the mark with the liquor producted by the monks according to their secret method. In most cases involving expropriation of trademarks together with the whole enterprise, the situation is different. The production factors remain in the hands of the expropriator. The courts deny, nevertheless, the expropriator the right to use the mark in the forum state[54]. The marks are normally considered to belong to the original owners of the enterprise. In many cases, it must have been obvious that the original owners would not be able to carry on production with unchanged quality of goods and that the consumers could be cheated. Sometimes the court stressed that the original owners controlled subsidiaries outside of the expropriating state so that the rules binding the trademark to the enterprise were not violated[55]. On other occasions, the courts openly defied the rules protecting the consumers[56], or even expressly stated that it was immaterial whether the public would be deceived as to the place of origin of the goods concerned[57]. In the Swiss case of *Koh-I-Noor* (BG 1957), the court declared that the consumers would not be cheated since they could be expected to know about the foreign expropriation and about the attitude of Swiss courts towards it: they would thus know that the products marketed in Switzerland under the original trademark had not been produced by the original enterprise in the expropriating country. It is, however, dubious whether such a high level of legal knowledge can be expected from a buyer of a Koh-I-Noor pencil. If the consumers really knew all this, the trademark would no longer represent any goodwill and it would be worthless.

In lawsuits involving takings of whole enterprises including trademarks, the expropriator has sometimes invoked the 1891 Madrid Convention which had made it unnecessary to register trademarks separately in each state, a registration with the B.I.R.P.I. being sufficient for obtaining the exclusive right to use the mark in all member states. Since the protection of this "international mark" depends on the protection in its home country, the expropriator tried to show that there is only one universal mark atteached to the enterprise and seized with it. The courts do not accept this line of thought[58].

According to the Madrid Convention, the international registration entitles the owner to protection as if the mark has been registered separately in each country. The "international mark" is thus only a bundle of national trademarks that can be handled as separate assets in each state[59]. This view is confirmed also by the *ut singuli* expropriations of enemy-owned marks in several countries.

The presentation of the case law would be false, if the exceptional judgments in favor of the expropriator were not mentioned.

Mumm (Mixed French-German Tribunal 1921)[60]: The French expropriator of a German-owned enterprise producing French champagne was entitled to use the trademark also abroad. The champagne could not be produced outside of France and the mark was thus "lieé indissolublement au fond". It was not an independent asset.

The outcome can perhaps be explained by the background of the expropriation and by the nature of the court. Of interests is also

Hardtmuth No. 1 (C.A. Paris 1950): The French-registered mark of a seized Czechoslovak company belonged to the expropriator. In the words of the *Avocat Général*, the mark did not belong to French assets of the company. The mark followed the enterprise and it had become the property of the expropriator[61]. In *Hardtmuth No.2* (C.A. Paris 1958), the court decided in the opposite way, stressing that trademarks are localized in each country where they are protected.

Special attention is to be paid to few exceptional judgments giving the expropriator the right to use the commercial name of the expropriated enterprise:

Zeiss v. Au Bon Marché (Trib. Paris 1971): The court prohibited the French store to sell East German product carrying the Zeiss trademark. As to the commercial name, both the East and the West German producers were entitled to use it, but solely if indicating the place of origin, i.e. Heidenheim or Jena.

Breitkopf und Härtel (C.A. Amsterdam 1966): The enterprise in West Germany sued a Dutch company importing products from the East German enterprise. The action was rejected as the court did not find any reason why the company in the West should have the exclusive right to the commercial name.

Zeiss (Swiss BG 1965): The West German Zeiss sued the East German Zeiss on grounds of unfair competition by illegal use of the commercial name. The action was rejected. Both firms were entitled to use the name. There was no danger of confusion as the East German enterprise used the name with the supplement "VEB Jena". In the eyes of the court, the decision did not amount to enforcement of the expropriation but only to recognition of an accomplished fact (*Tatsache*).

In these decisions, the expropriator was allowed to use the commercial name, but the original owners were not forbidden to use it either. It is understandable that the courts did not want to deprive an enterprise of its name as used

in its home country. As commercial names need not be registered (Art. 8 of the Paris Union), such double use is not legally impossible and it may be a good solution when the names are distinguishable, e.g. by compulsory use of address[62].

56. Legal theory.- Several authors have tried to solve the dilemma between the protection of consumers and the refusal to enforce foreign expropriations.

The first group of writers support the practice of courts and declare that foreign expropriations cannot have any effect on marks protected in the forum country[63]. The marks are said to belong to their original owners.

Relying on the need to protect the consumers and on the "situs" of marks at the seat of the enterprise, the second group of authors would like to see the mark in the forum country vested in the foreign expropriator[64].

The third group of writers seek a compromise. Trademarks have two main functions: to protect the enterprise from a species of unfair competition and to protect the public from imitations. When these two functions conflict, it is not clear which one is more important. Some find a compromise in allowing the depossessed owners to use the mark if they control producing branches outside the expropriating country, but not otherwise[65]. *Troller*[66] locates marks at the seat of the enterprise, but he suggests that the courts may invoke public policy if they do not want to recognize the taking as to the protection accorded to the mark in the forum country. Perhaps he wants to use public policy if consumers would not be cheated by the use of the mark by the original owners?

57. Suggestions.- The trademarks registered or otherwise validly obtained in the forum country are beyond the reach of the expropriator. This should normally lead to rejection of his claims. In some cases, the expropriator's use of the mark would even cheat the consumers, e.g. when the mark contains the personal name of the dispossessed owner or when this owner keeps the production secrets.

The use of the mark by the original owner would, however, often mislead the public, since the production factors had remained in the expropriating country. The mark may even contain a geographical reference to a place in that country.

Undoubtedly the best solution would be an agreement between the expropriator and the dispossessed owner, an agreement which also would protect the interests of the consumers. Thus the East German and the West German Zeiss enterprises came to an agreement as to their rights in England[67]. This will, however, happen only seldom.

It is submitted that while the expropriator should normally not be given the right to the mark in the forum country, the original owners should not be allowed to misuse it either. If the mark cannot be used by the original

owner without abuse, it should lose its protection (by erasure in case of registered trademarks)[68]. The municipal laws have provisions making it possible to liquidate a mark, e.g. if the enterprise ceases to exist or the mark becomes confusing. These provisions should be strictly applied[69]. If nobody opposes the use of the mark by the expropriator, there will be no reasons to oppose it *ex officio*, unless the use is misleading.

As to commercial names, it seems reasonable to let both the expropriator and the original owners indicate their relationship to the original enterprise, provided that this is not misleading (e.g. by the use of the name of the original owner by the expropriator)[70] and provided that the names are distinguishable by compulsory use of some sign (e.g. address)[71]. This is, however, possible only if the name is not at the same time used as an exclusive trademark.

1) *Bystrický* 229 and in Problemen 115; *Lunc* 173; *Réczei* 219-22; *Szászy* 231-3; *Burth* 47-8; *Ehrenzweig*, JBl 1949, 426; *Gurski*, NJW 1965, 1355-6; *H. Lewald*, JBl 1952, 238-40; *Lieberknecht*, NJW 1956, 931-6.
2) *Latvian Shipping v. Montan Export* (D.C. Hague 1946, C.A. Hague 1950); *Brown v. Beleggings Societeit* (Ontario High Ct. 1961); *Petrolifera Muntenia v. Child* (C.A. Genua 1964); *cf.* also *Cassan v. Royal Dutch No.2* (France Cass. 1972); *Upské papírny v. B.* (Swiss BG 1960).
3) Most of the cases invoked in Chapter Five involved expropriation of the rights to juridical persons.
4) *Wolff*, IPRD 153.
5) *Burth* 87; *Grasmann* 283-4; *W. Lewald*, AWD 1958, 86; *Mann*, 132 RC 179-80 (1971); *Münch*, 98 RC 479, 496 (1959); *Niederer*, Schw. JIR 1954, 102-3; *Schulte-Uhlenbrock* 21; *Seidl-Hohenveldern* 130, JBl 1952, 410-3 and 123 RC 35-6 (1968); *Serick*, JZ 1956, 198; *Vannod* 79.
W. German BGH Jan. 30, 1956: The institution of juridical person can be considered only to the extent it corresponds to the *"Zweck der Rechtsordnung"*. This is not so in the case of expropriation of the rights to the juridical person.
Austrian OGH April 19, 1961: A legal entity is only an auxiliary creation aimed at enabling its owners to exercise jointly their individual rights. Expropriation of corporate rights cannot give the expropriator more rights than a direct expropriation of property.
Austrian VWGH Oct. 1, 1959: The juridical person which to all outward appearances may continue to exist after the expropriation is no longer the legal reflection of those persons and interests previously represented by the juridical person. It is no more than the formal organization now existing for the purpose of enabling the state to carry on the enterprise. Therefore, in the case of a confiscation, notwithstanding that the juridical person may continue to exist in its home state, there is no legal succession to its assets abroad.
6) *Batiffol*, Travaux du Comité francais d.i.p. 1962-4, 181.
7) *Bufe*, BB 1954, 48; *Grasmann* 284; *Jungfleisch* 50; *Kuhn*, WM 1956, 10; *Schulte-Uhlenbrock* 22-31; *Seidl-Hohenveldern* 125 and in 6 JIR 265 (1955), Clunet 1956, 420 and 123 RC 66-7 (1968); *Vannod* 86. *Contra, Burth* 112-3; *Lieberknecht*, NJW 1956, 571-5, 936.
8) LG Hamburg June 11, 1958; Bezirksgericht Zürich March 12, 1958.
9) *Bystrický* 221; *Katzarov*, Theory 176-9, 366; LG Leipzig Dec. 10, 1948; further

references in *Sarraute and Tager*, Clunet 1952, 500.

10) BGH April 10, 1957 and Oct. 21, 1971; KG May 7, 1956 and Feb. 2, 1959; OLG Düsseldorf Jan. 8, 1952; LG West Berlin Dec. 30, 1960 and May 31, 1965; Oberverwaltungsgericht West Berlin July 2, 1964; *Drobnig*, Recht in Ost und West 1963, 97.

11) ObLG Bayern March 23, 1965.

12) BGBl 1965 I 1065; *Féaux de la Croix*, WM 1967, 1262 ff.

13) BGH Nov. 29, 1965.

14) BGH July 24, 1957; Feb. 6, 1959; June 30, 1961 etc. See *Heintzeler*, Der Fall "Zeiss" (Baden-Baden 1972); *Herbst*, GRUR Int. 1968, 117.

15) BGBl 1967 I 839.

16) Legal opinion of Nov. 27, 1967, IzRspr. 1966-7, 135.

17) See *Hebst*, GRUR Int. 1968, 127.

18) *Schulte-Ublenbrock* 30-1; *Seidl-Hohenveldern*, 6 JIR 264 (1955).

19) *Gurski*, NJW 1965, 1355-6; *Van Hecke*, 126 RC 562 (1969).

20) *Kuhn*, WM 1956, 8.

21) *Serick*, JZ 1956, 203.

22) *Drobnig* 209.

23) *Mann*, 11 I.C.L.Q. 488 n. 75, 495 (1962).

24) BGH Oct. 21, 1971. On previous occasions, the BGH said that separation is, in any case, to take place when all or nearly all shares have been seized; see judgments of May 5, 1960 and Jan. 23, 1961. The decision of Nov. 21, 1955 (*Böhler Case*) is also of interest. It involved an Austrian expropriation of German-owned shares of an Austrian company. The BGH granted the request of the dispossessed German shareholders and appointed a German court before which they would be able to demand that an emergency board be named to administer the German assets of the company. The board was, however, not appointed since the matter was settled by an Austro-German treaty providing that German courts would, "*zur Wahrung der Einheit der juristischen Person*", recognize the effect of the Austrian expropriation also as to assets in Germany, whereas Austria would compensate the dispossessed shareholders. See BGBl 1958 II 130; *Seidl-Hohenveldern*, 123 RC 96-8 (1968). In the *AKU Cases* (Dec. 13, 1956 and Oct. 31, 1962), the BGH recognized the effect of a Netherlands expropriation of German-owned shares of a Dutch company as to assets in West Germany. The court relied mainly on a treaty obliging Germany to give effect to the Dutch measure and no general conclusions can be drawn from the judgments.

25) BGH Feb. 20, 1961; LG Hamburg March 13, 1974.

26) *Beemelmans* 81-2 and WM 1966, 674; *Bufe*, BB 1954, 48; *Jungfleisch* 129-34; *Loos*, AWD 1961, 278; *Stöcker*, WM 1964, 538 and WM 1965, 455.

27) *Vannod* 87.

28) *Ammon v. Royal Dutch* (Swiss BG 1954); *Dana v. Royal Dutch* (Cour de justice civile Genève 1961); *Labadie v. Royal Dutch* (France Cass. 1966); *Cassan v. Royal Dutch* (France Cass. 1966, 1972); *Plichon v. Royal Dutch* (Trib. Seine 1966); *cf.* also *Oliner v. Canadian Pacific Ry* (N.Y. App. Div. 1970) involving a Canadian expropriation of shares of a Canadian company.

29) *Seidl-Hohenveldern*, 123 RC 48 (1968); OGH May 31, 1951; June 3, 1953; Jan. 5, 1955; March 2, 1955; March 4, 1959; April 19, 1961; Sept. 26, 1962; March 6, 1963; April 6, 1965 etc.

30) *Hjerner* 305; *Karlgren* 48-9; *Nial* 139; *Forsikrings AS Norske Atlas v. Sundén-Cullberg* (HD 1929); *Göteborgs Bank v. Banque russe* (HD 1931); *Ruditzky v. Svenska Handelsbanken* (HD 1932); *Stockholms Enskilda Bank v. Amilakvari* (HD 1938); *Banque Azow-Don v. Stockholms Enskilda Bank* (HD 1945); *Scheel*

v. Oljecentralen (HD 1947); *The Cotton Spinning Company v. Trelleborgs Gummifabrik* (HD 1954).

31) *Nial* 139.

32) *Seidl-Hohenveldern*, 123 RC 9 (1968).

33) *Cf. Beitzke*, Spaltgesellschaft 30, 33.

34) United Kingdom: section 338 of the 1929 Companies Act, later replaced by sections 399 and 400 of the 1948 Companies Act. The courts were given the possibility to solve the problem of administration of separated assets of foreign seized companies by winding them up in England. There is no doubt that the foreign company (its liquidator) has *locus standi* in English courts after the winding up procedure has been initiated. It is, however, not clear whether the company is deemed to have been in existence also during the time period between the expropriation and the initiation of the procedure. Thus in the case of *Russian and English Bank v. Baring Bros* (H.L. 1936), lords *Blanesburgh* and *Macmillan* held that the Companies Act was to be interpreted so that the Russian bank, without being restored to life, should, by means of a legal fiction, be treated as if it were still in existence. Lord *Atkin* held that the bank never ceased to exist within the English jurisdiction for the purpose of its liquidation. In the case of *Banque des marchands de Moscou* (Ch. 1952), the court held that the Russian bank had not existed in the time period between its dissolution in Russia and its winding up in England. A person who had rendered services to the bank in that period had thus no right to payment. To say that the non-existent bank was none the less employing a non-appointed agent to conduct its non-existent affairs was, according to the court, to enter a maze of metaphysics from which there really was no logical escape. The revivification of a Russian bank by the winding up order was, nevertheless, given retroactive effect in the case of *Russian Commercial and Industrial Bank* (Ch. 1955). The bank had carried on normal business in England for a considerable time after its dissolution in Russia as if the dissolution had not occurred.
New York: Civil Practice Act (N.Y. Sess. Laws, 1936, c. 917, adding Civil Practice Act, § 977-b). According to this law, a permanent receiver should be appointed for the assets in New York of foreign corporations which had been dissolved, liquidated or nationalized or had their organic law suspended, repealed, revoked or annulled or ceased to do business (voluntarily or otherwise). The receiver is appointed in a lawsuit brought against the company by any creditor or stockholder, e.g. *Manalich v. Cia Cubana de Aviación* (N.Y. Sup. Ct. 1960).

35) A list of early cases was published in ZfO 1933, 440 ff. The *société de fait* is an analogy to French companies *in statu nascendi*. The courts, connecting nationality of juridical persons with their seat, spoke here about a *siège de fait* of the foreign company in France. Not all foreign seized companies were given the status of a *société de fait*. According to some, a condition was that the company had a branch in France (*Loussouarn and Bredin* 361-3 ; *Beemelmans* 32) or "une existence de fait permettant de l'individualiser en France" (*Banque de Sibérie v. Vairon*, C.A. Bordeaux 1928). It has also been suggested that the company was to be recognized as a *société de fait*, if it "poursuit son activité et se révèle aux tiers comme telle" (*Picard and Tager*, Clunet 1929, 133). It is interesting to note that the continued activity of the company in France was not a consequence, but a prerequisite of its recognition. The confusion can be illustrated by the fact that the Banque de Sibérie was found to exist as *société de fait* by the C.A. Paris (*Zelenoff v. Banque de Sibérie*) whereas it was found non-existent by the C.A. Bordeaux (*Banque de Sibérie v. Vairon*), both decisions dating from the same month, January

1928. Further, there was no unity as to the purpose of the *société de fait*. Sometimes they were considered to exist solely for the purpose of liquidation, whereas a distinction was sometimes made between a *société de fait* and a company in liquidation, the latter requiring appointment of an administrator (*Picard and Tager*, Clunet 1929, 133; *cf. Loussouarn and Bredin* 363). The *société de fait*, as well as the company in liquidation, were considered to exist independently of the court, their recognition being of declaratory nature only. The French *Conseil d'Etat*, which is an administrative tribunal, considered on Nov. 18, 1960, the question of survival of a Polish seized company to be open, even when only the survival for the purpose of liquidation was concerned (*Sté des mines et usines à zinc de Silésie*, Clunet 1961, 1065). The value of the older practice recognizing the survival is consequently dubious (see *Goldman*, Clunet 1961, 1069-73).

36) *Drobnig* 209; *Mann*, 11 I.C.L.Q. 480 (1962); *Raape* 671; *Seidl-Hohenveldern*, 6 JIR 263-70 (1955) and 123 RC 66, 72 (1968); BGH May 5, 1960; Oct. 6, 1960; Feb. 20, 1961; Nov. 29, 1965; Feb. 28, 1972 etc. According to the theory of split or of severance (*Spaltungstheorie*), the foreign company seized in its home country is split into two parts (or even more if the company owns assets in several countries). One part is controlled by the expropriator and it disposes of the property within the expropriator's reach, whereas the other part, the *Spaltgesellschaft*, is composed of the original members and controls the separated assets in West Germany. It seems that this theory has its roots in the special conditions of the divided Germany, although it is applied also to non-German companies (e.g. BGH Oct. 6, 1960). Several authors asserted that East Germany had not the right to dissolve, with effect for all of Germany, companies based on all-German laws (*Burth* 50-1; *Friedrich*, Süddeutsche JZ 1948, 27; *W. Lewald*, Wirkungen 437-9; *Solheid* 72, 77), but this should not conceal the fact that the BGH has adopted the *Spaltungstheorie* for practical reasons and not because of theoretical considerations. It said on May 5, 1960, that it was an open question whether the *Spaltgesellschaft* was inevitable or the separated assets might be held at the disposal of the beneficial owners in some other way. Almost every aspect of the *Spaltgesellschaft* is disputed in the West German literature. This starts even at such theoretical problems as which of the companies is the original one and which is the new (*Beitzke*, Spaltgesellschaft 34; *Kegel*, Probleme 33). Another theoretical issue is whether the two companies are two parts of the same juridical person or two separate juridical persons. *Seidl-Hohenveldern*, 6 JIR 263 (1955) and 123 RC 74 (1968), believes that the company continues to exist as a single juridical person, possessing, however, two sets of organs. *Peters* (in *Kegel*, Probleme 45) pointed out, in this connection, that also in the time of antipopes and schism, there had only been one church. The *Spaltgesellschaft* can, however, hardly be considered identical with the expropriator-controlled company for any practical purposes, since they have different managements, separate accounting and control separate assets. They may both be engaged in economic activities in the same country and one of them is not liable for the obligations of the other. As to *Peters'* parallel, it is to be remembered that the two popes both claimed the whole church, whereas a *Spaltgesellschaft* is attributed only a part of the company's assets. Another disputed issue is whether the *Spaltgesellschaft* is to exist only for the purpose of its liquidation (*Burth* 101; *Seidl-Hohenveldern* 112; *Serick*, JZ 1956, 204) or as a permanent company (*Grasmann* 435, 572; *Seidl-Hohenveldern*, 123 RC 73 (1968). Further possibilities are to let the *Spaltgesellschaft* decide whether it wants to be liquidated (*Schulte-Uhlenbrock* 61-2) or to transform it into a West German company (*Beemelmans* 98; *Beitzke*, Spaltgesellschaft 38; *Friedrich*,

Süddeutsche JZ 1948, 27). The courts usually do not limit the existence of the *Spaltgesellschaft* to the needs of its liquidation. There are exceptions: thus foreign banks survived as split companies without the permission of the Federal Banking Inspection since it happened solely for the purpose of their liquidation (BGH June 1, 1970).

The seat of the *Spaltgesellschaft* is also disputed. As the West German private international law determines the *lex corporationis* with the help of the seat, this is a very important question for companies other than East German ones. Some want to apply the law of the expropriator with the expropriation decrees excluded (*Beemelmans* 97-8; *Burth* 63-4; *Grasmann* 572), others speak for *lex fori* (*Serick*, JZ 1956, 200), some want to use the individualizing method considering all conceivable connecting factors (*Schulte-Uhlenbrock* 76-9), still others find the problem impossible to be solved (*Gurski*, WM 1964, 1146; *Mertens*, Juristische Schulung 1967, 103). In its decision of March 13, 1974, the LG Hamburg held that the law of the expropriator was to be applied as the personal law of the *Spaltgesellschaft* (expropriation and dissolution decrees excluded), but, at the same time, it considered the *Spaltgesellschaft* to be a stateless person with its seat in the forum country (for the purpose of *cautio judicatum solvi*). West German law is liberal as to transfers of seat to West Germany (*cf.* the Act of Aug. 7, 1952, BGBl 1952 I 407, *Beemelmans* 102, about the possibilities to transfer the seat to West Germany from territories previously belonging to Germany).

Although the *Spaltungstheorie* undoubtedly is a part of the West German law, several authors criticize it, mainly because the split company is a "floating wreck" without any control by authorities (*Burth* 29-68; *Gurski*, WM 1964, 1146 and NJW 1965, 1354; *W. Lewald*, NJW 1958, 281; *Lieberknecht*, NJW 1956, 931; *Mertens*, Juristische Schulung 1967, 97; *Mann*, 11 I.C.L.Q. 493 (1962); *Schulte*, NJW 1966, 521).

37) *Ehrenzweig*, Conflict of Laws (St. Paul 1962) 173, writes that a seizure of a foreign juridical person will ordinarily cause a splitting of legal entities resulting in corporations with two sets of directors and stockholders' meetings. This view seems to be confirmed by the case law.
Ron Bacardi v. Bank of Nova Scotia (U.S.D.C. 1961): "In sum, defendant's challenge on the issue of corporate existence is denied on the ground that the public policy of our nation is antithetical to the recognition of the Cuban Government's confiscatory decree with respect to property outside Cuba; and on the further ground that under the extraordinary situation presented here the directors and the large majority of the shareholders must be deemed to have had the necessary power to act for the corporation in authorizing the continuation of its business from a new seat and the conservation of its assets outside of Cuba." 32 I.L.R. 10
Maltina v. Cawy Bottling (U.S.C.C.A. 1972): The dissolution of the foreign seized company is effective in the foreign state, but the company retains a *de facto* existence in the United States beyond the territorial reach of the confiscating government.

38) *Beitzke*, Spaltgesellschaft 33; *Seidl-Hohenveldern*, 123 RC 49 (1968).

39) N. 34 *supra*.

40) W. German KG Feb. 3, 1961; OLG Düsseldorf Dec. 4, 1954; OLG Celle March 25, 1965; *Netherlands v. Federal Reserve Bank* (U.S.C.C.A. 1953); *U.S.S.R.'s Representation v. Narva Flachs* (Denmark ØL 1955); in *Koci v. Trostli* (Sweden HD 1941), the court stressed that the shares had been kept in Sweden, but this was not decisive for the outcome, *Hjerner* 386.

41) *Batiffol*, Travaux du Comité français d.i.p. 1962-4, 187-8; *Bufe*, BB 1954, 47; *Burth* 13-21; *Ficker* 105, 157; *Hjerner* 297, 370; *Kuhn*, WM 1956, 2; *Philip* 393;

Seidl-Hohenveldern 99.

42) *Delson,* 57 Columbia L.R. 782 (1957); *H. Lewald,* JBl 1952, 240; *Niederer,* Schw. JIR 1954, 95-6.

43) *Mann,* 11 I.C.L.Q. 501 (1962); see also *Loussouarn and Bredin* 426.

44) *Seligmann-Gans v. Zivilgericht Basel* (BG 1940); see *Vannod* 82-4; *cf. Kugel's application* (Sweden HD 1944).

45) *Hjerner* 370.

46) Wertpapierbereinigungsgesetz WiGBl 1949, 295; see also BGBl 1950 I 88; BGBl 1952 I 553.

47) N. 28 *supra; H. Lewald,* JBl 1952, 240.

48) *Niederer,* Schw. JIR 1954, 95-6; *Philip* 393; *Rigaux* 405; *Schulte-Uhlenbrock* 14; *Vannod* 66; *Wortley,* 94 RC 228 (1958).

49) *Raape* 692-4; *Remmert,* NJW 1949, 82-3; OLG München March 26, 1959; Austrian OGH April 26, 1960; *U.R.S.S. v. Chaliapine* (France Cass. 1936); *Bessel v. Sté des auteurs* (TCiv Seine 1931); *Novello v. Hinrichsen* (England C.A. 1951); *Capitol Records v. Mercury Records* (U.S.D.C. 1952 aff'd U.S.C.C.A. 1955).

50) *Philips v. Noel* (C.A. Paris 1963).

51) *Van Hecke,* 126 RC 558 n. 48 (1969); Rev. 1957, 280.

52) OLG Hamm (W. Germany) Jan. 17, 1964.

53) *Lecouturier v. Rey* (H.L. 1910); *Chartreuse* (Swiss BG 1913; German RG 1908; Dutch HR 1908; Denmark Sup. Ct. 1911; C.A. Brussels 1910; Ct. Stockholm 1912; C.A. Rio de Janeiro 1907; C.A. Tunis 1907; Trib. Buenos Aires 1905, etc.).

54) Austria: OGH May 10, 1950; Dec. 18, 1957; June 2, 1958;
Belgium: *Hardtmuth* (Cass. 1960);
Denmark: *Grammophone* (Sup. Ct. 1922);
Egypt: *Zeiss* (Ct. Cairo 1954);
France: *Hardtmuth No. 2* (C.A. Paris 1958); *Sidney Merlin v. Directeur des Domaines* (Cass. 1961); *Agfa* (C.A. Paris 1963); *Saatsucht v. Deutsche Saatgut* (C.A. Paris 1963); *Zeiss* (Cass. 1966);
Germany: RG Oct. 15, 1929; BGH May 10, 1955; June 7, 1955; June 29, 1956; Jan. 15, 1957; July 24, 1957; Feb. 14, 1958; Feb. 6, 1959; Dec. 18, 1959; March 7, 1961; June 30, 1961; Oct. 12, 1962; March 8. 1963; April 14, 1965; Jan. 30, 1969; OLG Hamburg July 19, 1948; new marks registered by the expropriator after the seizure belong to him, BGH Jan. 23, 1963; Jan. 30, 1969;
Italy: *Ornati v. Archimedes* (Cass. 1959); *Hardtmuth* (Cass. 1960);
Netherlands: *Amato v. Keilwerth* (D.C. Hague 1956); *Zeiss* (HR 1957); *Kjellberg* (HR 1965);
Norway: *Hardtmuth* (Byrett Oslo 1959);
Sweden: *Koh-I-Noor* (C.A. Svea 1960);
Switzerland: *Hardtmuth* (BG 1955); *Carborundum* (BG 1956); *Koh-I-Noor* (BG 1957);
U.S.A.: *Palicio v. Brush* (U.S.D.C. 1966); *Zeiss* (U.S.D.C. 1968; U.S.C.C.A. 1970); *Menendez v. Faber* (U.S.D.C. 1972).

55) *Hardtmuth* (Italy Cass. 1960); *Koh-I-Noor* (Swiss BG 1957); *Hardtmuth* (Byrett Oslo 1959).

56) *Amato v. Keilwerth* (D.C. Hague 1956): "It may be true that, as a rule, the right to the exclusive use of a trademark cannot exist without the concomitant possession of a factory or a business the trademarks of which have the purpose of distinguishing its goods from those of other factories or business enterprises. It is also true that the right to a trademark lapses once the person entitled to it no longer possesses the factory or business where the goods are manufactured or handled.

But in the case of confiscation of a factory or a business situated in a foreign country, those rules cannot be understood to mean that the original owner of the trademark in that country is no longer entitled to continue to enjoy his rights in the trademark in this country. For, according to the law of this country, such rights constitute a separate part of his property once he resumes production in a factory located in a country other than the one in which his confiscated factory was situated." 24 I.L.R. 438

Palicio v. Brush (U.S.D.C. 1966): The trademarks in dispute had been used for Cuban cigars and the exiled owners had obviously no possibilities to obtain tobacco from Cuba. The court said, nevertheless, that the right of the former owners to conduct business in the United States included the right to make use of the goodwill incorporated in the trademarks. The court argued that any different decision would amount to giving "extraterritorial effects" to the Cuban expropriation.

57) W. German BGH May 10, 1955.

58) *Hardtmuth No.2* (C.A. Paris 1958); BGH June 7, 1955; Dec. 18, 1959; March 8, 1963.

59) *Loos,* AWD 1958, 113; *Stoephasius*, Wettbewerb in Recht und Praxis 1970, 285-7.

60) *G.H.,* Rev. 1961, 756-7.

61) *Sarraute and Tager*, Clunet 1952, 1150.

62) The Austrian OGH on Dec. 18, 1957, considered "VEB" not to be sufficient for distinguishing commercial names "Zeiss".

63) *Abel*, JBl 1951, 77; *Bussmann* 143 and in GRUR 1950, 97; *Ficker* 131-141; *Friedrich,* Süddeutsche JZ 1948, 26; *v. Godin,* BB 1953, 47; *Loos*, AWD 1958, 113; *Lutz,* GRUR 1948, 93; *Mezger,* Rev. 1955, 508; *Paterna,* MDR 1948, 464; *Raape* 673-4, 694; *Schaumann,* Schw. JZ 1966, 40; *Seidl-Hohenveldern* 99-101, Clunet 1956, 434 and GRUR Int. 1958, 112; *Van Hecke*, 126 RC 556-7 (1969); see also n. 48 *supra.*

64) *W. Lewald*, Wirkungen 443, modified view in AWD 1958, 87; *Petersen,* Tagung deutscher Juristen - Reden und Vorträge (Bad Godesberg 1947), 136 ff.

65) *Rotondi* 447-8.

66) *Troller* 141-6, 149.

67) *Bernstein*, Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht 1971, 360-1, 20 A.J.C.L. 313 (1972).

68) *Magerstein,* JBl 1950, 355; *Ulmer,* Süddeutsche JZ 1948, 679.

69) W. German BGH Oct. 12, 1962.

70) *Bussmann*, GRUR 1950, 96 and *Raape* 696-8 write that commercial names cannot be expropriated at all because of their personal nature.

71) *Stoephasius,* Wettbewerb in Recht und Praxis 1970, 284.

CHAPTER SEVEN

EXPROPRIATIONS WITH SPECIAL DEFECTS

I. Expropriations by a not recognized expropriator

58. When the legislator of the forum country instructs the courts to apply foreign law, he does not contemplate decrees issued by groups of insurgents or bandits. It is irrelevant whether the group in question declares itself to be the only legal government. Thus, foreign law is not to be applied if the foreign "legislator" does not have governmental power, but is only a group of private persons pretending to be a government[1]. On the other hand, once the insurgents have taken over the effective control of the territory of the foreign state and their power is stable, their decrees begin to have the character of law.

The courts have limited possibilities to investigate what is the living law in a foreign country, for example when two different governments pretend to exercise sovereignty over its territory and population. The court cannot refuse to give judgment and it cannot declare the foreign state to be a juridical vacuum where there is no law at all. The forum has to turn to the executive branch for information and help. According to the *recognition doctrine*, which is adhered to by some jurists, the forum should be bound by the attitude taken by the government of the forum state and expressed by means of the diplomatic recognition or non-recognition of the foreign expropriator.

As the courts are unwilling to *enforce* seizures by even diplomatically recognized foreign expropriators, the non-recognition is there irrelevant. The same is valid for cases involving partition of the expropriation risk or loss, since the foreign expropriation law is, as it will be shown (Chapters Nine and Ten *infra*), not applied in those cases. The fact that the seizure has been carried out by a group of bandits, and not by a lawful government, may be of indirect importance, for example it may influence the duty of the debtor to resist the expropriation (s. 123 *infra*). The recognition or non-recognition may thus be of direct relevance only when the title of the foreign expropriator to already seized property is disputed.

England is the country where the recognition doctrine plays the most important role[2]. *Mann*[3] asserts that the absence of recognition deprives the acts of the alleged state of any validity. In his view, this rule is applied in all countries, since any other position would be untenable. Also *Lauterpacht*[4] writes that both the unrecognized government and its acts are a nullity, but he admits that this rule ceases to be reasonable when states begin to recognize governments on grounds other than their effectiveness and stability. In *Dicey's* handbook, there is a more flexible statement[5]:

". . . the courts have never recognized a law or act unless it is a law or act either of a government recognized by Her Majesty's Government in the United Kingdom or a subordinate body set up by such a government to act on its behalf. However, there is high authority for regarding as open the question whether the courts can recognize the laws or acts of a body which although it does not satisfy either of the foregoing tests is nonetheless in effective control of the place in question."

The English courts are conscious of the fact that a rigid adherence to the recognition doctrine would often lead to unacceptable results and they try to avoid it[6]. When two governments competed in one country and one was recognized *de jure* and the other *de facto*, the courts in England and Scotland recognized the validity of acts of both governments, but only as to the parts of territory held by the respective governments[7].

The *American* courts also adhere to the recognition doctrine, although they are more flexible in its application. They seem to feel free to invoke non-recognition or not, depending upon the demands of justice in the particular case. In numerous cases, the foreign expropriation law was ignored because of the non-recognition of the expropriator by the United States[8], but there are also cases where the recognition doctrine was abandoned[9]. It seems that the development trend is towards more "de-factoism", i.e. towards scrutiny of the objective conditions in the foreign country instead of a blind adherence to the recognition doctrine[10].

On the *European Continent*, decisions invoking the recognition doctrine can be found mainly in older practice[11]. The doctrine is also supported by some authors[12], although others oppose it[13]. The position in the socialist states towards the doctrine is negative, which is understandable since it has often been used against them[14]. On the other hand, there have been suggestions in the West that acts of a foreign government that, although recognized by the forum country, is not based upon the presumable will of the majority of its population should be considered illegitimate[15].

Courts and authors adhering to the recognition doctrine have studied the question whether the recognition is to be given effect *ex tunc* or *ex nunc.* Should, for example, seizures by a group of insurgents be recognized if the group subsequently stabilized its power and obtained recognition by the government of the forum state? The prevailing view seems to be in favor of effects *ex tunc* with the exception of cases finally decided previously to the recognition[16]. On the other hand, rights acquired according to laws of an effective and recognized government may be protected also after that government lost its power in the territory in question, for example because the borders had changed[17]. In the case of *Cockerill v. La Union et le Phénix espagnol* (C.A. Paris 1930), the recognition of the Soviet Union by France was given only partial retroactive effects: decrees dissolving expropriated Russian companies issued prior to the recognition were given effect, but the companies were considered dissolved only as from the day of recognition. The case of

Nomis v. Federazioni (C.A. Genua 1930) is also of interest: persons who had occupied Russian vessels in Italian harbors in order to demonstrate solidarity with the Soviet state were obliged by the court to pay damages to the original owners of the vessels on the ground that Soviet Union had not been recognized by Italy *at the time of the occupation.* At the time of the decision, the U.S.S.R. was already recognized.

It is submitted that the courts should use the same criteria that should be used by states in the matter of recognition, i.e. the stability and effectiveness of the foreign government. As states often let their policy of recognition be influenced by other factors, the courts should not be bound by the official position of the executive. Application of laws of a non-recognized government has never been considered to imply any recognition in the sense of the law of nations. It can thus hardly be said that a court applying the law of a non-recognized expropriator contradicts the executive. Further, application of foreign law is not a service rendered to the foreign state.

It is true that the courts usually lack posibilities to study the objective situation in the foreign country and that they will have to turn to the executive for information, but the executive should furnish such objective information without being influenced by the diplomatic recognition or non-recognition of the expropriating government by the forum state.[18]

II. Expropriations violating international law

59. Introduction.- It has been shown that the courts normally refuse to enforce foreign expropriations. The additional factor that the foreign taking violates international law will consequently make no great difference insofar as *enforcement* of the expropriation is concerned. Also in cases involving partition of the expropriation loss, the lawfulnes or unlawfulness of the expropriation under international law should normally be irrelevant (Chapter Nine and Ten *infra*). The alleged violation of international law by the expropriator may become of importance in cases where the seizure has already been enforced and the court is to judge upon the validity of the foreign expropriator's title to the property. Although such title is normally recognized (Chapter Four *supra*), should it be recognized even when the taking is illegal under the law of nations?

The unlawfulness of the expropriation is usually not invoked against the foreign expropriator himself, but against the persons who derive their title to the property from him, for example against persons who have bought the property from the expropriator and subsequently imported it to the forum state.

In a note sent to the Soviet Government by nineteen nations in 1918, it was jointly declared that they considered invalid (*"sans effet"*) the Soviet expropriations of property belonging to their nationals, since the takings were

contrary to international law[19]. More recently, the U.S. Department of State expressed the view that expropriations violating the law of nations are in valid[20].

But is it really true that unlawfulness under interenational law entails invalidity?

60. Case law.- Foreign enforced expropriations have traditionally been protected from judicial review in the *U.S.A.* because of the act of state doctrine (s. 9-11 *supra*). In the case of *Rich v. Naviera Vacuba* (U.S.C.C.A. 1961), the U.S. Department of Justice sent a brief to the court asking it to apply the act of state doctrine in order to recognize an unlawful Cuban expropriation[21]:

"It may be assumed that the confiscation is unlawful under international law, i.e. so far as relations between the Governments of the United States and Cuba are concerned. But this does not mean that Cuba, as between herself and petitioner, does not have valid title to the expropriated property so far as our courts are concerned."

The most important decision where the act of state doctrine was considered to bar the review of the seizure's legality under international law is the case of *Sabbatino No.1* (U.S. Sup. Ct. 1964) (s. 9 *supra*). The court argued that the doctrine was to be applied also as to foreign acts violating the law of nations in order not to disturb the executive:

The Cuban expropriator and the dispossessed American owner disputed the right to the purchase price of sugar that had been seized in Cuba. According to the U.S.D.C., the taking was contrary to international law and as such not protected by the act of state doctrine. The U.S.C.C.A. affirmed, pointing out that international law is part of American law. The U.S. Sup. Ct. gave judgment in favor of the Cuban expropriator. *Inter alia*, the court said[22]:

"Following an expropriation of any significance, the Executive engages in diplomacy aimed to assure that United States citizens who are harmed are compensated fairly. Representing all claimants of the country, it will often be able, either by bilateral or multilateral talks, by submission to the United Nations, or by employment of economic and political sanctions, to achieve some degree of general redress. Judicial determinations of invalidity of title can, on the other hand, have only an occasional impact, since they depend on the fortuitous circumstance of the property in question being brought into this country. Such decision would, if the acts involved were declared invalid, often be likely to give offense to the expropriating country; since the concept of territorial sovereignty is so deep seated, any State may resent the refusal of the courts of another sovereign to accord validity to acts within its territorial borders. Piecemeal dispositions of this sort involving the probability of affront to another State could seriously interfere with negotiations being carried out by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached."

The attitude towards foreign expropriations violating international law changed in 1964 when the *Sabbatino* Amendment was enacted (s. 10 *supra*). In the

case of *Sabbatino No. 2,* on remand from *Sabbatino No.1,* the original dispossessed owner was given the right to the purchase price.

It is important to stress that the Amenment speaks generally about takings violating international law, regardless of the nationality of the dispossessed owner or of the rule that has been violated. It has, however, to be kept in mind that the Amendment only gives the courts the right (and duty) to examine the taking on its merits; it does not say that takings violating international law are invalid. Such invalidity is, nevertheless, considered to be a consequence of the fact that the law of nations is incorporated in American law[23].

It can also be mentioned that in the case of *Banco Nacional de Cuba v. National City Bank No.3* (U.S.C.C.A. 1973), the dispossessed American owner was allowed to use the value of the seized property for the purpose of a set-off against the sums he owed to the expropriator, since the expropriation was found to be in direct contravention of the principles of international law.

Also in *England* and other countries following English law, the act of state doctrine is adhered to (s. 8 *supra*). It seems, however, that the doctrine does not protect seizures violating international law. Thus, the British Supreme Court of Aden found in the case of *Anglo-Iranian Oil Co. v. Jaffrate*(1953) that an Iranian expropriation of British-owned oil concessions was unlawful under international law and consequently null and void. The court stressed that international law was incorporated in the domestic law of Aden. The judgment was later criticized in the case of *Helbert Wagg* (Ch. 1956), where the circumstances were, however, quite different (s. 106 *infra*).

Article 55 of the *French* Constitution of 1958 affirms the priority of international treaties before municipal law. It seems, nevertheless, that Franch courts are not allowed to reject application of a foreign law on the sole ground that it violates a treaty or common law of nations. In France, there is no judicial control of the constitutionality of laws. French courts must not study the conformity of a French law with international law and[24]

"ce qui est vrai d'une loi française ne peut l'être moins d'une loi étrangère qui n'est compétente que parce que la règle française de conflit lui attribue compétence."

This is something different from the act of state doctrine, as French courts feel free to invoke public policy against foreign expropriations. The dispossessed owners may thus have greater success invoking the incompatibility of the foreign taking with French *ordre public* than relying upon its illegality under international law. The attention is focused on the question of compensation as takings without indemnity have traditionally been considered by French courts to be contrary to public policy (s. 35 *supra*)[25].

In several French cases involving partition of the expropriation loss caused by the Algerian takings (s. 95 *infra*), these takings were contrary to French-Algerian treaties. The

Cassation Court relied, however, on their incompatibility with public policy and not on their unlawfulness under international law when it refused to "apply" them.

Article 25 of the *West German* Constitution states that the common law of nations is a part of the federal law having priority before domestic legislation. It has happened that a West German court declared a foreign taking to be null and void, invoking its incompatibility with international law. The invalidated seizure was a Czechoslovak expropriation of German-owned property[26]. More recently, the courts recognized, however, the validity of foreign expropriations which violated international law.

OLG Bremen Aug. 21, 1959 (*Bremen Tabacco Case*): Indonesia expropriated some tobacco concessions belonging to Dutch nationals. A consignment of tobacco from these plantations arrived in Bremen and the dispossessed owners sued the importer, arguing that the taking was invalid because it was contrary to international law and public policy. The court rejected the action. The petitioners had not shown that they had rights *in rem* to the tobacco under the terms of the concession. But even if they could prove their title, it would have been extinguished by the expropriation which was to be recognized even if contrary to international law. International law did not require that foreign unlawful takings should be treated as null and void by national courts. The petitioners were referred to diplomatic channels for compensation. The court admitted that diplomatic channels were inefficient, but it pointed out that invalidation of the expropriator's title by courts would adversely affect world trade. As to the question of public policy, the court said that it was questionable whether there was a sufficient connecting link to Germany. The court mentioned the fact that the petitioners were not of German nationality. The question of *ordre public* could, however, be omitted as it had not been proved that there had been such a severe violation of international law that would demand application of the *Vorbehaltsklausel.* Finally, the court expressed some doubts whether the expropriation really was contrary to international law and found it not sufficiently proved.

LG Hamburg Jan. 22, 1973: The court recognized the Chilean expropriator's title to copper imported from a nationalized mine in Chile, although the taking was contrary to international law. According to the court, the law of nations did not oblige national courts to consider as null and void from the very start a foreign act of sovereignty which is in violation of international law. The illegality of the taking did not make it invalid. Any other position would lead to complications of political and economic nature and interfere with international order. The taking would, nevertheless, be denied recognition, if it were contrary to German public policy. The Chilean expropriation was entirely unbearable under the German view of legality and morality, but this was not sufficient for application of the public policy clause because of the lack of connection link to Germany, the dispossessed owners being Americans. The petitioner was, furthermore, not the owner of the copper in any case, as the copper had been extracted and treated in Chile after the expropriation by a company owned by the expropriator and acting in good faith(!). The provisions of the Civil Code of Chile were invoked.

Courts in the *Netherlands* had to judge the validity of Indonesian seizures of Dutch-owned assets. According to the official view of the Netherlands Government, these takings were contrary to international law. The courts considered

them to be invalid on the same grounds[27]. The Cassation Court used instead the public policy clause, pointing out that the measure had prejudiced Netherlands interests[28]. In a recent case, the compatibility of an American seizure with international law was examined and the taking was found lawful and valid[29]. In older practice, the Netherlands courts adhered to the act of state doctrine which was considered to protect the validity of even foreign takings violating the law of nations[30].

In two *Italian* judgments involving the Iranian expropriation of British oil concessions, the title of the expropriator was recognized:

Anglo-Iranian Oil Co. v. SUPOR (Trib. Venice 1953): The dispossessed Anglo-Iranian Oil Co. asserted that the expropriation was contrary to Italian public policy, being without compensation. Violation of international law was, it seems, not directly invoked. The action was rejected as the expropriation law had promised some compensation and it was, consequently, not contrary to public policy.

Anglo-Iranian Oil Co. v. SUPOR (TCiv Rome 1954): Here, too, the expropriation was found compatible with the Italian *ordre public*. It was in addition found lawful under international law since it had promised compensation. The court declared that it would not recognize any taking violating the law of nations as Italian courts have the duty to examine whether the foreign law to be applied is contrary to any generally accepted principle of international law. Any decree expropriating property of foreigners without compensation must not be applied in Italy. The court also remarked that the decision *in casu* would be in favor of the respondent even if the taking had violated international law, as the concession terms gave ownership only to oil extracted by the dispossessed company and it was not proved that the disputed oil had been extracted by it.

Similar was the outcome also in a recent case involving Libyan expropriation of British oil concessions:

British Petroleum v. SINCAT (Trib. Siracusa 1973): According to the terms of the concession, its holders were owners of only the oil extracted by themselves. Oil extracted by the expropriator after the expropriation of the concession was thus not property of the dispossessed company. Legality of the taking under international law was consequently irrelevant and there was no need to study it.

A *Japanese* court, too, recognized the right of the Iranian expropriator to oil extracted from the expropriated British-owned concessions:

Anglo-Iranian Oil Co. v. Idemitsu Kosan (Tokyo High Ct. 1953): The action of the dispossessed company was rejected by the D.C. Tokyo. It was not clear whether there really had been any violation of international law and there was no rule of international law allowing or obliging the courts to consider foreign acts to be invalid if unlawful under international law. The High Court affirmed the decision, relying upon a principle similar to the act of state doctrine. It decided not to try the validity of the expropriation, but conditioned its decision by statements that the Iranian law was not completely confiscatory and that it was in accordance with resolutions of the General Assembly of the United Nations. The court stressed that the refusal to judge upon the validity of the expropriation did not imply its recognition.

The *Swedish* courts have had opportunity to take a position to foreign expropriations violating international law only under very special circumstances and only in the form of an *obiter dictum*:

The Rigmor (HD 1942): The Norwegian vessel was seized peacefully by the Norwegian Government while in a Swedish harbor. The action of the owners for restitution was rejected, mainly because of immunity, but the validity of the seizure was also recognized (s. 34 *supra*). In this connection, the court said that an expropriation cannot be carried into effect within the territory of another state under compulsion and be legally binding.

It is difficult to interpret this statement to mean that any taking under compulsion by a foreign state in Swedish territory (and even in territories of third states) is invalid (not legally binding) in the eyes of Swedish courts. It is even more difficult to conclude from the statement that these courts consider any foreign taking violating international law to be invalid.

61. Expropriations by an occupant in occupied territories.- These takings must be handled apart from the other types of seizures allegedly violating international law.

The expropriations by an occupant in violation of the law of nations (mainly of the Hague Regulations of 1907) have, as a rule, been denied recognition and the dispossessed owners could with success claim restitution of the property[31]. It deserves to be mentioned that the Allied Powers issued on January 4, 1943, a declaration of warning, where they reserved for themselves the right to declare invalid the expropriations carried out by the enemy in the territories under his occupation[32]. Also the neutral states adopted the same attitude after the end of World War II. The Swiss Federal Council declared on December 10, 1945, that dispossessions violating international law carried out by occupants were invalid and that the dispossessed owners could demand restitution of the assets that had been taken to Switzerland and were held there by possessors in good or bad faith[33]. Similar provisions have been adopted in Sweden by enactment of the Restitution Act of June 29, 1945 (Svensk författningssamling 1945 No. 520). It is of interest to note that, according to both the Swiss and the Swedish regulations, even the *bona fide* possessors had to restitute the property to its original owners. They were, however, to be compensated by the Swiss or Swedish state, respectively.

There are also examples of cases where the title of the occupant was recognized after the court had established that the taking had been carried out in conformity with international law[34].

In a Danish case[35], the court declared that the lawfulness or unlawfulness of the occupation seizure was irrelevant and it appears that it was of the view that the property was to be restituted to its original owner in any case.

It seems that the legality or illegality of the taking under international law was, in most cases, attributed decisive importance. The courts found unlaw-

ful takings invalid even when the party deriving its right from the occupant was the forum state itself[36], whereas they were ready to recognize the taking's validity if it was lawful under international law even when the party attacking it was the forum state[37].

Sometimes there were strong reasons of equity speaking in favor of the actual possessor of the property. He had, for example, obtained it in exchange for his own similar objects previously seized[38] or he could prove his good faith[39]. Nevertheless, the unlawfulness of the seizure under the law of nations has even here been considered to entail invalidity.

The good faith of the occupant that he was acting in accordance with international law is given no importance. When the occupant seized a private-owned motor car believing that it was the property of the enemy forces, the court ordered restitution to the original owner by the present possessor who had derived his title from the occupant[40].

62. Comparative remarks.- It is not easy to summarize the practices of courts in various countries into one picture. The result will depend on the degree of generalization, for example on whether the occupation cases are considered separately. Here it is submitted that the occupation cases should not be considered at the same time as the rest of the case law.

It is irrelevant whether the violation of international law is used as an independent legal ground or only indirectly via the public policy clause.

Several courts have expressed the view that they were not free to judge upon the validity of foreign expropriations, because of the act of state doctrine or similar principles. This leads, in practice, to the same result as if the rights of the expropriator were recognized[41]. After the 1964 *Sabbatino* Amendment, the American courts ceased to rely upon the doctrine in cases involving foreign unlawful takings. In the Japanese decision, the application of the doctrine was, it seems, conditioned by the legality of the taking under international law.

In a number of cases, foreign expropriation allegedly violating international law was not recognized[42]. The Netherlands Cassation Court relied here on public policy. In several decisions, the validity of the taking was upheld, but only after the court had established that the taking did not violate international law[43]. Even when the main reason for upholding the taking was different, the courts cared to mention that the expropriation was not illegal under the law of nations or that its illegality had not been proved[44].

With the exception of some older decisions based on the act of state doctrine, the only court explicitly recognizing the validity of an expropriation violating international law is the Landgericht Hamburg in its judgment of January 22, 1973. The *Bremen Tobacco Case* is similar, but there the court at least expressed doubts about the alleged unlawfulness of the taking. The West German courts seem to be of the view that a foreign expropriation vio-

lating international law is valid unless it is contrary also to German public policy. The application of the *Vorbehaltsklausel* is conditioned by a very close relationship of the case to Germany. It is of interest to remember that according to the West German Constitution, international law enjoys priority in conflicts with domestic law. It appears that the decisions of the West German courts are based on the assumption that international law, itself, does not consider an unlawful expropriation to be automatically invalid.

The West German, as well as Italian, courts stressed also that the foreign state had expropriated concessions and not the disputed products. The rights *in rem* of the dispossessed concession holders to products which had been produced by the expropriator after the taking were denied or put to doubt[45].

Discussing violations of international law, the courts use general formulations and do not formally distinguish between violations directed against the forum state and those directed against third countries. Those courts which studied the violation of international law from the standpoint of *ordre public* admit, however, that the necessary connection link to the forum country may be influenced by the fact that the dispossesed owner is a national of the forum state[46]. The examination of legality of the foreign taking seems to be much more severe in countries damaged by the expropriation than in third states. It is symptomatic that the Iranian expropriation of British oil concessions was found unlawful by a British court in Aden whereas it was considered legal by Japanese and Italian courts and that the Indonesian takings, unlawful according to the Netherlands courts, were treated much more leniently in West Germany. A comparison of the recent West German practice with the decision of the OLG München of June 14, 1951, also indicates that the courts are reluctant to reprobate violations of international law directed against a third country. It seems that the courts do not want to endanger further trade with the expropriating state and that they also want to protect the buyers of the expropriated goods, as these are usually merchants of the forum's nationality. Although it can be said that only West German courts have been willing to recognize expressly the validity of an expropriation violating international law, courts in other countries achieve the same result by declaring that the taking is lawful. The West German courts indicate, in turn, that they might consider the taking invalid if it were directed against the interests of German nationals.

In American judgments as well as in the Aden judgment, the courts stressed that international law was a part of the *lex fori. Lex fori* was, however, hardly applicable to the validity of a foreign seizure which had been carried out in a foreign country. It would have perhaps been more correct to say that international law was a part of the forum's public policy.

63. Right of the forum to recognize unlawful takings.- It has been said that the act of state doctrine is not a rule of international law (s. 13 *supra*). If it is thus allowed to deny recognition to foreign takings in general, this will be

even more valid if the expropriation violates international law. A problem arises, however, in another respect: is the forum obliged under international law to deny recognition to such foreign expropriations violating the law of nations? This question is posed only in cases there the violation of international law has been directed against a third state.

There are opinions of authority which contend that it is the duty of the forum state to deny recognition to foreign expropriations contrary to international law[47]. Others insist that the forum state has complete freedom to recognize even foreign unlawful seizures to be valid. Some say so explicitly[48], whereas others implicitly presuppose this freedom when discussing various practical reasons for and against such recognition. In some judgments, the courts expressly stated that international law did not require them to invalidate unlawful expropriations[49]. In the international practice of states, there seems to have been no protest by any country against judicial recognition of expropriations violating international law.

While in the municipal law, an unlawful act is often considered an act committed against the whole society at large, in international law a tort is, with few conceivable exceptions, committed against a particular state. Whereas the forum state must not actively co-operate in committing the tort (e.g. by enforcing a foreign taking violating the law of nations), it may remain indifferent and passive[50]. An obligation to invalidate unlawful expropriations and to restitute the seized property to its original owners may, of course, be assumed by an international treaty. Some attempts in this direction have been made, although without any great success[51].

The freedom under international law to recognize even takings violating the law of nations does not give any answer to the principal question: should such seizures be recognized or should they be deemed invalid? In the legal literature, three basic approaches to this problem can be found. Some authors write that an expropriation violating international law should always be null and void (the invalidity approach). Others are of the opposite view, asserting that the unlawfulness of the seizure has no bearing on the title of the expropriator (the validity approach). The authors belonging to the third group look for more flexible solutions.

64. Invalidity and validity approaches.- Many writers embrace the view that expropriations unlawful under international law are incapable of transferring title to the property to the expropriator. The seizure is, in their view, invalid and the title remains vested in the original owner[52]. Some consider municipal and international law to be two parts of the same legal system, where the latter enjoys priority, thereby making municipal law violating the law of nations automatically null and void. Others prefer more practical motives saying that the expropriator should not be allowed to violate international law with impunity. Some authors have limited their statement to a partial problem, e.g. they speak

in favor of invalidity of unlawful takings by an occupant, and it is not clear whether they mean that any other taking in violation of international law should also be invalid[53].

There are also several authors[54] who want to invalidate unlawful expropriations by application of the public policy clause. According to these authors, any expropriation violating international law would, it seems, always be contrary to public policy. Application of *ordre public* is, however, considered by some to be an inappropriate instrument, since it requires some connecting link between the expropriation and the forum state and since all unlawful takings should be deemed invalid, regardless of such link[55].

The opposite extreme view is represented by several writers who assert that the violation of international law does not make the expropriator's title invalid[56]. These authors do not invoke the act of state doctrine, but rather the theoretical and practical advantages of this solution. They write that the unlawfulness of the seizure entails only the duty to provide compensation. Instead of invalidating the taking in courts, the remedy for the international tort is to be achieved by other, more appropriate, means, e.g. by obtaining indemnity via diplomatic channels. It has also been pointed out that the invalidation would lead to a situation where the same foreign decree would be valid as to property of certain persons (e.g. nationals of the expropriator), while it would be null and void as to property of others, depending on citizenship. Some admit, however, that the diplomatic channels are inefficient and propose the establishment of an international organ with compulsory jurisdiction[57].

It has been objected against the validity approach that if the remedies are limited to compensation, then all the difference between lawful and unlawful takings will be eliminated as even lawful expropriations of aliens' property must provide compensation[58]. Against this it can be said that in case the expropriation is considered illegal only because of the lack of compensation, the indemnity need not exceed the value of the expropriated assets, whereas in other cases (e.g. if the taking is discriminatory or contrary to an international treaty), indemnity for the *lucrum cessans* could also be claimed.

65. Flexible approaches.- The third group of authors do not consider an expropriation violating international law to be automatically and always invalid, but they are ready to invalidate the title of the expropriator under certain circumstances. Thus *Mezger* writes[59]:

"Il nous semble que l'incompatibilité avec le droit international public ne soit qu'un élément, important mais non pas décisif, pour le juge de droit interne et, à elle seule, ni suffisante ni nécessaire pour lui dicter la solution."

Similar is also the view of *Seidl-Hohenveldern*[60]:

". . . a rule of public international law would not *per se* be superior to a rule of the domestic law of a foreign state held applicable under the conflict of law rules of the forum. A public international law rule thus could not by itself oust such a rule of domestic law enacted by a third state in violation of public international law. Yet, this rule might be inapplicable in the forum as its application would there be deemed to be contrary to the forum's public policy to uphold public international law and to ensure its respect also in domestic law. However, this line of thought may possibly enter into conflict with other considerations (e.g. with certain aims of the commercial policies pursued by the forum state). The balance of these policy considerations therefore will not necessarily be in favor of unlimited respect to public international law."

The view that the forum *may* decide that a foreign expropriation violating international law is incompatible with forum's public policy has been expressed by several writers[61]. Some authors admit such flexibility also when the violation of international law is invoked not via the public policy clause, but as an independent legal reason[62].

Heiz[63] is of the view that even foreign unlawful expropriations should, in principle, be recognized as valid in the interest of legal security. Public policy could, however, be invoked in the case of a serious violation of international law. Public policy has, in his view, an advantage when compared to diplomatic remedies: the latter can be used only to protect the forum's own nationals, whereas public policy can be used also to protect nationals of third states.

Sperduti[64] seems to be of the view that, in absence of international treaties, only unlawful takings directed against the nationals of the forum should be considered invalid. This is also the view of *Raape*[65] who views the German nationality of the dispossessed as a condition for the application of public policy.

Hjerner is, in principle, in favor of invalidating foreign expropriations violating international law, but he stresses that the invalidation should not damage third persons[66]:

"A strict rule that such an illegal act shall have no effects in the national jurisdiction cannot be assumed. Other circumstances than the illegality must also be taken into consideration, e.g. long possession or the position of a bona fide buyer. One injustice cannot be taken as a pretext for another, and the reaction of the national courts against the illegal act of a foreign state must be so limited that the inconveniences do not strike innocent persons without any liens to the illegally acting state. How this is to be done is a question not answered by international law, which in itself here affords no guidance."

Eek[67] wants to reprobate foreign unlawful takings only in quite exceptional circumstances, e.g. when the taking is contrary to a treaty between the expropriator and the forum state. He writes that courts trying private actions should not pass judgment on questions concerning the mutual relationships of states.

Fickel[68] sees the solution in an open evaluation of interests by the court. In connection to the Landgericht Hamburg judgment of Jan. 22, 1973, he attempts to compare Chile's interest in the taking (the economic importance of copper for Chile, Chile's right to dispose of its natural resources) to the interests of the U.S.A. as the home country of the dispossessed owners and to the interests of West Germany as the country of the forum interested in continued import of copper. Since he finds the interests of the expropriator more worthy of protection, he favors recognition of the expropriation in that judgment.

Behrens[69] opposes any *"Patentrezepte"* in a question where the interests of developing nations and industrial nations conflict with each other. He advises great care, but gives no concrete suggestions.

66. Conclusions.- There are strong reasons to oppose the view that the validity of the expropriator's title should always be recognized, even if the taking is contrary to international law. True, the courts should not make foreign politics. In the past, it may have been advantageous to let violations of the law of nations be reprobated by other organs than courts. International law gave, in the past, great freedom to the states in enforcing their rights, e.g. even by an armed intervention. Such use of force is now forbidden by the United Nations Charter and the states have to look for new methods, both lawful and efficient. The non-recognition of the expropriator's title should thus not be based on theoretical constructions of supremacy of international law, but on purely practical considerations. This is of crucial importance, since once this view is accepted, then it is also necessary to agree with *Hjerner*[70] that it is irrelevant whether the violation of international law consists only of the refusal to pay compensation or also of other failings. It is similarly irrelevant whether the seizure involves the disputed goods or only a concession from which the goods have been extracted[71]. The leading idea is that the expropriator should not profit from the violation of international law and the only way to achieve this is to invalidate his title to the seized property. The other method, recognizing the expropriation but giving the dispossessed owners the right to compensation, is not very practical. The diplomatic channels are not always efficient and a direct action for compensation in the forum is normally barred by immunity. It is, of course, possible to agree with *Ziegel* that the best solution would be an international court with compulsory jurisdiction, but this does not solve today's problems (n. 57 *supra*).

The recognition of the expropriator's title and payment of the compensation by the expropriator is a very good solution, for example if it is reached by means of a treaty between the expropriator and the home country of the owners. Such compromise agreement can be considered to validate the expropriation retroactively, since the international tort has been mended. The real problems arise, of course, when no acceptable diplomatic solution has been found. In this situation, the invalidation of the expropriator's title to the

seized property seems to be the only way of reprobation.

There are, it is admitted, also strong reasons speaking against the invalidity approach. A reprobation of the expropriation may make continued imports from the expropriating state to the forum country very difficult, if not impossible. This, in itself, need not be regretted, as it shows that the reprobation can be an efficient method of enforcing international law. As imports, especially in developing countries, are often conditioned by exports, the forum state might, however, see its own industry damaged by the reprobation. Small countries oriented in their trade to a great expropriator might incur considerable damage. In case the expropriation concerned products that the forum state cannot obtain from other sources, e.g. oil, a reprobation may lead to a disaster[72]. These considerations may force the forum to recognize the expropriation, especially when the taking is directed against a third state and not against the nationals of the forum country.

There are also other reasons against the invalidity approach. As there are different interpretations of international law in different countries, a practice that would make any minor violation lead to an unconditional invalidity of the seizure would cause confusion and endanger the security in international trade relations. Further, the practice of states shows that the diplomatic contacts that usually follow illegal expropriations of aliens' property practically never lead to restitution. In case an agreement is reached, it is usually only a compromise about payment of compensation[73].

It is an open question whether the forum should reprobate violations of international law which are detrimental to third states to the same extent as if they were directed against the forum country itself. There seem to be no substantial grounds speaking for a general limitation of the reprobation to the latter cases. A co-operation of states in this field may be unrealistic, but remains desirable. A possible exception may be a violation of an international treaty where the forum state is not a party.

Whereas the courts have usually no sympathy for a foreign expropriator violating international law to the detriment of the forum state, it is conceivable that they may feel certain solidarity with the expropriator when the tort is directed against a third country. Thus, for example, courts in a developing state may sympathize with a taking carried out in a country in the same difficult economic situation. It is important that international law develops so that the situation of the developing countries is considered. Such development is observed, for example, in the matter of compensation for the expropriated property. But insofar as the forum believes in existence of certain rules of international law, it should help to enforce them. This is a situation not unknown to a judge who must sometimes give judgment against the party having his sympathies or compassion. The view that foreign measures violating the law of nations should be deemed invalid is not one-sidely directed against the developing states. Thus, an African lawyer writes that all concessions accorded

in Namibia by the South African Government are null and void as they are contrary to international law. He suggests that the United Nations, as trustee for the Namibian people, should go to courts in countries importing goods from Namibia and assert its ownership to them[74].

It is very difficult to give any final recommendations in the sensitive matter of expropriations violating international law. It can perhaps be suggested that violations should be reprobated by considering the title of the expropriator to be invalid, provided that all the following conditions are fulfilled:

a) The government of the damaged state (especially if the damaged state is not the state of the forum) considers the taking to violate international law,
b) the forum is of the same view,
c) the violation is of a serious nature,
d) there is no hope of a diplomatic solution within a reasonable time,
e) important economic or political interests of the forum state are not endangered by the reprobation,
f) if the taking is directed against a third state, the courts in this state are also ready to invalidate the title of the expropriator, as there are no reasons why the forum should go further in the reprobation than the courts of the damaged state itself.

This solution may be criticized as inconsistent. The unlawfulness of the seizure may lead to its invalidity in one case, but not in the other. Here it must again be stressed that the reprobation should not be based on any supremacy of international law over municipal law which would result in the automatic nullity of any governmental act violating international law, but rather on practical considerations. The fact that the forum may be coerced by economic realities to recognize the validity of an unlawful expropriation of, for example, oil fields supplying oil to the forum state, does not mean that the forum is obliged to recognize, for example, unlawful seizures by an occupant in occupied territories.

III. Unconstitutional and self-limited expropriations

67. It happens that one of the parties in a lawsuit involving a foreign expropriation asserts that the foreign expropriation law is contrary to the constitution of the *expropriating* state and, consequently, invalid. A similar problem is faced when the expropriation is allegedly contrary to international law and such law is considered in the *expropriating* country to be a part of the municipal law with stronger legal force than the expropriator decree. The forum is put before a difficult problem. It is to apply foreign law, but what really belongs to it? The constitution may formally have strong legal force, but it may, at the same time, be obsolete. When international law is invoked as part of the foreign law, is it to be interpreted as it is understood in the ex-

propriating country even if the forum is of a different view? Should the forum apply the foreign constitution even if the foreign judge himself would not be allowed to do so?

It has to be kept in mind that the constitutionality test will normally be of relevance only in one type of situation, i.e. in cases where the title of the expropriator to already effectively seized property is under dispute. As courts refuse generally to enforce foreign expropriations, the alleged unconstitutionality does not make any difference here.

Whereas one group of authors[75] oppose the study of constitutionality of foreign expropriatory laws, others[76] are of the view that the forum should examine the constitutionality, at least to the extent the courts of the expropriator are allowed to do so. According to *McNair*, even the statement by an allied government that its decree is constitutional should not be conclusive as it is both the duty and the right of an English court to inform itself by evidence as on a question of fact[77].

The unconstitutionality of the foreign expropriation decree is relatively seldom invoked in the forum. The party invoking the unconstitutionality usually asserts that the foreign decree is invalid because the contents of the decree are unconstitutional (e.g. an expropriation without indemnity) or because the decree has some formal defect (e.g. it has not been issued by the competent authority or it has not been properly published).

In some cases, the courts refused to study the constitutionality of the foreign decrees because of the act of state doctrine or similar principles[78]. As it was said in the case of *Banco de España v. Federal Reserve Bank* (U.S.C.C.A. 1940), so long as the act is the act of the foreign sovereign, it matters not how grossly the sovereign has transgressed its own laws.

In some other cases, the forum studied the constitutionality and found the decree constitutional[79] or unconstitutional[80], although in the latter case, the unconstitutionality was not the only motive for the decision.

In the third group of cases, the court studied, first of all, whether the courts of the expropriator had the right to examine the constitutionality of laws[81].

There have also been cases with very special circumstances. In the case of *Tallina Laevautisus v. Estonian State Line* (England C.A. 1946), the constitutionality of a Soviet expropriation was attacked from the viewpoint of the constitution of Estonia, but the annexation of the Baltic republics by the U.S.S.R. was already recognized *de facto* by the United Kingdom at the time of the judgment and it was held that the new sovereign was not bound by the constitution of the predecessor still recognized *de jure*.

Four reasons are usually advanced against the examination of constitutionality of foreign expropriations.

The *first* objection is that the forum is often prohibited to examine the constitutionality of *lex fori* and that it consequently should abstain from si-

milar examinations of foreign law. The question whether the forum is allowed to test the constitutionality of the statutes of *lex fori* is, however, a question of substantive law rather than of procedure. In some countries, the constitution is of great practical importance and to cut it off from the rest of the legal material would give a false picture of the legal system of the country. Constitutions serving only as political declarations have, on the other hand, no real legal force at all. The character of the constitution of the forum state should not determine the legal standing of foreign constitutions.

The *second* objection is that the forum cannot understand the foreign constitution as terms like "public utility" or "public necessity" have political implications that cannot be interpreted by the forum without misinterpretation. However, this is a problem not limited to foreign constitutions, as the same can be said about any application of foreign law. True, there is a risk of misinterpretation, but it is not greater than the risk that foreign law will be disfigured if a "living" constitution is separated from the rest of the legal rules.

The *third* objection is based on the act of state doctrine, international law or international comity which are said to forbid the study of constitutionality. It is submitted, however, that there is no such prohibition (s. 13 *supra*). In any case, the respect due to a foreign state can hardly be affected when the forum applies the foreign decree as it would be applied in the courts of the expropriator.

The *fourth* objection stresses that the forum is to interpret and apply foreign law in the same way as it is interpreted and applied in the legislating country. If there were any chance for the dispossessed owners to have the decree declared unconstitutional, they would ask for such declaration in the courts of the expropriator. The fact that they turn to the forum shows that the courts of the expropriator would consider the taking to be lawful. This is, however, not quite true. It may be the expropriator himself who sues in the forum, for example in order to obatin payment for the seized property which he has sold to a person living in the forum state. Sometimes it may be impossible for the original owner to go to the expropriator's courts, for example because he is a refugee or because the expropriating country is occupied by a third state[82].

It is submitted that "*living*" foreign constitutions should not be ignored by the forum. The constitutionality test is to be carried out in the same way and to the same extent as it is done in the legislating country. If the decree violates a written constitution which is only a dead letter, the violation shall be immaterial, provided that the decree is *de facto* in force in the legislating state[83]. All this is in accordance with the *auctor regit actum* principle.

The problem becomes more complicated when the foreign constitution is a living one, but the constitutionality test is reserved for a special constitutional tribunal. In case it is impossible for the forum to obtain the opinion of

the constitutional court in the expropriating state (e.g. because only the courts there, but not individuals or foreign courts, have the right to ask for such an opinion), it will probably have to abstain from the constitutionality test. If the foreign constitutional or other superior court has already decided upon the constitutionality, then the forum should be bound by such decision. A situation opposite to the one just mentioned is also conceivable: the forum state has a constitutional tribunal, whereas in the expropriating country, the constitutionality test is within the competence of general courts. As constitutional tribunals are normally created to protect exclusively the constitution of the forum, it appears that the test should, in this situation, be left to the general courts in the forum state.

Another problem, also closely related to the *auctor regit actum* principle, is the question of *self-limitation* of foreign expropriatory laws. In several cases, the forum tried to avoid taking position towards the effects of a foreign expropriatory or similar decree by means of its restrictive interpretation[84]. It was, for example, maintained that the foreign decree "did not intend to affect assets abroad" or that it "seized the property of juridical persons but did not intend to dissolve them".

It is, of course, quite conceivable that an expropriation law limits its own applicability[85]. Under normal circumstances, there are no reasons why such self-limitation should not be respected by the forum[86]. In most cases, the expropriator wants, however, to give his expropriation decrees the widest application that is possible. An excessively restrictive interpretation of the decrees may be unintentional, for example short time after their enactment when the intentions of the expropriator are not known. In this way, the Soviet expropriations were sometimes misinterpreted abroad. The Russian authorities contributed unintentionally to this misinterpretation. Some circular letters of Soviet ministries contained formulations that could be invoked by those who alleged that the Soviet takings had not intended to affect assets beyond Russia[87]. The courts sometimes relied in their interpretation on expert opinions furnished by lawyers-refugees from Russia[88].

The reluctance of the expropriator to litigate in foreign courts need not be a proof of self-limitation. It can often be explained by the fact that the expropriator knows that he has no chances to have his decrees enforced there[89].

It would probably be wrong to assert that the courts maliciously distorted the foreign decrees in the mentioned cases. It seems that they simply preferred, when in doubt, the interpretation that spoke in favor of a reasonable solution, although other interpretations were more probable. It would be a mistake to believe that the outcome of the cases would have been different in the case of a less restrictive interpretation of the foreign decrees. The courts would have probably arrived at the same result on other grounds, some of which are usually mentioned by the court in addition to the restrictive interpretation.

It is self-evident that foreign law should not be intentionally misinterpre-

ted by the forum and this applies also to foreign expropriatory and similar laws. The misinterpretations have been criticized by several writers in the socialist states[90] and it is necessary to agree with them. If the forum does not want to give certain effects to foreign expropriatory laws, it should give the real grounds for the decision.

It is an open question whether the forum should be bound by the interpretation furnished by the expropriator himself subsequently to the taking and in connection to a particular lawsuit. In the case of *U.S. v. Pink* (U.S. Sup. Ct. 1942), the Soviet expropriator was asked directly via diplomatic channels whether he had intended to expropriate also assets localized in the United States. The expropriator is usually not disinterested in the outcome and his interpretation may be biased.

The "self-limitation" of foreign expropriation laws must not be confused with the "territorial limitation" which is sometimes imposed upon such laws by the forum (s. 42 *supra*).

1) *Kegel* 445.
2) *Luther v. Sagor* (K.B., C.A. 1921); *Princess Palley v. Weisz* (C.A. 1929). *But King of the Hellenes v. Brostrom* (K.B. 1923).
3) *Mann*, 88 L.Q.R. 74 (1972).
4) *Lauterpacht*, Recognition in international law (Cambridge 1947) 147.
5) *Dicey and Morris(-Mann)* 559-60.
6) *Carl Zeiss Stiftung v. Rayner and Keeler* (H.L. 1967); *cf. Monta of Genoa v. Cechofrakt* (Q.B. 1956).
7) *Banco de Bilbao v. Sancha and Rey* (C.A. 1938); *cf. El Condado* (Scotland Ct. of Sessions 1939).
8) *The Kotkas* (U.S.D.C. 1940); *The Denny* (U.S.D.C. 1941); *The Maret* (U.S.C.C.A. 1944); *Merilaid v. Chase National Bank* (N.Y. Sup. Ct. 1947); *Estonian Line v. U.S.* (U.S. Ct.of Claims 1953); *Zeiss* (U.S.C.C.A. 1970).
9) *Banque de France v. Chase National Bank* and *Banque de France v. Equitable Trust* (U.S.C.C.A. 1932); *Salimoff v. Standard Oil* (N.Y.C.A. 1933); *The Denny* (U.S.C.C.A. 1942).
10) See *Lubman*, 62 Columbia L.R. 304-9 (1962).
11) *Nomis v. Federazione* (C.A. Genoa 1930); *Héritiers Bouniatian v. Optorg* (TCiv Seine 1923); *cf. Schinz v. Bächli* (Swiss BG 1926); German RG May 20, 1930; the appelate court in *Forsikrings AS Norske Atlas v. Sundén-Cullberg* (Sweden HD 1929). *But Herani v. Wladikavkazsky Ry* (C.A. Amsterdam 1942); *Zeiss* (Swiss BG 1965).
12) *Castberg* 350; *Eek*, Nya Stater 63-5; *Féaux de la Croix*, WM 1967, 1270; *Magerstein*, JBl 1954, 426; *Neumeyer* 224; *Roed*, I.L.A. 1958, 201; *Sundberg*, Folkrätt 47; *cf. Freund*, Clunet 1924, 51.
13) *Heiz* 65-7, 225-31, 253-4; *Hjerner* 338 and in Scandinavian Studies in Law 1958, 198-9; *Kegel* 445; *König* 38-42; *Münch*, 98 RC 430 (1959); *Sauveplanne*, NedTIR 1960, 46; *Schaumann*, Schw. JIR 1953, 183-4; *Seidl-Hohenveldern*, I.L.A. 1958, 201; *Vannod* 16-7; *cf. Freund*, Clunet 1924, 51.
14) *Bystrický* 109; *Lunc* 99; *Szászy* 185.
15) *Magerstein* , I.L.A. 1958, 201.
16) *Dicey and Morris (-Mann)* 560; *Seidl-Hohenveldern* 22; *U.S. v. Pink* (U.S. Sup. Ct. 1942); *Luther v. Sagor* (England C.A. 1921). *But, Nomis v. Federazione* (C.A. Genoa 1930).

17) *Shapleigh v. Mier* (U.S. Sup. Ct. 1937); *Ditmar and Linde v. Ministry of Agriculture* (Estonia Ct. Tartu 1933); *Banco de España v. Federal Reserve Bank* (U.S.C.C.A. 1940).
18) *Salimoff v. Standard Oil* (N.Y.C.A. 1933).
19) *Fouilloux* 368; *Khatib-Chahidi* 127.
20) Statement of May 7, 1974, in 13 I.L.M. 767-82 (1974).
21) Quoted from 11 I.L.M. 50 (1972).
22) 376 U.S. 431-2.
23) *Paquete Habana* (U.S. Sup. Ct. 1900), 175 U.S. 700.
24) *Bredin,* Clunet 1966, 115.
25) *Codelco v. Braden* (Trib. Paris 1972).
26) OLG München June 14, 1951.
27) *Bank Indonesia v. Senembah* (C.A. Amsterdam 1959); *Volker v. Hollandsche Assurantie* (Trib. Amsterdam 1962); lower instances in *De Nederlanden van 1845 v. Escompto Bank* (HR 1964).
28) *De Nederlanden van 1845 v. Escompto Bank* (HR 1964).
29) *U.S.A. v. Bank voor Handel en Scheepvaart* (HR 1969).
30) *Petroservice v. El Aguila* (C.A. Hague 1939).
31) *Netherlands v. Federal Reserve Bank* (U.S.C.C.A. 1953); *Menzel v. List* (N.Y. Sup. Ct. 1966); *Et. Graf v. Sté La Mure* (France Cass. 1951); *Blum v. Sté d'injection rapide* (France Cass. 1955); Austrian OGH April 18, 1951; June 20, 1951; July 20, 1955; *Bertrand v. Bontemps* (C.A. Liège 1951); *Pensioenfonds v. P.C.G.* (C.A. Amsterdam 1951); *Ministerio Difesa v. Ambriola* (Italy Cass. 1951); *Randfjordsbruket and Jevnaker Kommune v. Viul Tresliperi* (Norway Sup. Ct. 1951); *Bataafsche v. The War Damage Commission* (Singapore C.A. 1956). In *U.S.A. v. Dollfuss Mieg* (England H.L. 1952), the action of the original owner failed because of the immunity of the present holder of the property. For practice after World War I, see *Oppenheim and Lauterpacht* II 411 n. 6.
32) *Woolsey,* 37 A.J.I.L. 282 (1943).
33) *Guggenheim,* Schw. JIR 1949, 139-41; *Rosenberg v. Fischer, P. v. AG K and P.* (both BG Restitution Chamber 1948).
34) *Ministerio Difesa v. Salamone* (Italy Cass. 1950); *cf.* Sup. Ct. British Zone of Germany Oct. 13, 1949; *Christen v. Onderlinge* (Netherlands Council for Restoration of Legal Rights 1951).
35) *Statens Jordlovsudvalg v. Pedersen* (Denmark Sup. Ct. 1948).
36) *Bertrand v. Bontemps* (C.A. Liège 1951); *cf. Bataafsche v. The War Damage Commission* (Singapore C.A. 1956).
37) *Ministerio Difesa v. Salamone* (Italy Cass. 1950).
38) Austrian OGH April 18, 1951.
39) *Menzel v. List* (N.Y. Sup. Ct. 1966); *Pensioenfonds v. P.C.G.* (C.A. Amsterdam 1951).
40) Austrian OGH June 20, 1951.
41) *Rich v. Naviera Vacuba* (U.S.C.C.A. 1961); *Sabbatino No.1* (U.S. Sup. Ct. 1964); *Petroservice v. El Aguila* (C.A. Hague 1939); *Anglo-Iranian Oil Co. v. Idemitsu Kosan* (Tokyo High Ct. 1953).
42) *Sabbatino No.2* (U.S.C.C.A. 1967); *Anglo-Iranian Oil Co. v. Jaffrate* (Aden Sup. Ct. 1953); n. 26, 27, 28 *supra.*
43) *U.S.A. v. Bank voor Handel en Scheepvaart* (Netherlands HR 1969); *Anglo-Iranian Oil Co. v. SUPOR* (TCiv Rome 1954).
44) *The Rigmor* (Sweden HD 1942); *Anglo-Iranian Oil Co. v. Idemitsu Kosan* (Tokyo High Ct. 1953); OLG Bremen Aug. 21, 1959.
45) *But, Anglo-Iranian Oil Co. v. Jaffrate* (Aden Sup. Ct. 1953).

46) *De Nederlanden van 1845 v. Escompto Bank* (Netherlands HR 1964); OLG Bremen Aug. 21, 1959; LG Hamburg Jan. 22, 1973.
47) *Oppenheim and Lauterpacht* I 268 and II 410-1 n. 6; *Verzijl,* ZaöRV 1958, 543, 549; *Wortley,* Expropriation 16-7. See n. 74 *infra.*
48) *Baade,* 3 JIR 134 (1950-1); *Bayer,* ZaöRV 1965, 49; *Behrens,* RabelsZ 1973, 418; *Hjerner* 55; *Schwarzenberger* 523-4; *Seidl–Hohenveldern,* 56 A.J.I.L. 509 (1962).
49) OLG Bremen Aug. 21, 1959; LG Hamburg Jan. 22, 1973; *Anglo-Iranian Oil Co. v. Idemitsu Kosan* (Tokyo High Ct. 1953).
50) *Riphagen,* NedTIR 1973, 28.
51) The O.E.C.D. Draft Convention on the Protection of Foreign Property, Clunet 1963, 686.
52) *Castberg* 351, 360-1; *Domke,* 55 A.J.I.L. 610 ff. (1961); *Hjerner,* Scandinavian Studies in Law 1958, 199, 214-5; *Kegel* 445; *Kollewijn,* NedTIR 1959, 144, 150, 152, Clunet 1964, 625 and 1969, 984-6; *Magerstein,* JBl 1950, 351-3; *Mann,* NJW 1961, 709-10 and 132 RC 151, 155 (1971); *Morgenstern,* 4 I.L.Q. 343-4 (1951); *Oppenheim and Lauterpacht* II 411; *Sauveplanne,* NedTIR 1960, 47-8; *Van Hecke,* 126 RC 526 (1969); *Verdross,* NedTIR 1959, 285; *Vischer,* IPR 658; *Wortley,* Expropriation 17.
53) *Jägerskjöld,* SvJT 1945, 93; *Nial* 132.
54) *De Nova,* Rev. 1958, 541; *Niederer,* Schw. JIR 1954, 99; *Schaumann,* Schw. JIR 1953, 167.
55) *Kollewijn,* Clunet 1964, 623-5.
56) *Baade,* 54 A.J.I.L. 805 (1960); *Delson,* 57 Columbia L.R. 763-4 (1957); *Gihl,* Two Cases 62; *Meessen,* AWD 1973, 179; *Raape* 663.
57) *Ziegel,* 6 McGill L.J. 27-9 (1959-60).
58) *Verdross,* NedTIR 1959, 285.
59) *Mezger,* Rev. 1962, 395.
60) *Seidl-Hohenveldern,* 123 RC 14 (1968). See also *Seidl-Hohenveldern* 36, 43, Die Friedenswarte 1955, 17 and 7 JIR 384-5 (1957), AWD 1974, 426-8.
61) *Beitzke,* RabelsZ 1949-50, 147; *Madsen-Mygdal* 245-6; *Makarov* 34; *Raape* 663; *Vannod* 43.
62) *Carlston,* 54 Nw. U.L.R. 418 (1959-60); *cf. Makarov* 34.
63) *Heiz* 209, 212, 232-4.
64) *Sperduti,* Rivista di diritto internazionale 1973, 288.
65) *Raape* 663.
66) *Hjerner,* Scandinavian Studies in Law 1958, 200.
67) *Eek* 211-2.
68) *Fickel,* AWD 1974, 73-5.
69) *Behrens,* RabelsZ 1973, 433-4.
70) *Hjerner* 344, 365-6.
71) *Mann,* NJW 1961, 709.
72) It has for example been asserted that a reprobation of a Libyan oil nationalization would lead to a blackout of the New York City, 13 I.L.M. 776 (1974).
73) *Fatouros* 310.
74) *Sagay,* 66 A.J.I.L. 600-4 (1972). See the advisory opinion of the International Court of Justice on Namibia of June 21, 1971, 10 I.L.M. 715 (1971).
75) *Adriaanse* 138; *Castberg* 362; *Heiz* 170; *Morris,* 68 L.Q.R. 127 (1952); *Seidl-Hohenveldern* 44-6; *Vannod* 34-5.
76) *Bystrický* 130; *De Nova,* Rev. 1958, 536; *Eek* 207; *Fedozzi,* 27 RC 206 (1929); *Mann,* 132 RC 153-5 (1971); *Morgenstern,* 4 I.L.Q. 330-1 (1951); *Münch,* 98 RC 435-7 (1959); *Van Hecke,* 126 RC 515 (1969); *Wolff,* PIL 174; *cf. Adriaanse* 138;

Neumeyer 221-2.

77) *McNair*, 57 L.Q.R. 69 (1941).

78) *Banco de España v. Federal Reserve Bank* (U.S.C.C.A. 1940); *Sabbatino No.1* (U.S.D.C. 1961); *Cementos Resola v. Larrasquitu* (C.A. Poitiers 1937); *Lafuente v. Llaguno y Duranona* (C.A. Bordeaux 1938); *Petroservice v. El. Aguila* (C.A. Hague 1939); *cf. Present v. U.S. Life* (N.J. Sup. Ct. 1967).

79) *Anglo-Iranian Oil Co. v. SUPOR* (TCiv Rome 1954); *cf. Shapleigh v. Mier* (U.S. Sup. Ct. 1937).

80) *Petroservice v. El Aguila* (D.C. Rotterdam 1938); *Belgium v. Lubrafol* (U.S.D.C. 1941).

81) *Princess Palley v. Weisz* (England C.A. 1929); OLG Bremen Aug. 21, 1959.

82) *Cf. Re Amand No.2* (K.B. 1942) which did not, however, involve foreign expropriation.

83) *King of the Hellenes v. Brostrom* (K.B. 1923).

84) *Lecouturier v. Rey* (H.L. 1910); *Russian Commercial and Industrial Bank v. Comptoir d'escompte de Mulhouse* (H.L. 1925); *Employers Liability v. Sedgwick Collins* (H.L. 1927); *The Jupiter No.3* (England C.A. 1927); *Tallina Laevautisus v. Estonian State Line* (England C.A. 1946); OLG Hamburg Nov. 13, 1957.

85) Greek State Council 1957, AWD 1958, 99.

86) *Lalive*, Schw. JIR 1971, 107-8 shows, however, some doubt in this respect.

87) *Sarraute and Tager*, Clunet 1952, 1141-3.

88) *Russian Commercial and Industrial Bank v. Comptoir d'escompte de Mulhouse* (H.L. 1925).

89) See *Seidl-Hohenveldern*, ÖJZ 1949, 533.

90) *Bystrický* 232; *Lunc* 175.

PART THREE

PARTITION OF THE EXPROPRIATION LOSS

CHAPTER EIGHT

THE PROBLEM

68. Expropriation loss.- In the previous chapters, the main question was the expropriator's title to the expropriated property. Many lawsuits do not, however, concern the expropriator's rights, but rather the question who is to bear the loss caused by the foreign expropriation (*the expropriation loss*). The loss partition problem has been relatively seldom discussed in legal literature. For this reason, this part of the thesis goes to more detail than the previous ones.

If the expropriator profits by the seizure, then somebody must suffer a loss. This is quite evident and confirms the adage that it is not possible to eat a cake and still keep it. The direct loss corresponds to the value of the seized assets, provided that the taking has been enforced and that no compensation has been offered to the owner. Indirect loss is also conceivable, since the seizure may make it impossible for the owner to fulfil his contractual obligations and inflict him or his contractual partners additional damage.

At a first glance, it might seem obvious that the loss should be borne by the dispossessed owner, but this is not quite true. One type of cases involving loss partition has already been considered, namely the case of *bona fide* acquisition of seized tangibles (s. 36 *supra*), where the courts have to decide whether the loss is to be borne by the dispossessed owner or by the person who in good faith purchased the property from the expropriator. This is, however, a very special problem, as it is linked to the question of the expropriator's title.

In this Part of the thesis, we shall discuss the discharging effects of foreign expropriations on obligations. The dispossessed owners have often invoked a foreign expropriation as discharge of their contractual or other obligations. If the seizure is given such liberating effect, the loss will be wholly or partially transferred from the owner to other persons. We can, for example, imagine a bailee who has been coerced to deliver the property entrusted to him into the hands of a foreign expropriator. Will he be allowed to invoke the seizure as a discharge of his obligations *vis-à-vis* the original owner of the property? May a mandatary who has incurred expropriation loss during the execution of the mandate ask the mandator to cover the loss? Is a debtor who has been compelled to pay the value of the debt to the foreign expropriator discharged of his debt? The forum is asked to partition the expropriation loss between two (or more) usually equally innocent parties. A decision in favor of one of the parties will necessarily damage the other party. This "Scylla and Charibdis problem" calls for considerations other than those relevant to

recognition of the expropriator's rights to the expropriated property.

It happens that the forum has to partition a potential expropriation loss, i.e. the risk that a foreign expropriation would be carried out in the future. Since the partition of the *expropriation risk* has many similarities to the partition of the expropriation loss, they will be handled together.

69. Statutory and case law.- With some exceptions, the legislators have let the problem of loss partitioning be tackled by courts with the help of general rules. Special legislative interventions partitioning loss caused by foreign expropriations are few. The legislators intervene only in critical situations after large foreign expropriations and the legislative measures cover only some special situations. It remains for the courts to make the law. For this reason, the special legislative measures will be handled together with the case law.

70. Expropriation profit.- It is conceivable, although rare, that the forum has to partition a profit caused by a foreign expropriation. Thus, in the cases decided by the German Reichsgericht on Nov. 13, 1917, and by the Swiss Federal Tribunal on May 18, 1917, the goods to be delivered for a certain price under a contract were seized by the state of the seller before the delivery. The price of the goods was at the time of the seizure higher than at the time of the conclusion of the contract. The expropriator paid full compensation to the seller and the court in the state of the buyer had to decide whether the seller's extra profit was to be delivered to the buyer. The answer was found in the proper law of the contract.

CHAPTER NINE

CASE LAW

I. Expropriation of the object of specific obligations

71. Introduction.- If the specifically ascertained property which is necessary for fulfilment of an obligation is seized, the fulfilment becomes impossible. It is obvious that, for example, a bailee evicted from possession by a foreign expropriation cannot be required to deliver the same object to its original owner. Instead, the questions arise whether the party unable to fulfil becomes liable for damages and whether he is entitled to performance from the other party. In some cases, the parties foresaw the risk of loss already at the time of the conclusion of the contract and agreed in advance on a certain loss partition. In default of such agreement, the forum has to rely on the legal rules governing the type of the legal relationship involved. These rules usually stipulate that property "perishes" for its owner and that other persons bear the loss only if they have assumed the risk or caused the loss by non-fulfilment of their duties.

72. Bailment.- In bailment contracts, the expropriation loss has, as a rule, been put on the owner and not on the bailee:

X. v. Agence Y. (TCom Seine 1926): The bailee bank was not liable for negotiable instruments deposited for the client in Moscow and seized there by a *fait du prince* similar to *force majeure.*

Marchak v. Rabinerson (C.A. Paris 1933): Jewels kept by Marchak for Rabinerson were seized in Kiew. Marchak was found discharged by *force majeure.* The court relied on French law, although both parties had been Russian nationals and residents at the time of the conclusion of the contract. It mentioned, however, that Russian law stipulated, *"d'ailleurs"*, the same.

Kobylinsky v. Banco di Chivari (Italy Cass. 1951): Kobylinsky had deposited a chest with silver with the bank. German occupants expropriated Kobylinsky's property and compelled the bank to deliver the chest to them. The court found the bank liberated since it had not failed to take all reasonable steps to protect the depositor. The seizure had been, further, in conformity with the law of nations.

Banque des marchands de Moscou (Ch. 1952): The Russian bank was not responsible for securities deposited with it in Russia and seized there, because a bailee who has been evicted by title paramount has no longer any liability under the bailment. The court relied on a British precedent.

In the following case, the *risk* of loss discharged the bailee:

Bercholz v. Guaranty Trust (N.Y. Sup. Ct. 1943): The bailee bank refused to deliver securities to their owner, a French refugee, as there was a risk that in the future it would have to face similar demands by the French state which had forbidden the delivery. The court decided for the bank, stressing that it was an American company.

This practice is indirectly supported also by judgments where the loss was partitioned otherwise, but only after the court had established that the claim was generic[1]. Of interest is the case of

Crédit national industriel v. Crédit lyonnais (TCom Seine 1925, C.A. Paris 1926, Cass. 1929): In 1917, sums of rubles were deposited at the Russian branch of the Crédit lyonnais with the account of the Crédit national. The Russian branch of the Crédit lyonnais was expropriated and the Crédit national sued in France for payment of the deposit's value. The TCom pointed out that this was not a usual bank deposit, since the depositor had to pay the bank for keeping the money instead of obtaining interest. This was not a contract of loan, but of bailment. The bailee could consequently refuse payment relying on *force majeure* provisions in French law. The TCom also mentioned that negotiations on compensation were being conducted between France and the Soviet Government, so that the claim of the Crédit national had to be rejected only for the time being. The C.A. and Cass. classified the contract as a generic bank deposit; the Crédit lyonnais was thus liable and could not invoke *force majeure*. The claim was, however, considered worthless due to the depreciation of the ruble. Also the C.A. and Cass. applied French law.

When the bailee was guilty in the seizure, the court did not hesitate to put the loss on him:

Plesch v. Banque nationale d'Haiti (N.Y. App. Div. 1948): The bank kept securities in New York for Plesch. Under a Haitian decree expropriating the property of Plesch, the bank moved the securities to Haiti where they were seized. The court found the bank liable. The decree could not be recognized in the U.S.A. because of public policy and it could not consequently be asserted as a defense. The court compared the taking to an action by thieves. The bank had transferred the securities to Haiti without consent of Plesch and it had thus violated its duties as bailee. The court mentioned that the bank was wholly owned by the Haitian expropriator.

73. Sale.- Also in contracts of sale and other similar contracts, the main part of the loss was put on the owner. When the seizure had made fulfilment impossible, the seller was obliged to repay the advance payments he had obtained from the buyer. The seller was, however, not liable to pay damages for non-fulfilment.

Kursell v. Timber Operators and Contractors Ltd. (England C.A. 1927): In 1920, the plaintiffs sold to the defendants timber growing in a certain forest in Latvia. The defendants were to have 15 years in which to cut the timber and pay the price by in-

stallment. A few days after the conclusion of the contract, Latvia expropriated the forest. The plaintiffs contended that the title to the timber had passed to the defendants (English law was invoked) and that the timber was at the risk of the defendants. The court held that the title had not passed and that the loss was on the seller.

Swerintzeffs arvingar v. Nilsson-Åkers (Sweden HD 1937)[2]: Swerintzeff, a Russian, paid in 1917 to Nilsson-Åkers, a Swede, a down-payment for a house in Moscow. Nilsson obliged himself to sell the house (*pactum de contrahendo*) and put the money on a bank account in Moscow. Both the house and the money were expropriated. Swerintzeff's heirs sued for repayment of the down-payment and a fine, arguing that Swerintzeff had been willing to fulfil his part of the contract. The court obliged Nilsson to repay the down-payment which was, however, worthless due to the depreciation of ruble. The claim for the fine was rejected since the sale had become impossible for both parties.

Blue Star Line v. Burmeister & Wain (Denmark Sup. Ct. 1948): German occupants requisitioned a vessel that was being built in Denmark for an English firm. The court put the loss on the Danish dockyard which had to repay the down-payment. The dockyard was, however, not liable to pay damages for non-fulfilment since it had been unable to avert the taking. The incompatibility of the requisition with the law of nations, invoked by the English firm, was irrelevant.

OLG Braunschweig Jan. 6, 1948: The plaintiff ordered and advanced payment for machinery to be delivered from the defendant's works in East Germany. Due to the expropriation of the works, the delivery became impossible and the plaintiff demanded restitution of the advanced amounts. The court gave judgment for the plaintiff. It had not been shown that the defendant would not be enriched by a discharge, as the advance payments had been made to an account in the West. The court expressly rejected the idea that the loss was to be partitioned between the parties, as such equitable partition would lead to legal insecurity. It was for the legislator to intervene if he wanted the loss transferred from one party to the other.

OLG Düsseldorf June 22, 1955: Real property in East Berlin belonging to owners living in the West was subjected to special "control" equalling expropriation. According to the court, this amounted to a *Wegfall der Geschäftsgrundlage*, since it would be contrary to *Treu und Glauben* to coerce a buyer under a *pactum de contrahendo* to fulfil his obligation, i.e. to buy the property and pay the price.

The loss was put on the seller even when the title to the property had passed to the buyer before the seizure, provided that there were special reasons to do so:

Quigley v. Desjardins (Cour supérieure Québec 1903): An American had purchased furs in Canada without knowing that their importation to the U.S.A. was forbidden. The Canadian seller promised to deliver the furs in the U.S.A. and smuggled them there, but they were seized by U.S. Customs few days after delivery. The buyer was by the court granted the right to recover the sum he had paid for the furs. The loss was on the seller who had known about the prohibition and had assumed the risk by promising delivery in the U.S.A. The buyer was considered to have acted in good faith.

This judgment is to be compared to a case decided shortly before:

Couch v. Desjardins (Cour supérieure Québec 1903): The circumstances were almost identical with those in the *Quigley* case, but here the buyer had not been in good faith. The loss was put on the buyer, as the seller was not liable for losses incurred after the delivery.

74. Other contracts.- The following examples involve contracts of transportation, charter and mandate:

Monta of Genoa v. Cechofrakt (England Q.B. 1956): A vessel carrying cargo from China was intercepted by a Taiwan vessel and the cargo was seized. The lawsuit did not concern the cargo, but only the freight costs. The carrier was recognized the right to full freight costs, as there was a clause in the contract guaranteeing the carrier's right to payment even if the vessel would have to comply with orders of any government.

The Adriatic (U.S.C.C.A. 1919): The British steamer Adriatic was chartered for a voyage and, while en route to the starting point, it was requisitioned by Great Britain. The contract provided that if the vessel were requisitioned by the Admiralty, the charter should be null and void. The charterers contended that the requisition was illegal. The court held that the act of state doctrine prevented the determination of the validity of the requisition and that the suggestion by the British Ambassador that the requisition was lawful had to be accepted as conclusive.

Texas Co. v. Hogarth Shipping (U.S. Sup. Ct. 1921): Texas Co., an American oil company, concluded a charterparty with Hogarth, a British shipowner, for a specific vessel in 1915. The vessel was requisitioned by the British Government and Hogarth notified Texas that it would not be available. Texas procured another vessel at an increased cost and sued Hogarth for damages. The action was rejected. Hogarth had acted in good faith and had tried to avert the seizure. The contract had been entered into on an implied condition that if the ship were rendered unavailable by a supervening act, the contract would be at an end and the parties absolved from liabilities. The court relied also on the validity of the seizure.

Tatem v. Gamboa (England K.B. 1939): It was agreed between the plaintiff (shipowner) and the defendant (charterer) that the vessel would be hired for 30 days at a rate of about three times the market rate for the purpose of evacuation of refugees from Spain to France. The hire was paid in advance. The vessel was stopped and detained by the Franco Government and the shipowner sued for hire for the detainment period. The court decided for the charterer relying on the frustration of performance. It mentioned that the charter was at a very high rate of freight, obviously because of the hazardous nature of the enterprise in which the ship was to be engaged.

Frumier de Boylesve v. Jordaan (C.A. Paris 1927): The plaintiff ordered the defendant bank to buy for him Russian war bonds. Due to the war events, the bonds could not be transferred from Russia and they were kept there for the plaintiff until they were seized by the Soviets. In the opinion of the court, the bank had fulfilled its obligations. The buy and the storage were at the risk of the client.

75. Comparative remarks.- The loss of the value of the seized property is practically always put on its owner unless the parties have agreed otherwise or the party other than the owner has caused the seizure. As to fines and damages for non-fulfilment, the courts allow the obliged person to invoke the seizure as *force majeure*, i.e. as an unforeseeable event that could not be averted. It can be assumed that the courts would here, too, decide otherwise if the loss had been caused by the obliged party. The case law is consistent with the provisions of law governing the various contract types like bailment, sale, etc. The law usually puts the loss on the owner of the property and nobody is liable to fulfil an impossible obligation.

It appears that the courts do not seek solutions in application of the foreign expropriation decree, but rather in the mutual relationship of the parties. The validity of the foreign decree does not seem to be relevant, although it happens that the court examines, *inter alia*, also the lawfulness of the taking under international law or its compatibility with the public policy of the forum[3]. If the foreign expropriation is considered as a fact, for example as a *force majeure*, its validity should be as irrelevant as the "validity" of a natural disaster.

According to the usual rules of private international law, the relationship between the parties is governed by the proper law of the contract. Hence, it is the rule of that law concerning impossibility, *force majeure*, etc. that should be invoked. It appears, however, that the courts tend to apply *lex fori* also when the proper law of the contract is probably foreign law[4]. Sometimes, the court does not even make clear which law is applied. In *Swerintzeffs arvingar v. Nilsson-Åkers* and *Khorosh v. Rossia* the proper law was probably Russian (the contracts involved real property in Russia), but the courts did not say whether they applied Russian, Swedish (French) or other law or perhaps some general principles of justice. With the exception of the reference in *Marchak v. Rabinerson*, the courts seem never to have considered any law other than *lex fori*. In *Texas Co. v. Hogarth Shipping*, the problem was solved by discovering an "implied" condition in the contract so that the applicable law was irrelevant.

II. Expropriatory interventions into contracts of mandate

76. Introduction.- Mandate is a contract under which the mandatary undertakes to conduct a certain affair on behalf of the mandator. As the mandatary acts for the mandator upon his instructions, he is normally required only to act with care and (professional) skill. Unless guilty of negligence or bad intentions, the mandatary is not responsible to the mandator for the result of his actions. The mandator shall further compensate the mandatory for costs reasonably incurred by the latter at the execution of the mandate.

It happens that a foreign expropriation spoils the result the mandate was

supposed to achieve and the forum must partition the loss between the mandator and the mandatary. A case where a specific object of a mandate had been expropriated has already been mentioned[5]. In the following cases, the seized property was, from the point of view of the mandate contract, of generic nature.

77. **Money transfers.**- Several Swedish judgments concern contracts under which Swedish banks were, upon instructions of their Swedish clients, to place rubles to accounts in Russia. The clients or the addressees did not, however, obtain the money in that country due to the expropriation of Russian banks. The ruble also became worthless. When the clients moved to recover the amounts in Swedish crowns they had paid to the Swedish banks, their actions were rejected[6]. The Swedish Supreme Court said that the banks had not guaranteed the result of the mandate. The transfers had been made at the risk of the clients. *Hjerner* interprets the judgments to mean that the clients could still recover the amounts in rubles.[7] Although this was of no practical importance because of the total depreciation of the ruble, it seems that the clients were not entitled to amounts in rubles either. The banks had bought the rubles in Russia, but these had been lost by expropriation. If the banks were obliged to repay the amounts to their clients, they would have to bear the loss. This would be contrary to the principles governing contracts of mandate.

Money transfers must be distinguished from the cases where the bank only sells a check or money order to be presented in the foreign country by the client himself. The risk that the foreign bank would not honor the check or money order was put on the issuing bank and it had to repay the ruble value of the check (money order) to the client[8]. The loss caused by the depreciation of the ruble was, however, on the client. He could recover the original amount in Swedish crowns only when the bank had agreed to assume even that risk[9]. These were not contracts of mandate. The bank suffered no loss from the impossibility to cash the check (money order) in Russia and it could be obliged to repay the amount to the client without risking double liability. When the bank could show that it had paid the value of the check, although it had not been honored in Russia (the bank had no account of its own in Russia and drew the checks on the Russian account of another Swedish bank and paid immediately the value of the check to this bank), the court accordingly discharged the bank. It was not liable to repay the amount to the client either in Swedish currency or in rubles[10].

Several interesting judgments can be found in Switzerland:

Dr. W. v. Privat- und Verwaltungsgesellschaft (HG Zürich 1934): W. bought "interior" German marks from the company which promised to deliver them to a payee in Germany. The German payee refused to accept the payment executed in violation of German

currency laws and the amount was seized by German authorities. The court found the mandatary company entitled to the value of the seized sums and to costs. It had not acted carelessly and it had even informed W. about the risks connected with the mandate.

B. v. Lombardbank (HG Zürich 1935): The circumstances were similar to those in the case above. The court classified the contract as one of sale, not of mandate. The loss was, nevertheless, put on the buyer (mandator) as the transaction had been at his risk according to the will of the parties. The buyer was a banker and he must have known about the risks. The seller had done all he had obliged himself to do and it was not his fault that the German payee had not accepted the payment.

Frankl v. Fina (BG 1937): Fina, a Swiss company, bought Austrian shillings from Frankl, a Czechoslovak bank, to be paid by Frankl to a person in Vienna. This was illegal under Austrian currency laws and the shillings were seized in Austria before the delivery. Fina demanded resitution of the amount in Swiss francs which it had paid to Frankl. The cantonal court, invoking Swiss law, obliged Frankl to pay, since it had not fulfilled the contract. Frankl had assumed the risk by promising delivery in Vienna. The BG found the contract governed by Austrian law, but the application by the lower court of Swiss law was beyond the BG's control.

A French case in point is

Banque des pays v. Banque française (C.A. Paris 1936): The Banque française (the mandator) bought "interior" German marks from the Banque des pays which promised to pay the sum on behalf of the mandator to a German company in Germany "sous réserve de toutes difficultés de transfert pouvant résulter de mesures officielles ou autres restrictions". The payee refused to accept such payment forbidden by German law and the amount was seized. The mandator now demanded repayment of the sum in francs. The court gave judgment for the mandator. The mandatary had failed to demand permission of German authorities to effect the transfer and acted *in fraudem legis*. It had not been shown that the mandator had known that payment would be made in violation of German law. The court classified the contract as one of sale and not of mandate and applied French law.

The classification of the contract as one of sale was probably only a method by which the just partition of the loss was achieved. The mandatary had to bear the loss also in

Bronstein v. Banque russo-asiatique (C.A. Paris 1933): Bronstein bought in 1917 an amount in dollars from the defendant bank in Russia and the bank promised to transfer the amount to an account in the U.S.A. The transfer was not executed and Bronstein sued for payment from the bank's property in France. The bank contended, *inter alia*, that the expropriation of its property in Russia had constituted *force majeure*. The court held the bank liable to pay. It was shown that the bank had negligently failed to execute the transfer before the expropriation. Certain mitigation of the bank's obligation was, however, achieved by application of a rate of exchange disadvantageous for Bronstein.

It seems that the bank was considered to have caused the loss by postponing the transfer until it was too late[11].

78. Other types of mandate.- The mandatary was to blame for the loss in the following two cases:

Avi v. Langstaff (TCom Seine 1922): The plaintiff instructed the defendants to deliver a package to a person in Russia in exchange for a check on Paris. The mandataries delivered the package, but accepted payment in cash instead of the check. A decree of the Russian Government made it impossible to transfer the amount to France. It remained in Russia where it was later expropriated. The mandator sued for the value of the check. The mandataries argued that the mandate had been executed at the risk of the mandator and that the Russian decree had constituted *force majeure*. The court obliged the mandataries to pay. They were guilty of breach of contract, having accepted payment in cash instead of the check and they had to cover the damage.

BGH April 24, 1954: In April, 1945, the client asked the defendant bank to cash a check drawn on the Reichsbank in Berlin. Although the bank could present the check at the Reichsbank's local branch, it sent the check to Berlin where it arrived too late to be cashed, due to the war events. The BGH put the loss on the bank. It was to cover the damage incurred by the client.

The next two cases involve loans for the purpose of smuggling. The circumstances are very similar to those in cases of mandate and the authors commenting the judgments speak sometimes explicitly of mandate[12]. The loss was put on the mandator (creditor) in

Spitzer v. Amunategui (TCiv Seine 1956): Spitzer gave an amount of gold to Amunategui in Lisbon who promised to pay Spitzer a sum in escudos within a week "sauf en cas de confiscation". Amunategui was supposed to smuggle the gold to Spain, sell it there and bring the money back to Portugal. The gold was seized by Spanish authorities. Spitzer sued for payment. The court rejected the action as the contract was illegal having "une cause illicite".

It is tempting to see in this decision an expression of international co-operation in enforcement of public law. It should not, however, be forgotten that the case mainly involved a partition of the loss caused by an already enforced foreign taking. The outcome was in accordance with the contract. The court would have hardly come to the same result had the smuggling succeeded and Amunategui made profit. This can be illustrated by the second case:

Vogt v. Muller (C.A. Colmar 1932): This decision involved a loan for the purpose of smuggling from Germany to France. The court obliged the debtors (mandataries) to repay the loan although they asserted that the contract was contrary to good morals and that it had "une cause illicite". The court stated that the foreign decrees which the parties had intended to violate were not binding for French nationals and that the contract was lawful.

In this case, no seizure was mentioned. It seems that the smuggling had either been successful or it had not been attempted. There was no loss to be partitioned.

A Swedish case in point is

Alltrafiks Nya AB v. Alm (HD 1941): Alm, an employee of a Swedish travel agency, transported money through Germany on behalf of the employer. Alm omitted to declare the amounts to German customs and the money was seized. Alm was punished by a fine which was paid by the employer. The employer attempted to use the value of the fine as well as of the seized money for a set-off against certain claims of Alm. The court assumed that Alm had violated German laws with the consent and in the interest of the employer. The set-off was not allowed.

This decision involved a contract of employment rather than of mandate, but also here one person had acted on behalf and at the risk of another. The employer had to stand not only for the loss of the transported money, but also for the costs (fine) incurred by Alm at the execution of the mandate. The same position was taken in

Geissmann v. Bentzinger (C.A. Colmar 1937): Bentzinger, a German refugee, asked Geissmann, a Frenchman, to smuggle out of Germany some property belonging to Bentzinger. Geissmann was stopped by German customs, Bentzinger's property was seized and Geissmann himself was punished by confiscation of his car and by fine. He sued Bentzinger and demanded compensation for his losses (it seems that both parties agreed that the loss of Bentzinger's property was to be borne by Bentzinger). The court found the contract not immoral and enforceable. Bentzinger as mandator was held liable to cover the losses of Geissmann who was guilty of no fault. French law was invoked.

Also this case shows that the French courts sometimes use morality or immorality of the contract as an instrument of loss partition.

79. Comparative remarks.- In cases involving contracts of mandate and other similar contracts, the courts partition the expropriation loss in accordance with the rules of law regulating contracts of that kind. The loss is normally put on the mandator. When the mandatary is guilty of the loss, he must bear it[13]. The loss is put on the mandatary also if he has assumed the risk of expropriation[14] or if he has not acted *bona fide* to the mandator[15].

The courts found solutions in the mutual relationship of the parties. The courts did not feel they were "applying" the foreign decree when giving it certain effect, e.g. when discharging the mandatary or obliging the mandator to cover the mandatary's loss. They abstained, consequently, from inquiring whether the taking was valid, compatible with public policy or international law, etc.

III. Expropriations of generic claims

80. Introduction.- As claims ascertained generically but not in money are seldom expropriated[16], we shall, in the following, speak about financial claims. The results can, nevertheless, be used by analogy to other types of generic obligations.

Financial claims can be expropriated as any other kind of property. The taking is directed against the creditor. The money is, however, collected from the debtor. The seizure is enforced by compelling the debtor to pay the value of the debt to the expropriator. The expropriator will subsequently consider the debtor discharged of his debt.

The debtor who has paid the value of the debt to the expropriator faces a problem if he owns assets outside of the expropriating state. The dispossessed creditor often sues the debtor in courts outside of the expropriating country for a new payment for himself. The debtor invokes the payment to the foreign expropriator as discharge. The real issue in these lawsuits is the partition of the expropriation loss. The insterests of the expropriator are not at stake.

Debtors invoking payment to the foreign expropriator as discharge are in a position worse than e.g. a bailee who had to deliver some specific property to the expropriator. Firstly, the seized money was property of the debtor. Secondly, a payment to the expropriator does not make a new payment to the original creditor impossible as *force majeure*, since payment in money is always deemed to be possible. A general refusal to discharge the debtor from double liability would, however, lead to unbearable results. The seizure is directed against the creditor, perhaps as a result of his crimes. Why should the innocent debtor stand for the loss? Against putting the loss quite generally on the creditor, it can, however, be said that in many cases the creditor is equally innocent as the debtor.

Closely related to double liability in expropriation cases is the situation where one person is by foreign law obliged to pay taxes on behalf of another (e.g. an employer on behalf of an employee), while having the right of redress (e.g. by a deduction from wages). If the forum does not allow the redress, the person who has paid to the foreign state (e.g. the employer) will incur a kind of double liability.

81. U.S.A.- A statutory rule protecting certain debtors from double liability has been enacted in New York. Under the Section 204-a(3)(a) of the New York Banking Law[17], foreign banks doing business in New York are there liable for contracts to be performed at their offices abroad and for deposits to be repaid at such offices to no greater extent than a bank organized under the laws of such foreign country would be liable under its laws. This provision makes it possible for foreign banks to invoke as discharge the payments made to an expropriator abroad.

In two old cases, the expropriation was not discharging:

Williams v. Bruffy (U.S. Sup. Ct. 1877) and *Stevens v. Griffith* (U.S. Sup. Ct. 1884): The debtors who had been coerced to pay debts due to loyal U.S. creditors into the hands of the Confederate expropriator during the Civil War had to pay again to their original creditors. The debtors could not claim release by reason of the coerced payment to an "unlawful combination". The enactments of the Confederates had been unlawful and void. The court admitted, however, that they might have discharged a bailee of a seized tangible, depending on the same principles which control in ordinary cases of violence too powerful to be successfully resisted. In the *Stevens* case, the debtor had done all he could to prevent the taking and had paid only under the threats of imprisonment. The court said, however, that he could not escape the consequences of the insurrection in the community of which he was a member, whatever might have been his individual feelings.

Several New York judgments held the debtor discharged:

Kleve v. Basler Lebensversicherungsgesellschaft (N.Y. Sup. Ct. 1943): The German branch of the defendant Swiss insurance company paid, as required by Nazi authorities, the value of the plaintiff's policy to them. The court decided for the defendant. The policy was governed by German law. The taking was, further, an act of state. The court invoked also the power of the German Government over the assets represented by the policies. It expressed hope that some after-war settlement would compensate the creditor.

Bloch v. Basler Lebensversicherungsgesellschaft (N.Y. Sup. Ct. 1947): The circumstances were similar to those in the above case. The court found the debtor liberated, arguing that the seizure was an act of state which had to be respected.

Trujillo v. The Bank of Nova Scotia (N.Y. Sup. Ct. 1966): The Dominican republic expropriated property of the Trujillo family. The Canadian bank was forced to pay to the expropriator the value of an account kept by Trujillo with its office in that country. The court found the bank discharged, invoking both the New York Banking Law and the act of state doctrine.

As we can see, the act of state doctrine may be used as an instrument of loss partitioning. At the enactment of the *Sabbatino* Amendment (s. 10 *supra*), it was made clear that it was not intended to prevent financial institutions from using the doctrine as a defense to multiple liability in expropriation cases[18]. It is obvious that the doctrine is here not an expression of respect to foreign state acts, but rather a rule aimed at a certain partition of the expropriation loss.

In an important recent federal case, the loss was put on the debtor:

Oliva v. Pan American Life and Aetna (U.S.C.C.A. 1971): Plaintiff, a Cuban refugee, had taken insurance with the defendant American companies. Cuba expropriated the policies and the companies were compelled to pay their value to the expropriator. Under Cuban law, the companies were discharged. The court held them liable. The act of state doctrine did not preclude recovery by the plaintiff.

This judgment is incompatible with the mentioned New York decisions more in formal motives than in the real loss partitioning effects. As the policies were in pesos, the value had to be converted into dollars. Although the contract stipulated payments on the basis of one peso for every dollar, which also was the official rate of exchange, the court applied the rate valid in American money markets at the time the plaintiff presented his demand to the company. The value of the peso after the political changes in Cuba was almost nil[19]. It seems that the choice of exchange rate implied some kind of loss division transferring a great part of the loss to the creditor.

The debtor was held liable also in:

Menendez v. Saks and Co. (U.S.C.C.A. 1973): Cuba expropriated Cuban cigar-manufacturing companies and placed "interventors" in charge of these enterprises. The inter ventors continued to export cigars to the same U.S. importers as before the expropriation. The dispossessed owners sued the importers in order to recover payment for deliveries made before the expropriation. The importers argued that they had already by mistake paid to the expropriator. The court held that the dispossessed owners were entitled to the money. The importers were allowed to deduct this new payment from the debt they owed to the expropriator for post-intervention shipments. The act of state doctrine was found not to bar such a set-off.

The debtor was liable although he had already paid, by mistake, to the expropriator. The debtor, who was in the favorable position of owing money to the expropriator, was, at the same time, allowed to recover the amount by means of a set-off. This means that the debtor was not risking double liability, provided that the value of the pre-intervention shipments was not greater than that of the post-intervention ones.

A few words can be said also about cases involving partition of the expropriation risk. In *Russian Reinsurance v. Stoddard* (N.Y.C.A. 1925), the American debtor was allowed to refuse payment to an expropriated Russian company, since he was not protected from possible future claims by the Soviet expropriator. In *Petrogradsky Bank v. National City Bank* (N.Y.C.A. 1930), the court found the double liability risk negligible, but it also stressed that this risk had been assumed by the debtor when entering the banking business. The *Stoddard* case was distinguished as it had been an action in equity and not in law. In several judgments, the risk of double liability was found non-existent, not proved, purely theoretical or it was simply ignored[20]. In most of these cases, the debtor did not even assert that he owned property in the expropriating state.

It is of interest to mention that the American courts protect debtors from double liability also under an American seizure:

Cities Service Co. v. McGrath (U.S. Sup. Ct. 1952): The court obliged the American debtor to pay the U.S. Custodian of Enemy Property, although the bearer bonds were not held by the Custodian. The debtor would in case of double liability be entitled to

just compensation under the Fifth Amendment of the U.S. Constitution.

Loss caused by foreign revenue laws was partitioned in

Korthinos v. Niarchos (U.S.C.C.A. 1950): The employer was, under Greek revenue law, obliged to deduct taxes from the wages of seamen serving on a Greek vessel. The seamen contended that the employer was not entitled to deduct the tax when paying wages in the U.S.A. The court held for the employer. The law of a foreign government with respect to its nationals serving as seamen on a vessel flying its flag could not be ignored.

From the above cases, it is necessary to distinguish those where the double liability invoked by the debtor was only fictitious:

Sokoloff v. National City Bank (N.Y.C.A. 1924, 1928): The debtor, an American bank, argued in vain that the creditor's account had been expropriated in Russia. The account had been expropriated only subsequently to seizure of all Russian assets of the bank. Thus, the taking of the account could not have been an extra burden for it.

Sulyok v. Penzintezeti (N.Y. App. Div. 1952): The debtor, a Hungarian state-owned bank, was not discharged by the expropriation of the creditor's claim in Hungary. Foreign confiscations could not be asserted as a defense, since they are invalid and ineffective as contrary to American public policy.

In the first case, the expropriation of the creditor's account had not caused any real loss. In the second case, the debtor was in fact identical with the expropriator. There was thus no place for loss partitioning considerations.

82. England.- In an old case, the debtor was not discharged:

Wolff v. Oxholm (K.B. 1817): A Danish debtor paid, as he was required to do under Danish war legislation, the money he owed to an English creditor into the hands of the Danish expropriator. The court obliged him to pay again. The discharge granted in Denmark was disregarded, since the seizure was not conformable to the usage of nations. The Danish ordinance had not been followed by any practical measures of compulsion upon the debtor.

As the expropriation was considered to be contrary to international law, it was perhaps felt to be natural to put the loss on the party of the expropriator's nationality. Certain enrichment of the debtor, as alleged by the creditor, may also have been of some relevance: the debtor had paid to the expropriator at an extremely advantageous exchange rate, eight times under the current rate. The court seems to have been of the view that the debtor should have opposed the seizure and that he had paid voluntarily to make a profit.

The debtors were refused discharge also in

Spiller v. Turner (Ch. 1897) and *Indian and General Investment Trust v. Borax* (Ch. 1919): Debtors in Australia and the U.S.A. were, under the laws of those countries, obliged to deduct from their payments to creditors in England certain income tax. Creditors sued for full payment and the court decided in their favor, thus imposing double liability on the debtors to the extent of the tax. The debts were governed by English law and they were to be fulfilled in England. Foreign law was thus immaterial. In the *Borax* case, the court said that it was not part of its duties to enforce taxing acts of other countries.

Rossano v. Manufacturers Life (Q.B. 1963): Rossano, a national and resident of Egypt, had bought insurance from the Canadian company through its branch in Egypt. He left Egypt and sued in England for the value of the matured insurance. The company objected, *inter alia*, that Egyptian authorities had served garnishment orders on the company's branch in Egypt in respect of Rossano's revenue debts. The court required the company to pay. The garnishment orders could not be given any effect, since English courts would not enforce, directly or indirectly, a foreign revenue law or claim. A payment to the Egyptian revenue authorities could not constitute a valid discharge.

The interests of a foreign treasury were not involved in the lawsuits. It appears that the debtors could not refuse to pay to the foreign authorities in any case. Under such circumstances, it is strange to speak about non-enforcement of foreign revenue laws. The real issue was that of loss partition and it is not clear why the loss was put on the debtors. It was perhaps hoped that the foreign state would restitute the collected amounts and repeal the garnishment order as a consequence of the English judgment.

The debtor was found released in

Arab Bank v. Barclays Bank (H.L. 1954): The Jerusalem branch of the debtor English bank paid the balance of the creditor's bank account to the Israeli Custodian as required by local law. The court found that the account had been "situate" in Israel and subjected to Israeli legislation. It had thus been validly vested in the Custodian with discharging effect for the debtor bank.

A case involving partition of the expropriation risk is *Employers Liability v. Sedgwick Collins* (H.L. 1927), where the English debtor objected against a garnishment order that there was a risk of double liability in Russia. The court found the risk small, since it expected that the Russian expropriator would recognize the discharge accorded in England (it was even said that international law obliged Russia to do so).

83. **France.**- Loss caused by foreign revenue laws was partitioned in

Héritiers Vogt v. Feltin (Cass. 1928): German authorities compelled Vogt to pay certain taxes due by Feltin (it seems that they were both jointly and severally liable for revenue debts connected with a company they had owned together). Vogt's heirs sued Feltin on the basis of undue enrichment, arguing that Feltin had been discharged of his German

revenue debts and thus enriched. The action was rejected. Foreign fiscal laws, the court said, are unenforceable in France.

Hirschfeld v. Wuhler (Cass. 1934): Hirschfeld, a French company, bought in January 1923 a house in Germany from Wuhler, a German. Hirschfeld promised to pay German fiscal fees for the transfer of the property and he also paid them. In December 1923, a German law raised retroactively the fees and Wuhler had to pay this surcharge. He now demanded redress from Hirschfeld. The action was rejected. Hirschfeld had not assumed to pay also possible future taxes. The retroactive character of a foreign fiscal law could not, further, be invoked in French courts against French nationals.

As in similar English cases, the court seems not to have realized that there was no question of enforcement of foreign fiscal laws. In the *Hirschfeld* case, the court relied, however, not only on the fiscal nature of the foreign law, but also on the interpretation of the contract and on the nationality of the parties.

The debtor was protected from double liability in

Cass. Dec. 8, 1970: A tenant of real property expropriated in Algeria was compelled to pay the rent to the expropriator. The court obliged him to pay also to the dispossessed owner. He could, however, deduct the sums he had to pay in Algeria.

84. **Italy.**- The loss was put on the debtor in

Levi v. Monte dei Paschi di Siena (Cass. 1947): German occupants compelled a bank to hand over to them the value of deposits belonging to their Jewish clients. The court found the bank not discharged. It established that the claim was generic and invoked the *res perit domino* principle. It also stressed that the seizure was an unlawful and criminal act of violence. The bank was the victim of the violence and it had to carry the loss.

It seems that the seizure was considered to be comparable to a bank robbery which could not absolve the bank. When the legality of the taking was not denied, the debtor was protected from loss:

Council of State Dec. 9, 1958: The Italian consul in Israel refused to pay rent to his Arab landlord because of the parallel claim of the Israeli Custodian. The refusal was upheld in view of the double liability risk. The legality of the taking was also studied.

85. **Switzerland.**- The decisions involving expropriations of insurance policies issued or guaranteed by Swiss insurers are of particular interest. Several judgments favor the dispossessed creditor:

Universale v. Wolff De Beer (OG Zürich 1940): The Jewish insured left Germany and assigned his claim to other persons. The German insurer paid the value of the policy to the Nazi expropriator. The present holder of the policy sued the Swiss company which had guaranteed the claim. The court obliged the surety to pay. The German insurer had known that the claim had been ceded and it should have opposed the taking.

Rückversicherungsgesellschaft v. Perutz (BG 1941): The Austrian insurer paid the amount due to an insured into the hands of the Nazi authorities. The BG stated explicitly that there was no need to invoke public policy: the solution was to be found in the relationship between the parties. The Swiss guarantor was held liable because of the nature of the guarantee (*Schuldmitübernahme* , co-debtorship). The same outcome was reached in a similar case, *Rückversicherungsgesellschaft v. Dr. M.D.*, decided by the BG on the same day. Different grounds were, however, used by the OG Zürich in the two cases. In the *Dr. M.D.* case, the OG Zürich argued that the foreign decrees were contrary to Swiss public policy, whereas in the *Perutz* case, another chamber of the same OG considered that question irrelevant and sought the solution in the relationship of the parties.

Rückversicherungsgesellschaft v. R.A. (OG Zürich 1943): The Jewish client's claim was paid to the Nazi expropriator by the Austrian insurer. The court held the Swiss guarantor liable to the original creditor. The position of the guarantor was classified as that of a co-debtor and not of a surety. The payment to the expropriator had not constituted fulfilment, as the measure was contrary to Swiss public policy.

In the best known case, the debtor was, however, discharged:

Schw. Lebensversicherungs- und Rentenanstalt v. Elkan (BG 1953): Elkan took out insurance with the German branch of the Swiss insurer. German authorities ordered the branch to pay the value of the policy to them and the branch obeyed the order. After the war, Elkan sued for a declaration that his rights subsisted notwithstanding the seizure. He argued that obligations of Swiss debtors were "situated" in Switzerland and that they could not have been validly expropriated in Germany. The taking was, in any case, contrary to Swiss public policy. Whilst the OG Zürich accepted these arguments and gave judgment for the creditor, the BG took the opposite view. It admitted that expropriations are operative only within the territory of the expropriator, but it added that "situs" of debts could not be simply determined as a fact. As to the attitude of the Swiss *ordre public* towards the expropriation, it was said that the Nazi racial laws had been unenforceable in Switzerland. However, since the Nazis had seized the claim, without there being a possibility for undoing what had been done, Swiss public policy did not require the non-recognition of the event and the imposition on the company of an obligation which was not incumbent upon it if it had fulfilled the contract. That would constitute an expropriation of the company, not to be justified by the fact that the Nazi taking was unworthy of a state respecting the law. The insurer had been under no duty to try to delay payment in face of demands by the German authorities based on the laws in force in Germany at that time.

This judgment should not be considered inconsistent with the previous ones. In the *Universale* case, the debtor could perhaps have averted the seizure by objecting that the claim had already been ceded by the Jewish creditor. In the *Rückversicherungsgesellschaft* cases, the outcomes seem to be rooted in the nature of the co-debtorship, which was considered to comprise also this type of risks and losses. In *Elkan*, there were no such factors. What is more, at the time of the *Elkan* judgment, the war was over and there was hope that the creditor would obtain compensation in West Germany under special laws (*Wiedergutmachungsgesetze*). This may have influenced the court.

From the above cases, one must distinguish the following one:

OG Zürich Sept. 16, 1952: The plaintiff had a pension claim against the defendant Hungarian bank. According to special Hungarian decrees, pensions of emigrants were expropriated. The court obliged the bank to pay despite the taking, invoking Swiss public policy.

The debtor bank was controlled by the expropriator and the double liability was, thus, only fictitious.

In order to protect Swiss sureties from expropriation losses, a special provision was enacted in 1941[21], according to which if a debtor living abroad is discharged by foreign law or such law limits his obligation, the Swiss surety is also discharged, unless otherwise agreed. This rule stipulates a presumption that the Swiss surety is not supposed to cover losses caused to the creditor by foreign expropriatory or similar laws.

86. West Germany.- The German Civil Code says in its Article 242 that the debtor is obliged to fulfil his obligation according to "*Treu und Glauben*". This makes it possible for the court to say that it would be contrary to *Treu und Glauben* to demand a new payment from a debtor who had already paid to a foreign expropriator. The magic words *Treu und Glauben* do not solve the loss partition problem, since they must be interpreted by the forum in each particular case, but they make a flexible approach formally impeccable[22].

Another statutory provision of interest is the *Vertragshilfegesetz*[23], which gave the courts the right to discharge, wholly or in part, the debtors of obligations originating prior to June 21, 1948. The discharge was to depend on the court's feeling for justice.

There are several interesting pre-war decisions:

RG Oct. 4, 1882: The Austrian debtor was, under Austrian law, obliged to deduct certain amounts from the interest he paid to his creditor and to pay them to the Austrian treasury. The RG decided that the debtor had to pay his creditor full interest without deduction. It argued, *inter alia*, that the Austrian law was fiscal and without effect beyond the Austrian sphere of power. This outcome was demanded also by *Treu und Glauben* as the Austrian law had existed already at the time of the contract conclusion (emission of bonds) and the debtor had agreed to pay full interest without informing the creditors about the deduction.

RG May 2, 1924: The value of the debt was collected by the British expropriator from the debtor's branch in India. The RG held the debtor discharged. True, the debt was "situated" in Germany, but the Versailles treaty had obliged Germany to recognize the taking. The creditor was to turn to the German state for compensation.

RG Dec. 20, 1924: The RG assumed that a payment by the debtor bank's branch in Brussels to the expropriator would, if it had taken place, have discharged the debtor.

RG April 3, 1925: The payment of the debt to the English expropriator had discharged

the debtor only if the taking had to be recognized under the Versailles treaty, but not otherwise (otherwise the taking was "*unwirksam*").

RG March 18, 1931: The London branch of a Swiss bank was compelled to pay to the British expropriator the value of an account belonging to a German creditor. The creditor sued the bank in Germany and contended, *inter alia*, that the taking was contrary to the Versailles treaty. The RG declared this to be irrelevant. Even if the taking had been unlawful, the debtor had not been guilty of fault. The expropriation had been directed against the creditor who was to bear the loss. The debtor had had no duty to oppose the seizure. He had done enough by informing the creditor about it. The London branch of the debtor had been in the power sphere of the expropriator and it could be assumed that the debtor would have been coerced to pay, even if it had refused to comply voluntarily with the seizure.

RG June 13, 1934: A German-owned company in France kept an account with a Danish bank. During World War I, France sequestered the company and the Danish bank paid, upon demands by the expropriator, the money to the French authorities. After the war, one of the owners sued the bank for payment. The bank argued that it had not been possible for it to refuse to obey the expropriator as it had owned sequestrable property in France. The RG found the payment not discharging, relying on the rules of international law protecting private property in time of war.

It seems that the decisions are more favorable to the debtor. In the 1882 case, the outcome can be explained by the fact that the debtor had not acted in good faith. In the cases of 1924 and 1925, the court relied mainly on the Versailles treaty when recognizing the discharge, but in the 1931 judgment the lawfulness of the taking was deemed irrelevant and the solution was found in the mutual relationship of the parties. The 1934 decision appears to be incompatible with that of 1931; it was perhaps felt that the Danish bank had not been under real pressure to obey the expropriator.

More recent decisions protect the debtor from double liability:

BGH Feb. 1, 1952: East Germany expropriated a claim secured by a mortgage on real property in East Germany. The expropriator was registered as mortgagee. The debtor, living in the West, was sued there by the original creditor. It has also to be mentioned that the debtor did not own the real property at the time of the lawsuit. He had sold it, but remained personally liable for the debt. The buyer had assumed the burden of mortgage and compensated himself by a reduction of the purchase price. The BGH stated that the "situs" of the debt was at the residence of the debtor, but it based its decision more on loss partitioning considerations. To make the debtor pay to the original creditor would be to make him pay twice, since he had already paid once when selling the property for a reduced price. The question was whether the creditor or the debtor was to bear the loss. This could not be decided generally. The relationship between the parties was to be studied according to *Treu und Glauben*. Under the circumstances, it would be contrary to *Treu und Glauben* to force the debtor to pay. The BGH admitted that this put the creditor in a position worse than that of creditors of unsecured claims.

In the following case, the court went so far as to order the creditor to

restitute to his debtor payments already obtained, since it turned out that the debtor would have to pay the expropriator:

BGH Jan. 15, 1954: The debtor paid his debt and the creditor gave his consent to the erasure of the mortgage. The East German court refused, however, to erase it, arguing that the debtor should have paid to the East German expropriator and not to his original creditor. The BGH ordered the creditor to restitute the obtained payment to his debtor. Claims secured by mortgage are "situated" at the property securing them and can be validly expropriated there. But even if this were disregarded, it would be against *Treu und Glauben* to make the debtor pay a creditor who cannot bring about erasure of the mortgage.

In the 1952 judgment, the claim's "situs" was only mentioned and the court relied mainly on loss partitioning considerations, while in the 1954 case the court relied mainly on the "situs", stressing, nevertheless, that an equitable loss partition would lead to the same result. Both cases have to be compared to the following judgment:

BGH Nov. 6, 1958: Both the debtor and the creditor lived in the West. The mortgage registered on property in the East was transferred to the East German expropriatior. The debtor sued the creditor in order to establish that he was discharged of the debt which was also secured by a mortgage in the West. The BGH found the debtor not discharged. The debt was "situate" at the residence of the debtor, regardless of whether it was secured by mortgage and in spite of the fact that this was a *Realkredit* where the mortgaged property was the center of the transaction. The debtor, if menaced by double liability, could be granted the right to refuse payment (*Leistungsverweigerungsrecht*) based on *Treu und Glauben*. This did not, however, mean that the debtor was discharged and could obtain erasure of the mortgage in the West. The BGH said also that it would not help the expropriator of the mortgage to seize also the personal debt in the West.

It seems that the expropriation of the mortgage in the East was not, in this case, considered equal to a payment of the debt to the expropriator. The court spoke about the *risk* of double liability, although the expropriator had already stepped into the rights of the mortgagee. The court declared itself ready to protect the debtor from double liability. This means that the creditor could not demand payment from the mortgage in the West, but this mortgage was, at the same time, not to be erased. It might be asked what was the meaning of conserving the mortgage in the West, especially as it could lead to unnecessary complications for the owner of the mortgaged property, e.g. if he wanted to sell it. A conceivable explanation is that the court hoped the expropriator would not attempt to collect the value of the debt from the mortgage in the East. The motivation of the court is also of interest. It located the claim at the seat of the debtor, although only two months later it declared that *Realkredit* claims were situated at the mortgaged property[24]. It is also to be noted that the court reasoned as if the expropriator himself had come to collect the claim in the West. In reality, the court was only to par-

tition the loss (or risk). The statement that a discharge would be a decision in favor of the East German expropriator appears to be somewhat out of place.

The best known case in point did not involve a foreign expropriation, but a German seizure during the Nazi period. The problem was, however, the same. The court protected the debtor from double liability even here:

BGH Feb. 11, 1953: The circumstances were similar to those in the Swiss *Elkan* case. The BGH gave judgment for the insurer (debtor). The claim was governed by German law, but this was not found to be decisive. The BGH invoked the "territorial limitation" and the "situs" of the claim. As it belonged to the portfolio of the German branch, its "situs" was in Germany and it could be validly seized there. The Nazi laws were unlawful, but they could not be ignored, since the Nazis had been able to enforce this *"Unrecht"* effectively for many years. To ignore this would lead to a chaos. The dispossessed could obtain compensation under the West German reparation laws[25]. The BGH rejected also the demand for damages presented by the creditor, who asserted that the debtor had not even tried to oppose the seizure. The situation in Nazi Germany had been such that the debtor could not have saved the claim by even the most ferocious resistance. The fact that the debtor had paid "*zu willfährig*" could thus be ignored.

Also in this case, the BGH invoked both the "situs" of the debt and the loss partition considerations. In the following cases, even debtors who had paid to the expropriator without coercion, but by mistake, were discharged:

BGH Dec. 22, 1953: The claim against a debtor living in the East was secured by a mortgage in the West. The debtor paid to the East German expropriator. The BGH recognized the discharge. The debtor had paid in good faith and he had not profited by it. He had not intended to damage the creditor. The representatives of the creditor had contributed to the loss, since they had omitted to draw the attention of the debtor to the fact that the expropriator was not the rightful creditor. True, ist is normally for the debtor to make sure he is paying the right creditor, but this rule could not be applied to complications emanating from the division of Germany and its effect on claims secured by mortgages. The discharge was demanded by *Treu und Glauben*. General rules could not be formulated. The circumstances of each particular case were decisive.

BGH April 15, 1955: The debtor and the owner of the mortgaged property in West Berlin paid the debt to the East German expropriator. The original creditor now opposed the erasure of the mortgage. The BGH stated that the seat of the debtor should normally be decisive as the "situs" of the claim. As the debtor lived in the West, the claim could not have been validly seized in the East. The debtor had, however, paid the expropriator by mistake and a new payment would be contrary to *Treu und Glauben*. There were no rigid rules and circumstances in each case had to be considered. The debtor *in casu* had paid the expropriator in 1946 when it was unknown that East German measures would be denied extraterritorial effect by courts in the West.

In these cases, the debtor was given the advantage of his own ignorance of law. The opposite outcome was reached in

BGH Nov. 11, 1953: The debtor living in the West paid the debt, secured by a mort-

gage in the West, to the East German expropriator. The BGH did not recognize the discharge. The original creditor had failed to inform the debtor about the expropriation, but he had been in the power of the expropriator and had not even known that the expropriator would try to collect his claims from debtors in the West. The creditor firm had been seized only a short time before the payment, so that its representatives had had not time to inform the debtor in any case. Although it was not shown that the debtor had acted *mala fide*, he was not absolved.

This judgment came only six weeks before that of Dec. 22, 1953. It is not probable that the court had changed its views so suddenly. In the December judgment, the November case was distinguished by the seat of the debtor. In both cases, the court used the *Treu und Glauben* clause. A more formalistic approach is exemplified by the following case:

OLG Frankfurt June 27, 1952: A bank seized in East Germany was the mortgagee of a property in the West. The owners of the property paid the expropriator and the original owners of the bank lodged a complaint against the cancellation of the mortgage. The court held that the complaint was justified irrespective of the good faith of the debtors. The payment had not discharged them because of the "territorial limitation" which was considered a rule of international law.

It must be kept in mind that this judgment originates prior to the Federal Tribunal decisions of Dec. 22 and Nov. 11, 1953.

In several cases involving partition of expropriation *risk*, the courts found a middle path: they were willing to make the debtor pay to his original creditor, provided that the latter gave security or promised to compensate the debtor in case of double liability[26]. The *Leistungsverweigerungsrecht* in the cases involving expropriation *risk* was temporary and the courts felt free to grant it generously until closer investigation of the risk could be made[27]. In several judgments, the risk of double liability was, however, found very small or it was ignored[28]. A whole group of decisions concern expropriations of German property in the Netherlands. Dutch debtors refused to pay debts to their German creditors, asserting that the claims belonged to the Netherlands state. The creditors demanded satisfaction from the mortgages in West Germany and the courts decided in their favor relying on "territorial limitation" and "situs" of the claims. Claims secured by mortgages were considered to have their "situs" at the mortgage[29], at least when there was a close relationship between the mortgage and the claim (*Realkredit*)[30]. Sometimes the court admitted that the claim was located in the Netherlands, but argued that the taking's effects could not be recognized on the mortgage in Germany because of the "territorial limitation"[31]. It would be a mistake to interpret these decisions to put the loss on the debtors. The courts in the Netherlands protected the debtors from double liability by giving them the right to refuse payment to the expropriator if the claim was secured by a mortgage in Germany. The Dutch expropriator was unsuccessful in his own courts even

when he offered security for the potential loss that might be sustained by the debtors, since the debtors had the right to have the mortgage in Germany erased and this the expropriator could not offer[32]. There was thus no risk of double liability, as one West German court expressly pointed out[33]. When the claim was not secured by a mortgage in Germany, the debtor was protected from the risk of double liability and considered discharged[34]. The Federal Tribunal considered here the "situs" of the claim to be in the Netherlands. The "situs" approach can be illustrated also by the following decision:

BGH March 24, 1955: The debtor, an Italian insurance company, refused after World War II to pay a pension to the creditor, arguing that the pension claim had been expropriated in Czechoslovakia from where the creditor had been removed because of his German origin. The BGH held the company liable. The claim had never been situated in Czechoslovakia and its seizure by that country was thus impossible (*gar nicht möglich*). But even if this point of law were left out of consideration, the debtor ran no risk of double liability as it had ceased to do business in Czechoslovakia and it had not delivered any of its reserves to that state.

It is obvious that no legal "situs" of a claim, as ingenious as it might be, can avert its physical seizure from the debtor who owns property in the expropriating state. Although the fact that the debtor owned no assets in Czechoslovakia was invoked only as a secondary consideration, it seems to be more relevant than any "impossibility" of seizure based on legal fictions.

Also in West Germany, it is necessary to distinguish decisions where the double liability invoked by the debtor was fictitious. Sometimes the debtor and the expropriator were identical:

OLG Hamburg Nov. 25, 1959: The plaintiff was a Netherlands company originally owned by Germans, but expropriated by the Netherlands and represented in the present lawsuit by the expropriator. The defendants were the original owners of another Dutch company that had also been seized. The plaintiff demanded redress for the defendants' revenue debts it had to pay to the Dutch treasury under a suretyship originating before the expropriation. The action was rejected, since German courts do not enforce public-law claims of foreign states. The suretyship had not changed the claim into a private one.

This case reminds one of the French decision in *Héritiers Vogt v. Feltin*, but there is a difference. The Dutch expropriator had paid from one of his pockets to another (the state-owned company had paid to the state). Thus, there was no question of loss partition. Another case where double liability was fictitious is

BGH Feb. 25, 1960: In 1941, the plaintiff granted, through his branch in Strasbourg, credit to a firm there. The defendant, a German company owning 75% of the stock of the principal debtor, assumed suretyship for the debt. After the retreat of German troops, the French Government expropriated both the principal debtor and the Stras-

bourg branch of the creditor. The creditor sued the surety for payment. The BGH decided for the creditor. True, the debt had been seized in France, but this could not affect the guarantee in Germany because of the "territorial limitation". It was irrelevant that the surety could not recover the sum from the main debtor in France. The surety could turn for help to the *Vertragshilfegesetz* and as long as there was such special law, the general provisions of *Treu und Glauben* could not be applied.

The expropriation of the claim had caused no real loss to the debtor, since it had come simultaneously with the expropriation of all his property in France[35]. There are several other West German decisions where the court, as well as the parties, discussed foreign expropriations of claims although the real loss had been caused by seizure of the debtor's property which was economically connected with the debt. There are reasons to believe that the courts were conscious of this. Although they normally protect the debtor from double liability, the debtors were, in these cases, obliged to pay to their original creditors. The decisions will be discussed later (s. 100 *infra*).

87. Scandinavia.- In a Swedish case, the court obliged the debtor to pay again, but the circumstances were very special:

Molnár v. Wilsons AB (HD 1954): Hungary expropriated the Hungarian creditor firm. The Swedish debtor paid the debt to the expropriator without coercion and despite warnings by the original owner of the creditor firm, but he obtained a promise that the amount would be repaid in case of double liability. The court obliged the debtor to pay anew to the original owner. The debt was "property in Sweden" and could not be seized abroad because of the "territorial limitation".

The debtor had paid the expropriator voluntarily, perhaps in order to protect his commercial interests in Hungary. He had not acted in good faith as he had been warned. But, first of all, it seems that there was no loss to be partitioned, since the expropriator had promised to protect the debtor from double liability. To release the debtor would thus amount to enforcement of the expropriation.

A Norwegian court did not hesitate to put the loss on a debtor who had paid voluntarily the foreign expropriator:

Böhm v. Bergsland (Byrett Oslo 1939): The Norwegian debtor paid the debt to the German expropriator, obviously in order not to endanger his commercial relations to Germany. The court obliged him to pay anew, this time to his original creditor.

In some cases, the debtors argued that there was a risk that the Soviet expropriator might claim the money from them in the future, but they did not assert that they owned property in Russia or that they had been threatened by the expropriator. The alleged *risk* of double liability was consequently ignored by the courts[36].

Of great interest is the Norwegian case law involving partition of the loss caused by expropriations by German occupants in Norway during World War II. The loss was put on the debtors:

Andresens Bank v. Norges Rederforbund (Sup. Ct. 1947): Germans compelled the bank where Rederforbund kept an account to deliver its value. After the war, Rederforbund sued the bank for payment. The court decided that the payment to the occupants had not discharged the bank as the seizure had been contrary to international law. Two Justices dissented: the measure had been directed against Rederforbund and it had not been in the power of the bank to resist it.

Kongeriket Norges Hypotekbank v. Bergens Provincialloge (Sup. Ct. 1948): The occupants coerced a lodge of free masons to hand over certain bonds and cashed the bonds in a bank. The court obliged the bank to pay the value of the bonds to the masons. The bank had known, when cashing the bonds, that they had been unlawfully seized. The fact that the masons themselves had delivered the bonds to the occupants was irrelevant. One Justice dissented: the taking had been directed against the masons and the bank could not have averted it.

Sobral v. Bergens Privatbank (Sup. Ct. 1949): The occupants seized certain tangibles of the plaintiff and paid compensation to a frozen account. The account itself was expropriated some time later. The court decided that the bank had to pay anew the value of the account, this time to the plaintiff. One Justice pointed out that war entails risks for all professions, also for banks, and they have to bear them themselves. One Justice dissented: this case was to be distinguished from *Andresens* as here the account had not originated before the occupation, but was itself a result of expropriation. The compensation for the tangible had only "passed through the books of the bank".

Norges Bank v. Polski Komitet Azotowy (Sup. Ct. 1951): German occupants in Poland seized an enterprise there. The same occupants in Norway forced the Norwegian bank to pay to them the value of a deposit belonging to the Polish enterprise. The court found this payment not discharging and the bank was obliged to pay anew. The expropriation in Poland had been contrary to international law and without effect in Norway. The bank should have waited with payment until a court decision. The court gave no effect to a decree that had been issued by the Quisling administration in Norway and which forced the bank to pay.

It seems that the court was of the view that the loss was to be borne by the owner of the seized property. As the seized claims had been generic, the money belonged to the debtor banks and not to the creditors. This view can be traced in

Trondhjems Sparbank v. S. Johs Logen (Sup. Ct. 1951): The occupants compelled a free mason chapter to hand over a negotiable receipt giving the right to a certain amount of bonds of a certain type deposited with the bank. With the help of the receipt, the occupants collected the bonds. The court (in a 3:2 judgment) found the bank not absolved. The bonds had been ascertained generically. It was irrelevant that the bank had not been able to avoid obeying the occupants. The bank had been *mala fide*, since it knew how the receipt had come into the hands of the occupants. The dissenters wanted

to discharge the bank, arguing that the masons themselves had delivered the receipt to the expropriator and that the bank could not be required to resist duress better than the masons. The masons had also failed to inform the bank about the seizure and had not asked the bank to stop delivery of the bonds. The bank official who had delivered the bonds was himself a mason, but the bank had no other choice than to obey.

It is peculiar that the majority attributed relevance to the fact that the bank had been *mala fide*, although it was common ground that the bank had not been able to prevent the delivery in any case.

In two decisions, the debtors were, however, discharged:

Bergens Provincialloge v. Norges Bank and Krigsskadetrygden (Sup. Ct. 1950): The court unanimously discharged the issuer of bonds and the bank which kept the bonds before the seizure. The bank had delivered the bonds to the occupants, but only after having contacted the owners who had admitted that the bank had no choice but to obey. The resigned attitude of the owners was decisive for the court.

The reasoning in the judgment is surprising. The only difference between this case and those previously mentioned seems to be that while here the creditor had admitted that the debtor had no choice, the creditors in the previously mentioned cases did not have any opportunity to express their view; what is more, in some cases they had tacitly resigned and delivered receipts or bonds to the expropriator. In no case it was asserted that the debtor could have averted the taking. The seizure was found discharging also in

Samuelsen v. Norges Bank (Sup. Ct. 1951): The occupants expropriated property of the exiled Samuelsen. The debtor of Samuelsen, ignoring who was his rightful creditor, paid to an official depositum with Norges Bank according to Norwegian law. The occupants coerced the bank to deliver the sum to them. In a 3:2 judgment, the bank was found discharged, mainly because the payment to the depositum had been made when the bank was controlled by the occupants and it had, thus, not served to secure the interests of the creditor.

This judgment indicates that the original debtor who had attempted to discharge his debt by deposition was not released (he was not a party to the present lawsuit). This case is not incompatible with the decision in *Norges Bank v. Polski Komitet Azotowy,* which also involved a similar official depositum, since there the deposition was made before the expropriation and undoubtedly discharged the original debtor.

88. Canada.- A Canadian case in point is

National Surety v. Larsen (B.C.C.A. 1929): National, an insurance company, provided bail in order to obtain release of an arrested person in the U.S.A. The arrested agreed to compensate the company in case of a loss of the bail and his wife secured this liability by mortgaging her property in Canada. As the arrested violated the conditions of

the bail, the company lost the sum and sued in Canada for redress. The debtor contended that the claim was contrary to public policy but the court gave judgment for the company.

This case is similar to those where one person had to pay taxes on behalf of another and sued for redress. The loss has been caused by the behavior of the arrested debtor and it was natural to let him bear the consequences. This was not an action by a foreign state for enforcement of its penal laws, but only a case of loss partition.

89. **India.**- The debtor was protected from double liability in

Delhi Mills v. Singh (Sup. Ct. 1955): Hindu merchants in what was subsequently to become Pakistan deposited maney with the local branch of a company with head office in India. The branch was compelled to pay the Pakistani Custodian of Evacuee Property. The Indian court recognized the payment as discharging. The Pakistani taking was not penal and confiscatory, since India had the same type of laws. However, the court admitted that it might have come to a different decision if there had been no payment to the Pakistani Custodian.

It seems that the nature of the taking (which was openly directed against the Hindu minority) was less decisive than the fact that the debtor had already been forced to pay to the expropriator. The court partitioned the loss and *Bergman* is hardly right when he sees in the judgment a decision in favor of the Pakistani Custodian[37].

90. **Philippines.**- The loss was put on the creditor in

Haw Pia v. China Banking Corp. (Sup. Ct. 1948): The Japanese occupants seized the defendant bank. The plaintiff paid to the expropriator the debt he owed to the defendant. After the war, the court found the debtor discharged. The Japanese had been entitled under international law to liquidate the defendant bank and they had also been entitled to issue occupation currency. Payment in such currency to the expropriator had consequently absolved the debtor.

The debtor seems to have paid the expropriator voluntarily. The outcome can perhaps be explained by the fact that the debtor had had no other possibility to discharge his debt during the occupation than by paying the expropriator. The duration and the outcome of the war must have been unknown to the debtor who had not only the duty, but also the right to pay his debt. It is natural that the court decided in the same way also when the occupants had ordered the debtor to pay the debt to them[38].

Mention may also be made of some statutes enacted in several territories in South-East Asia after World War II, according to which discharging effects were to be denied to payments made under the Japanese occupation to the

occupants[39]. A conceivable ground was that the debtors would otherwise be enriched, having paid the occupant in depreciated occupation currency[40].

91. Comparative remarks.- The case law may make a confusing impression because of the variety of circumstances, outcomes and motivations. It can also be presumed that not all considerations pertaining to the loss partition are mentioned in the judgments and that they have often to be guessed on the basis of the reported circumstances. Incomplete report of circumstances can lead to misinterpretation of the decision. But even if it is assumed that all the facts are known, it is difficult to assert that the loss was partitioned in this or that way because of this or that consideration of equity which perhaps was not even mentioned by the court. The discussion is thus on the level of probabilities, not of facts, when we are looking for the real motivation that makes the courts in different countries partition the loss in about the same way, although with the most varied formal explanations.
If it is assumed that the courts intend to partition the loss fairly and that these considerations prevail over the formalistic grounds often invoked, certain conclusions can be drawn.

It can be said that the courts are more favorable towards the debtor than towards the creditor. If the taking is directed against the creditor and the debtor cannot avert it, the courts will normally recognize the discharge. The cases with the opposite outcome can usually be explained by special circumstances, e.g. the debtor had assumed the risk of expropriation[41], had not acted *bona fide*[42], had contributed to the loss by violating or neglecting his duties[43], had paid voluntarily to the expropriator[44], was identical with the expropriator[45], was expected not to suffer from the imposed double liability[46] or the loss had been caused by expropriation of the debtor's property rather than by seizure of the creditor's claim from the debtor[47]. Even a voluntary payment to the expropriator is discharging if excusable under the circumstances of the case[48].

There are, however, also decisions putting the loss on the debtor without any reasons of equity. In some of these cases, the court considered takings by an occupant or an insurgent government to be comparable to acts by bandits and, consequently, put the loss on the immediate object of violence, i.e. on the debtor[49]. This was hardly a good analogy as the takings had been directed against the creditors and not against the debtors. It can be required of a debtor, e.g. of a bank, that it should protect the money by walls, locks, insurance, etc., but it can hardly resist demands by authorities governing the territory during a long period of time. In some other cases where the loss was put on the innocent debtor, the courts seem not to have observed that they were not asked to enforce the foreign decree, but only to partition the loss already caused by enforcement of the decree abroad. Especially the cases involving foreign revenue laws fall in this category[50].

When the courts had to partition the loss not between the creditor and the main debtor, but between the creditor and a person which had guaranteed the debt, it was considered whether the guarantee included also coverage of expropriation losses[51].

The reasoning of the courts is also of interest. There are two main types of reasoning and they can sometimes both be found in the same judgment. The first type discusses openly the equitable loss partition relying on the circumstances of the particular case. This is the *substantive law approach*[52]. The second type is characterized by the effort to establish some rigid loss partitioning rules independent of equity considerations and it sees the solution in application of the foreign decree: the court examines whether the decree is compatible with public policy[53], international law[54], it invokes the act of state doctrine[55], "situs" and "territorial limitation"[56]. This is the *private international law approach.* The result of both approaches is often the same, which shows that the reasoning does not always reflect the true considerations.

IV. Expropriation of debtor's property economically connected to a generic claim.

92. Introduction.- In cases to be reviewed here, the foreign expropriator has not expropriated the claim itself, but the debtor's property *from or for which* the payment of the debt was supposed to be made. The taking is not directed against the creditor but against the debtor. It happens that the expropriator simply takes over assets without specifying against whom the measure is aimed, but the taking can even here be considered to be directed against the debtor, since property perishes in the first place for its owner.

While the expropriator considers the debtor discharged by an expropriation of a claim, it is seldom that such discharge is intended when property economically connected with a claim is taken from the debtor. As the expropriator is reluctant to take over the liabilities connected with the seized property, the debtor remains liable even in his eyes. The debtors have, nevertheless, on innumerable occasions invoked the expropriation of their property as a discharge. It is obvious that in these cases there is no question of enforcement of the foreign expropriation. The court must only partition the loss between the debtor and his creditor. This presupposes, of course, that there is a loss. If the dispossessed debtor obtains full compensation, he will hardly try to invoke the expropriation as a discharge. It is also conceivable that the expropriator offers to take over the liabilities connected with the expropriated property and the creditors accept the offer. Under such circumstances, there will be no lawsuit at all.

According to perhaps all legal systems, the debtor is liable for his debts with all his property. Even if dispossessed of all his assets, the debtor remains liable. The position of the debtor is unfavorable also in another respect: as-

suming that the expropriator is willing to take over the liabilities connected with the seized property, this is not binding on the creditor who has not given his consent to such modification of the debt. The creditor remains entitled to demand payment from the original debtor. All these rules of law may, however, be modified by an agreement of the parties, by special legislation or even by a general *Treu und Glauben* clause.

93. U.S.A.- In a number of cases, American banks and insurance companies tried to avoid paying, asserting that the expropriation of their branches and assets in a foreign country had released them from their obligations connected with the seized property. A leading case is

Sokoloff v. National City Bank (N.Y.C.A. 1924, 1928): Sokoloff, a Russian, paid in 1917 a sum in dollars to the bank in New York. The bank then opened an account in rubles for Sokoloff at its office in Petrograd. This office was subsequently expropriated. Sokoloff sued the bank and demanded repayment of the dollar amount. The bank objected that the money had been seized in Russia together with the office there. The account of Sokoloff had, besides, also been expropriated (to this see s. 81 *supra*). The court gave judgment for Sokoloff. The bank was liable for its debts with all its property. If the expropriation had discharged the bank from its liabilities in Russia, then the bank could have profited on the seizure provided that its Russian assets had been smaller than its liabilities there.

The debtor was held liable also in

James v. Second Russian Ins. (N.Y.C.A. 1925): The Russian insurance company was sued for payment under a reinsurance contract. It invoked its own dissolution in Russia and the Russian law which had allegedly released insurers from their liabilities. The court held that the company could be sued and that the Russian law was a *brutum fulmen* without effects for courts outside of Russia, provided that assets were available in the jurisdiction of the forum.

In the following case the debtor was, however, discharged:

Dougherty v. Equitable Life (N.Y.C.A. 1934): The American insurer sold insurance to Russians in Russia. The policies provided that all disputes were to be settled in Russian court by Russian law and that the Russian Government could at any time cancel the right of the insurer to do business in Russia. The court found the company released. The policies were dependent on the law of Russia and consequently cancelled by the Soviet decrees; the rubles due under the policies were in any case valueless.

It seems that the interpretation of Russian law by the court was not correct. According to the Soviet official interpretation, the decree annulling insurance contracts was not applicable to contracts between foreign insurers and Russians[57].

A recent relevant case is

Blanco v. Pan-American Life (U.S.D.C. 1963, U.S.C.C.A. 1966): The plaintiffs, former nationals and residents of Cuba, had purchased insurance from the defendant American insurer. The policies stipulated payment in the U.S.A. The defendant argued that its Cuban assets had been seized and that the same decree had terminated its obligations under the policies, subrogating the Cuban state as debtor. The U.S.D.C. held that the Cuban decrees were confiscatory, discriminatory and in violation of international law. They were thus not protected by the act of state doctrine. The expropriated assets of the insurer bore no necessary relationship to the policies and the insurers were not liberated. The court mentioned that the policies were governed by the laws of Texas and Louisiana, but this was not considered decisive. Also the U.S.C.C.A. held the insurer liable. The fact that the Cuban expropriator had intended to relieve the insurer of his obligations was irrelevant. The seizure of the assets of the insurer could not change the right of the insured obligees to be paid at the places and in currency stipulated. Recovery was not precluded by the act of state doctrine. Free market exchange rate was to be applied.

The circumstances and outcome were similar also in

Pan-American Life v. Recio (Florida District C.A. 1963): The American insurer pleaded that Cuba had seized his Cuban assets and substituted the Cuban state as obligor. The policies, belonging to a national of Cuba, were payable in dollars in the U.S.A. The court held the insurer liable. The act of state doctrine was not applicable. A fair reading of the policies made it apparent that an important provision was that the holder might travel to the U.S.A. and that they would be paid there without regard to the vicissitudes of Cuban law.

The contract was interpreted to mean that the insurer had assumed the expropriation risk. A case where the insurer was discharged is

Present v. U.S. Life (N.J. Sup. Ct. 1967): The insurer refused to honor a policy in pesos in Cuba or in New York on the ground that the expropriation in Cuba had discharged him of liabilities under policies issued there. The court considered the insurer absolved. The rights of the litigants were governed by the law of Cuba, where the policy would have been paid under normal circumstances. The act of state doctrine demanded recognition of the expropriation's effect.

On numerous occasions, the insurers recognized that their obligations incurred in Cuba subsisted and they offered payment in pesos in Cuba, invoking that any other form of payment was forbidden by Cuban exchange control laws. The creditors were normally not willing to accept such payment as it was worthless from their point of view. These cases will be handled in connection with the partition of loss caused by foreign exchange control laws.

94. England.- Two older cases concern debts of Englishmen dispossessed in consequence of the American Revolution:

Wright v. Nutt (In Chancery 1788): Wright was sued for payment of debts connected

with his property expropriated in America. The court decided that the creditor had first to try to obtain payment from the expropriator (the State of Georgia had offered to pay creditors of dispossessed exiled royalists). The creditor would be allowed to collect in England only if the attempt to obtain payment in America proved unsuccessful.

Folliott v. Ogden (H.L. 1789-92): The circumstances were similar to those in the above case, but here both the debtor and the creditor had suffered seizures in America. The chances of the creditor to obtain payment in America were small and the debtor was held liable to pay.

When American insurers were sued in England after the Soviet expropriations for payment of debts incurred in Russia, they were sometimes liberated[58], sometimes held liable[59], depending on the attitude of the court towards the official interpretation of the Soviet decree annulling the policies[60]. The policies were considered to be governed by Russian law. The following cases involve Russian debtors:

First Russian Ins. v. London and Lancashire Ins. (Ch. 1928): The English insurance company owed a sum to the Russian one and it claimed the right to set-off its own claims against the Russian company. The court held that the Soviet decrees had not extinguished the debts of the Russian company which had to pay them with assets outside of Russia.

Russian Bank for Foreign Trade (Ch. 1933): The court held the Russian bank liable for debts "situated" in England, i.e. recoverable in London, whereas it liberated the bank of its Russian obligations by application of Soviet law which was considered to have transferred the liabilities to the expropriator.

Banque des marchands de Moscou (Ch. 1952): The Russian bank was discharged of its debts "situated" in Russia and governed by Russian law. The court expressed sympathy for the English creditor, but he was considered to have taken a risk when trading abroad.

An interesting recent case is

Sharif v. Azad (C.A. 1967): Azad, a Pakistani living in England, gave a 300 pound check to another Pakistani living in England in exchange for a 6,000 rupee check drawn by a Pakistani living in Pakistan. This transaction violated Pakistani exchange control laws and the check was seized when Azad sent it to that country. Azad reacted by countermanding the 300 pound check and the payee sued him for the amount. Azad defended himself by invoking the illegality of the transaction and its consequent unenforceability in England because of a violation of laws of a friendly nation. The court obliged him to pay. The transaction, being concluded between English residents and governed by English law, had not violated Pakistani laws and could, therefore, be enforced by English courts.

The court was to partition the loss caused by the Pakistani seizure of the rupee amount. Azad had lost the property for which he had given the pound check, but he remained liable. The court relied mainly on the legality of the transaction under Pakistani laws, although the authorities in Pakistan had seiz-

ed the money just because the transaction had violated those laws. It seems that there were loss partitioning considerations behind the more formalistic reasoning of the court. In the words of *Diplock L.J.*, Azad received what he had bargained for, a rupee check which he knew could only lawfully be paid with the permission of the State Bank of Pakistan. *Denning L.J.* was even more clear on this point when he said that the enforcement would teach Azad a sharp lesson not to engage in transactions of this kind. This sounds strange when compared with the principal ground of the decision, i.e. the lawfulness of the transaction. It appears that the court was of the view that Azad had assumed the risk of seizure when buying the rupee check. In order to partition the loss accordingly, the court had to enforce the contract and, since unlawful contracts are not enforced, it found it legal.

95. **France.**- French law allows no room for doubt: according to Art. 2092 of the Civil Code, a debtor is liable with all his present and future property. A seizure of his assets economically connected to the debt should not discharge him.

Numerous banks and insurance companies dispossessed of their assets in Russia have been sued in France for payment of debts connected to their Russian activities. The debts were mostly expressed in ancient rubles, quite worthless at the time of the lawsuit. The courts held the debtors liable, but the claims were considered of no value[61]. When the debt was expressed in other currency, the debtor had to pay. Two examples:[62]

Teslenko v. Banque russo-asiatique (TCom Seine 1927, C.A. Paris 1929): Teslenko, a Russian, had a pound sterling claim against the Russian bank. The TCom rejected his demand that his claim should be considered at the liquidation of the bank's branch in Paris, reasoning that the claim was based on activities other than those of the branch and that the Russian assets were not within the reach of the liquidator. The C.A. decided in favor of Teslenko. The Art. 2092 C.C. was invoked although the claim was hardly governed by French law.

Banque russe v. Technogor (C.A. Paris 1944): The Russian bank was sued for payment of a debt in Swedish crowns. The property connected to the debt had been expropriated in Russia, but the court held the bank liable. The origin of the claim was irrelevant. A debt cannot be situated as tangibles. It follows the person of the debtor. It is a principle of French law that every fraction of the debtor's property guarantees all his debts.

Sometimes also the risk of ruble depreciation was put on the debtor:

Sté des Cirages v. Van der Haegen (C.A. Paris 1927): The creditor had worked for the debtor French company as director of its factory in Russia and had a retirement pension claim in rubles. The court held the company liable to pay the pension in francs, despite the expropriation of the factory in Russia. It had not been shown that the pension was to be paid solely from the incomes of the factory in Russia. The company had obliged itself to secure the retirement of the creditor for the rest of his life. The obligation was,

according to the court, not of a sum in rubles, but of a certain value. The ruble amount was to be converted to francs at the exchange rate prevailing at the time of the conclusion of the pension contract.

In some cases, Russian banks tried to escape their obligations by asserting that their seat was still in Russia and that French courts, therefore, lacked jurisdiction. At first they had some success[63], but later the courts found that the banks had a *de facto* seat in France[64].

In some exceptional cases, the debtors succeeded in transferring the expropriation loss to their creditors. In addition to the first instance decision in the *Teslenko* case, we can mention the case of

Mkeidze v. Banque russo-asiatique (TCom Seine 1924): Mkeidze bought checks in francs in Russia from the defendant bank. The drawee was the Paris branch of the same bank. The Russian assets of the bank were expropriated. The court found the French branch released. The assets in France were not to be used for fulfilment of obligations connected with the property in Russia, since the expropriation had broken all ties between the bank and its branch in France.

It can be said that debtors dispossessed in Russia were normally held liable to pay their "Russian" debts. The French legislator intervened, however, in 1921 and imposed a moratorium[65]. This law did not discharge the debtors who had lost all or most of their property in Russia, but it gave them the possibility to postpone payment. The moratorium was to be granted in each particular case by the president of a commercial tribunal on the ground of flexible considerations of justice. The knowledge about this law may have had some influence on courts also when they decided on the question of the expropriation's discharging effects.

French courts had also to face takings other than Russian:

Elmassian v. Crédit foncier d'Algérie (TCom Marseille 1926)[66]: Elmassian kept an account with the Smyrne branch of the defendant Franch bank. The Turks occupied Smyrne and forbade the bank to pay to Elmassian. The bank had, however, rescued the assets kept at the Smyrne branch a few days before the arrival of the Turks. The court stressed the generic nature of the debt. The bank was the owner of all the assets kept with the branch and carried all the risks and costs of salvage. The Turkish prohibition of payment could not be given effect as the relationship was governed by French law.

In this case, there was no real expropriation loss since the bank had rescued the assets. It is, however, to be noted that the court held that the risk of the loss was on the debtor bank, which had also to carry the costs of salvage. Another case of interest is

Voglet v. Schenker (C.A. Colmar 1938): The French debtor Voglet paid his German creditor Schenker in a manner forbidden by German exchange control laws. The creditor refused to accept such payment and the amount was seized by German authorities.

The creditor sued for payment in France and the debtor objected that the first payment had discharged the debt and that the German decrees were contrary to French public policy. The court ordered the debtor to pay again. True, the German decrees were inapplicable in France because of their fiscal, monetary and political character, but *in casu* there was no question of their application, but only of considering their effect in France from the standpoint of French substantive law. Schenker was not responsible for the loss, since he had been entitled to refuse the unlawful payment in order to protect himself from heavy sanctions. The seizure was a consequence of Voglet's behavior.

It has to be stressed that in this case, as in all other cases in this division, the expropriator had not seized the claim, but only the property of the debtor that was supposed to be used for payment. The court realized that it was to partition the loss and not to apply the German decrees. The debtor was held liable also in

Ex-Roi Farouk v. Dior (C.A. Paris 1957): King Farouk of Egypt ordered a quantity of ladies' clothes from the French Dior company. Shortly after the delivery, Farouk was overthrown. Dior sued for payment, but Farouk objected, *inter alia*, that all his property in Egypt had been expropriated. The court obliged Farouk to pay.

In this case, the economic link between the debt and the expropriated property was weak. The same attitude was, however, taken also in

Union-Vie v. Hazan (Cass. 1963): The Egyptian branch of the French insurer sold insurance to an Egyptian resident. In 1957 the branch was expropriated and transferred, *"avec l'ensemble du portefeuille"*, to en Egyptian company. The insured, now living in Paris, sued the French insurer for payment under the policy and the court ordered the insurer to pay.

In the following case the debtor was, however, discharged:

Sté Shell v. Mary (Trib. Seine 1966): A French-owned enterprise was "sequestered" and later openly expropriated in Tunisia. In the present case, *exequatur* was demanded in France for a Tunisian judgment condemning the original owner to pay debts connected to the expropriated property. *Exequatur* was refused. The Tunisian expropriation was exorbitant and contrary to international law. The creditor had done nothing to obtain payment from the sequestrated property in Tunisia before it had been definitely expropriated.

After becoming independent, Algeria expropriated agricultural and other enterprises owned by French nationals. The dispossessed were personally liable for debts connected with the enterprises. The creditors were French banks and they sued the repatriated French settlers (or the sureties) for payment. The debtors contended that the expropriation of their enterprises in Algeria had discharged them of their liabilities related to the enterprises. The French

courts were here in a moral dilemma. The debtors had been ruined in Algeria and it seemed cruel to hold them liable for debts incurred for the purpose of investments in the property now seized.

It has to be mentioned that whereas some of the Algerian decrees explicitly transferred the liabilities connected to the expropriated property to the expropriator, other decrees remained silent on this point or even expressly denied the expropriator's responsibility.

In lower courts, the outcomes and rationale varied. The decisions not discharging the debtors relied sometimes on the Art. 2092 C.C. and stressed that the expropriation had not made the payment impossible as *force majeure*[67]. On other occasions, the expropriation was said to be contrary to French public policy and, consequently, to be ignored[68]. The judgments absolving the debtors relied sometimes on application of the expropriation decree which was not considered contrary to public policy[69], sometimes on the character of the seizure as *force majeure*[70]. It has also been said that the transfer of liabilities to the expropriator is inherent in the very nature of expropriation[71]. In one case, the court invoked *ordre public* against the creditor: it was held that it would be contrary to public policy to hold the debtor liable towards his Algerian creditor after the debtor had been dispossessed without compensation by the Algerian state[72].

On April 23, 1969, the Cassation Court decided eight cases involving the Algerian expropriations. The outcomes were the same and they were not influenced by special circumstances in each particular case, e.g. by the willingness of the expropriator to assume debts related to the seized property. The court held the debtors liable. In judgments affirming lower decisions[73], the court relied mainly on the Art. 2092 C.C. The debts were considered to be governed by French law: they had been concluded in Algeria between French physical and juridical persons at the time when Algeria was a part of France. The debtors were liable with all their property and the taking had not made fulfilment impossible as *force majeure*. In judgments reversing and remanding[74], the court relied mainly on *ordre public*. The Algerian decrees were contrary to public policy and could not be invoked in French courts.

The two different grounds used by the Cassation Court do not make clear which law was considered "competent" to discharge the debtors: the proper law of the contract or the law of the expropriator[75]. The reasons used indicate that the expropriation decrees might have discharged the debtor if they had not been contrary to public policy. The application of the *ordre public* clause by the court is surprising. The lack of indemnity was used here against the dispossessed owners (debtors) instead of in their favor. Another interesting point is that the court obviously was of the opinion that a discharge would imply application of the Algerian decrees.

After April 23, 1969, the courts followed the reasoning of the Cassation Court in a great number of cases. Sometimes the courts still found, however, a way to help the debtor:

Trib. Le Mans June 25, 1969: The court refused to grant *exequatur* to an Algerian judgment condemning a French insurance company, whose property had been seized in Algeria, to fulfil its obligations under policies owned by Algerians. According to the court, the *exequatur* would imply a recognition of the expropriation violating public policy, since it would admit that the debtor no longer had property in Algeria.

This decision shows the peculiarities of the *ordre public* as used by French courts. The same violation of public policy which was here invoked against the creditor had been invoked by the Cassation Court against the debtors. Only a few days after the Le Mans judgment, the Cassation Court decided that *exequatur* was to be given to Algerian judgments obliging debtors to pay debts related to their property which had been seized in Algeria. The court invoked the Franco-Algerian treaty on recognition and enforcement of judgments and stated that a judgment obliging a debtor to pay his debts was not contrary to French public policy[76].

The judgments putting the loss caused by the Algerian expropriations on the debtors must be interpreted in the light of the fact that the dispossessed debtors were already in 1963 granted moratorium. In November, 1969, came a law[77] which suspended actions against both juridical and physical persons based on obligations which had been assumed by them for the purpose of acquisition, conservation, amelioration or exploitation of properties they had lost by expropriation without indemnity in territories previously administered by France. The burden of proof was put on the creditors: obligations not indicating their purpose were presumed to be connected with the expropriated property. In order to avoid hardship and injustice, the courts could exceptionally push the moratorium aside after considering the financial situation of both the debtor and the creditor.

It is realistic to believe that the knowledge about the moratorium laws and a certain hope that the state would compensate the dispossessed debtors[78] may have influenced the Cassation Court.

The suspension of actions by the moratorium law of 1969 was temporary, until legislative measures would be issued providing indemnity for the expropriated property. Such measures concerning national contribution to the indemnification of the dispossessed were enacted in 1970[79].

From the described cases, we must distinguish those where the partition of the loss was fictitious. Thus, when the creditor and the Algerian expropriator are identical, the debtor may be discharged by the expropriation[80].

96. Austria.- The Austrian Supreme Court has declared that creditors of companies expropriated in their home countries could obtain payment from the Austrian assets:

OGH March 30, 1951: An Austrian creditor had a claim against a partnership in Czechoslovakia. The partnership was dipossessed and the creditor sued one of the personally liable partners. The OGH gave judgment for the creditor. The question of applicability

of the Czechoslovak decrees was irrelevant. The loss of assets could not discharge the debt, since Austrian law does not know of any rule of law which provides that a loss of assets results in previously existing liabilities being extinguished.

A legislative intervention in favor of some debtors was, however, the *Versicherungswiederaufbaugesetz* of 1955[81]. According to this act, insurance claims belonging to a foreign portfolio (*Versicherungsbestand*) or connected to such portfolio are *unenforceable* in Austria ("können nicht gerichtlich geltend gemacht werden"), if and insofar as the property of the portfolio has been taken from the insurance company by foreign official measures. Insurers with their seat in Austria are *discharged* from such debts if the property has been taken from them permanently. These provisions have been applied even when the parties had explicitly agreed that the creditor could demand payment in Austria[82].

97. Switzerland and Italy.- In the Swiss and Italian case law, there are two decisions where debtors have been liberated by seizures of their property related to the debts:

Pettai v. Schinz (OG Zürich 1928): The court discharged the debtor of a debt governed by the Russian pre-revolutionary law. This law had been pushed aside by the Soviet Government without being replaced by new laws. Together with the old law, the claim had disappeared. It would, in any case, be worthless because of the depreciation of the ruble. The court also mentioned that the debtor had been ruined by Russian expropriations and that the creditor would have lost his money also if he had not loaned it to the debtor.

Banca Nazionale del Lavoro v. Focanti (C.A. Rome 1968): The Albanian seizure of the bank's branch in Albania had, according to the court, discharged the bank of liabilities from an account kept with that branch. The "situs" of the account was in Albania. The Albanian decree, originally violating international law, had been made legal by an Italo-Albanian treaty and it was thus "effective" for the Italian legal order. The creditor could turn to the Italian state for compensation according to the treaty.

While the court in the *Pettai* case at least mentioned reasons of justice and of substantive law supporting the discharge, the Italian judgment was wholly based on "application" of the expropriation law.

In the latter case, it appears that there was a possibility to obtain indemnity for the loss elsewhere.

98. Belgium and the Netherlands. - The debtor was discharged in

D'Aivassoff v. de Raedemaekker (TCiv Brussels 1927): The court refused to enforce a claim based on a partnership agreement which had been concluded in 1899 for exploitation of lands in Russia. The obligation was annulled by Russian law which had to be given effect in spite of the non-recognition of the U.S.S.R. by Belgium, since ignoring

it would lead to "gross inequity".

A rather special case is

Nationale Handelsbank v. Kat's Handel (D.C. Amsterdam 1959): The defendant had agreed to buy Indonesian rupees from the plaintiff. The rupees were to be used by the defendant for importation of tobacco from Indonesia. Indonesia expropriated Dutch interests in that country. The defendant had to cease the importation while there still remained rupees to be bought according to the contract. The plaintiff now demanded that the defendant should fulfil the contract. The court rejected the action. The Indonesian measure, discriminatory and contrary to international law, would have caused considerable damage to the defendant if he had carried on the business. The measure was also contrary to Dutch public policy. The rupees would be of no value for the defendant because of the expropriation. The action of the plaintiff was, moreover, contrary to good faith as the plaintiff acted as a tool of the Indonesian Government.

The court explicitly identified the plaintiff with the expropriator, but this was invoked only in addition to the main rationale of the incompatibility of the taking with international law and public policy. It is, however, doubtful whether the character of the taking would have led to the same outcome even if both parties had been innocent Dutch companies acting in good faith.

99. Scandinavia.- In a Danish case, the debtor was held liable:

Svendsen v. Bruewitsch (Sup. Ct. 1925): A Russian unlimited partnership owned by Danish nationals was in 1918 engaged in helping Russians to transfer money out of Russia. For the equivalent in rubles, it promised payment in dollars abroad. The court held the partners liable to fulfil the promise, although the partnership with all its assets had been expropriated in Russia.

The court did not classify the contract as one of mandate which could have led to a different outcome[83].

The Swedish courts have on two occasions liberated the debtors from debts related to the expropriated assets. The first case is

Forsikrings AS Norske Atlas v. AB Sundén-Cullberg (HD 1929): A Russian insurance company was expropriated and dissolved. Its exiled managers assigned the value of the company's reserves in Sweden to Atlas, a creditor of the company. The reserves were in the possession of the Swedish representative of the company. When Atlas attempted to collect the money, he contested the claim, *inter alia* on the ground that he himself had a claim against the expropriated company which he wanted to set off. He had granted a loan of 100,000 Swedish crowns to the company and the company had opened an account for 222,000 rubles for him at its head office in Petrograd, but this office had subsequently been expropriated. The court decided that the representative had no legal grounds for the set-off. The representative did not even assert that he had demanded the money from the account or that the company had not kept the money available for him before the expropriation.

The court did not provide sufficient legal reasons why the loss was to be borne by the creditor (the representative) and not by the debtor (the company). The expropriated property in Petrograd had undoubtedly belonged to the company as the representative's claim was of generic nature. The judgment gives the impression that the expropriation of the property in Russia had discharged the debtor. What the court said about the availability of the money before the seizure showed only that the debtor was not guilty of the loss, but the creditor was also innocent since it had not been his duty to collect the money from the account before the day of the expropriation. It would, however, be too far-reaching to say that the court was of the view that in the loss partition between an innocent debtor and an innocent creditor it was the latter who was to stand for the loss. It is important to note that the case did not involve partition of the loss between the creditor and the debtor, but between two creditors (the representative and Atlas). It can also be mentioned that the representative had accepted payment in rubles in Russia in 1918 when the expropriation risk must have been obvious. He had perhaps had speculatory reasons to do so and the court may have felt that he had assumed the expropriation risk.

The second case in point is

Langhard v. AGA (Svea C.A. 1953): Langhard agreed to protect AGA's interests in Hungary from expropriation. He was supposed to obtain remuneration partly in Swedish currency in Sweden and partly in Hungarian currency from AGA's frozen account in Hungary. The money on the account was expropriated before Langhard could collect the remuneration. He sued in Sweden for its equivalent in Swedish crowns. The court gave judgment for AGA. The majority were of the view that the parties had tacitly agreed to limit the remuneration in Hungary to amounts available from the frozen account.

The loss was here put on the creditor who was considered to have assumed the risk of expropriation. There was, however, no provision in the written contract that would limit AGA's liability to the frozen account. A provision of such improtance should have been included in the document. It seems that the court felt that the expropriation of the account was to be at the risk of Langhard whose task it had been to prevent such expropriation.

100. West Germany. - The *Treu und Glauben* provision of the German Civil Code, as well as the *Vertragshilfegesetz*, can be invoked also in cases involving partition of the loss caused by foreign expropriations of debtor's property economically related to the debt (see s. 86 *supra*). In addition, there is a number of special statutory provisions discharging wholly or partially certain groups of debtors of their liabilities related to assets lost by foreign seizures. The expropriations in East Germany and the dispossession and removal of Germans living in Poland and Czechoslovakia resulted in a large number of

debtors being deprived of all their property or at least of a substantial part of it. The West German legislator intervened in their favor. Although these laws usually do not even mention the foreign expropriations, it is obvious that their purpose is to partition the expropriation loss. The practice of West German courts must be seen in the light of these rules which make it possible for the court to omit the loss partitioning considerations at the first stage of the lawsuit when the very continued existence of the debt is discussed. It has, however, to be kept in mind that the special laws are applicable only to a limited group of cases.

One of the most important special laws is the *Bundesvertriebenengesetz*[84] which stipulated that debtors who had been moved forcibly to West Germany after World War II would not have to pay their debts originating prior to the removal. This was applicable also as to liabilities of certain juridical persons which had moved their seat to West Germany from territories lost after the war. The law spoke about counterbalancing of interests of the parties. It stipulated exceptions where the debtors were to pay, e.g. debts related to property in West Germany, alimonies, salaries, wages.

According to another interesting provision[85], the banks in West Germany were to be liable only for liabilities originating in their branches in West Germany and liabilities towards creditors in West Germany. Foreign creditors could demand payment only if the equivalent had been furnished in West Germany. If it was not clear where the equivalent value had been placed, the bank was liable proportionally according to the ratio between the bank's property in West Germany and its total property before the end of World War II.

Similar provisions have also been adopted as to certain insurance claims[86], West Berlin banks[87], certain West Berlin cooperatives[88], etc.[89] The conditions for discharge varied, but the principal trend was clear: these debtors were to be absolved of most of their liabilities connected to their assets lost by foreign expropriations. In the West German literature, it has been pointed out that the equality of all citizens guaranteed by the West German Constitution demanded that all debtors, and not only some privileged groups, should be liberated from their East German liabilities[90]. The Association of German Industry has even elaborated a general legislative proposal in that respect[91]. In the West German case law, there are judgments where it was said that expropriation of assets connected to the debt absolved the debtor although there was no special legislation:

KG Dec. 22, 1950: The defendant was held discharged of his obligation related to his branch in East Berlin which had been expropriated (obligation to return generically ascertained table-clothes in exchange for those previously obtained from the plaintiff). The property of the defendant had been split (*gespalten*) and he was no longer liable for liabilities connected to East Berlin branches. The court said about the expropriation: "Ein derartiger Eingriff in die Substanz eines Unternehmens hat nicht nur in tatsächlicher,

sondern auch in rechtlicher Hinsicht Auswirkungen, denen man mit Anwendung der Vorschriften des BGB allein nicht gerecht wird. Es ist aber auch nicht notwendig, eine gesetzliche Regelung abzuwarten, vielmehr ist es die Aufgabe der Rechtsprechung, aus den gegebenen Tatsachen die rechtlichen Folgerungen zu ziehen."[92]

Sometimes the court relied on *Treu und Glauben:*

LG Lüneburg Feb. 4, 1954: The court said that the expropriation of the mortgaged property had not discharged the personally liable debtor. It would, however, be contrary to *Treu und Glauben* to force the debtor to pay. The creditor contended that this put creditors of secured claims in a situation worse than that of creditors of not secured claims. The court admitted this, but found it irrelevant[93]: "Als recht und billig erscheint es vielmehr, dass jede der Parteien insoweit ihre Kriegsfolgelasten trägt, der Kl. also auf seine Hypotek mit der Forderung und der Bekl. auf sein Grundstück verzichten muss."

BGH Dec. 30, 1957: One German firm owed money in pounds sterling and another German firm had claims in the same currency. As the post-war rates of exchange were unknown, the two firms concluded in 1940 a contract of mutual insurance: the profit that would be made by one of the parties on the post-war exchange rate was to cover the loss of the other party. The firm having the claim in pounds was dispossessed of it without any indemnity. The other firm demanded fulfilment of the contract. The BGH discharged the dispossessed party of its obligation on the grounds of *Treu und Glauben.*

The next case involves a so-called "*steckengebliebene Banküberweisung*" between the branches of the same bank from the East to the West:

OLG Hamburg Nov. 7, 1946: The branch in the East was expropriated. The court declared that the main office or a branch is liable for obligations assumed by another branch only if it can obtain coverage from that branch through the bank's internal channels. The branches in the West could thus refuse to honor liabilities assumed by branches in the East, if the coverage had in the meantime been seized.

The problem of transfers between the branches of the same bank from the East to the West was later resolved in favor of the unity of the personality of the bank which was held liable[94].

In most cases decided by West German courts, the dispossessed debtor was held liable for his debts related to the seized property. As the decisions usually involve East German expropriations, it is of interest to mention that the dispossessed debtors have not been liberated even in the eyes of East German courts. Thus, partners of an expropriated unlimited partnership, considered discharged of the partnership's debts by lower courts, were held liable by the East German Supreme Court[95]. Similar attitude had been taken by the pre-war *Reichsgericht:*

RG March 29, 1927: The English branch of a German bank had been seized in England as enemy property. In the opinion of the RG, this had not discharged the bank of the liability to deliver to its client the value of cashed instruments, although the instruments had been cashed by the English branch and the money had also been seized. The court stressed that the debt was of a generic nature.

In some of the relevant cases, the parties and even the court did not discuss the loss caused by the expropriation of the debtor's property related to the debt, but spoke about "the expropriation of the claim" although it was obvious that the seizure of the claim could not have been enforced since the property of the debtor himself had already been seized. The outcomes prove, however, that the courts were conscious of the real state of things. In all these cases the debtors were held liable, whereas the courts usually decided in favor of the debtor in cases involving expropriations of claims (s. 86 *supra*). In addition to the already mentioned Federal Tribunal judgment of Feb. 25, 1960, the following cases belong to this group:

RG. Sept. 22, 1930: The plaintiff had an account with the Mulhouse branch of the defendant German bank. On Nov. 16, 1918, or earlier, he instructed the branch to transfer the money to a bank in Munich. On Nov. 17, 1918, Mulhouse was taken by French troops. The branch of the defendant as well as the plaintiff's account were "sequestered". The sequestor of the branch paid the value of the account to the sequestor of the plaintiff. The plaintiff sued the bank in Germany for the value of the account. The bank contended that the payment between the sequestors in France had discharged it of the debt. The RG decided against the bank and obliged it to pay the value of the account as *damages* for non-execution of the plaintiff's instructions to transfer the money to Germany before the arrival of the French.

Sup. Ct. British Zone March 31, 1949: The defendant had a business in East Germany, but transferred it to the West in July, 1945. In December, 1945, his property in the East was expropriated. The plaintiff, whose business in the East had also been expropriated, sued for payment of a debt originating in 1944. The defendant contended, *inter alia*, that the expropriation of both businesses had discharged the debt. The court held that the debt was situated at the domicile of the debtor and could not have been expropriated in the East, because of the "territorial limitation".

OLG Neustadt Nov. 25, 1955: Both the debtor and creditor had businesses in the part of France occupied by Germany during World War II. The property of both was seized by France after the liberation. The debt was secured by a mortgage on real property in Germany. Both parties had moved to Germany before the liberation of France. The debtor now argued that the claim had been expropriated in France. The court decided for the creditor. It was dubious whether France had intended to seize also this claim. The expropriation could not have in any case included the claim as the parties had moved to Germany already before the seizure. True, the parties had lost their tangibles in France, but not their personal claims.

OLG Nürnberg April 25, 1961: The debtor firm was put under "administration" in East Germany, where also the property of the creditor was expropriated. The government-appointed "administrator" of the debtor paid the value of the debt to the expropriator.

The court did not find this payment discharging. It had taken place after the seizure of the debtor's property which had thus been lost for the debtor in any case.

BGH Feb. 28, 1972: Both the debtor and the creditor were originally companies with seat in East Germany. The East German assets of both were expropriated. The debtor invoked the East German expropriation of the claim, but the BGH held the debtor liable, although the debtor had had its seat in the expropriating country at the time of the expropriation. The debtor owned property in the West and, if the discharge were recognized, the East German measure would be given effect for the property in the West which would be contrary to the "territorial limitation".

In the mentioned cases, there were no reasons to speak about double liability. The property of the debtor had been seized and he tried to transfer part of the loss to the creditor by asserting that the assets had not been seized as his, the debtor's, property, but rather as the value of the creditor's claim. In some of the cases, there had really been a payment of the claim to the expropriator from the seized assets of the debtor, e.g. the sequestor of the debtor paid to the sequestor of the creditor, but such payments arranged by the expropriator for book-keeping reasons hardly cause a new loss as a new expropriation.

Sometimes the debtor invoked as discharge the expropriation of his property that was securing the debt as collateral:

LG Lüneburg Feb. 8, 1951: By expropriation of the mortgaged property in East Germany, the creditor lost the rights of the mortgage but not the principal claim. A debtor is not discharged by expropriation of his property. This result corresponds also to demands of justice: a careful creditor who had obtained a security by mortgage should not be in a situation worse than a creditor of an unsecured claim.

LG Hamburg July 5, 1956: The expropriation of the mortgaged property in the East had, according to the court, no effect on the personal liability of the debtor since the claim was "situated" at the seat of the debtor in the West and the seizure was "territorially limited". The demands of the creditor for payment were not contrary to *Treu und Glauben*. There was no risk of double liability as the mortgage as such had not been transferred to the expropriator. The real property had simply been expropriated and the mortgage erased. The loss of the property was on its owner and it would be unjust to treat creditors of secured claims worse than creditors of not secured ones.

BGH Sept. 19, 1957: The expropriation of the mortgaged property in the East could not discharge the debtor living in the West, although the creditor was an East German resident. Both parties were Germans and the creditor had neither caused the expropriation nor was responsible for it in any way. The outcome was not contrary to *Treu und Glauben* as the debtor was rich and could pay his poor creditor.

In several cases, the principal debtor had been expropriated and dissolved and the persons securing the debt contended that the disappearance of the principal debtor had entailed a disappearance of the debt itself. The courts were to partition the loss between the creditors and the sureties, since it was

obvious that the sureties would have no possibility of redress against the non-existing main debtors. The sureties were, nevertheless, found liable:

LG West Berlin Oct. 13, 1950: The principal debtor was expropriated in Poland. The court pointed out that the principal debtor had been liquidated *de facto*, but not *de jure*. The surety had made no exclusion of this type of risks in the contract and was thus liable.

LG West Berlin Dec. 1, 1950: The defendant had guaranteed the value and interests of shares of a company subsequently liquidated in Poland. He argued that the liability had been extinguished by the disappearance of the main debtor. The court declared the Polish taking to be "territorially limited", and obliged the guarantor to pay.

BGH Nov. 12, 1959: The debtor company was expropriated and dissolved in East Germany. It seems that at least some indemnity was paid by the expropriator. Members of the company had guaranteed the debt, but now they refused to pay on the grounds that the principal debtor did not exist any more. The BGH obliged them to pay. The taking was contrary to West German public policy and could not be recognized. Its effect on the guarantee had to be disregarded. As to the impossibility of recourse against the principal debtor, the BGH pointed out that the sureties had obtained compensation. They had further the possibility to seek relief under the *Vertragshilfegesetz*.

Also in these cases, the property originally predestined for payment had been expropriated, but the sureties had to pay. The debtor was held liable also in

BAG June 16, 1955: The employer was liable to pay in West Germany a pension due to the widow of a former employee despite the expropriation of the property in the East where the employee used to work.

In the following case, the debtor was held liable in spite of a reservation in the contract:

BGH Oct. 6, 1953: The bank in the West was responsible for obligations assumed by its branch in the East. A reservation in the contract conditioning the obligation by possibilities of moving the coverage from the East to the West was disregarded as contrary to *Treu und Glauben*. The BGH stressed the legal unity of the bank: its branches had no independent legal personality.

101. Israel.- The debtor was held liable in

Zilka v. Darwish (D.C. Tel-Aviv 1954): The plaintiff supplied credit to the Jewish debtor in Iraq. Iraq passed a law expropriating property of Jews. The debtor had moved from Iraq already before the expropriation. The creditor sued in Israel for payment. The debtor objected that the Iraqui law had rendered illegal a discharge of the debt by him. The court held that the Iraqui law could have no effect as regards the object of the litigation which was not situated in Iraq. The debtor had to pay.

It seems that the debtor had lost his business in Iraq and that he tried, by invoking the Iraqui law, to avoid paying his debts related to that business. The debtor was, on the other hand, discharged in

Regina Shorr v. Succession Meir Weizman (Sup. Ct. 1954): The plaintiff sold in 1930 a house in Lithuania to Weizman. The down-payment was made in cash and the rest of the price was secured by a mortgage on the house. The house was seized by the Soviets and the seller now sued in Israel for the rest of the purchase price. The court found a solution in the law which was valid in Lithuania before its annexation by the U.S.S.R. According to that law, as proved by expert witnesses, the seller had the right to satisfaction from the mortgage, but not from other property of the debtor. After the expropriation of the house, the creditor could not hold the debtor personally liable.

In this case, the court applied the substantive law governing the relationship. There was no question of "applying" the Soviet decree.

102. Poland.- The pre-war Polish Supreme Court decided that creditors of an expropriated Russian company could not obtain payment from its property in Poland unless the claim had been created by the Polish branch:

Muszkat v. Rossia (Sup. Ct. 1929): Muszkat paid in 1919 an amount to the Kiev branch of a Russian insurance company. According to agreement, the amount was to be repaid by the Warsaw branch of the same company. In the meantime, the Kiev branch was seized by the Soviets. The court rejected Muszkat's claim against the Warsaw branch. The expropriation of the company in Russia had changed its branches abroad into masses of property of no legal personality. The Kiev branch had had no right to dispose of assets in Poland.

This judgment must be seen in the light of a special Polish law of 1928[96], although it was not directly applicable since the case had already been pending when the law was enacted. According to the law, the Polish assets of expropriated Russian companies were to cover, in addition to the costs of liquidation, only debts secured by mortgages, debts owed to Poles or originating in Poland. The remainder was to belong to the shareholders.

103. Comparative remarks.- According to the prevailing practice, the debtors are not liberated from their debts by expropriation of their property economically related to the obligations. This is in accordance with the *res perit domino* principle. The willingness of the expropriator to take over the liabilities connected with the seized assets does not automatically liberate the debtor[97], although the creditor may be asked to demand payment initially from the expropriator[98].

The cases where debtors were considered discharged by the expropriation remain exceptional. Sometimes they can be explained by the fact that the debtor was, according to the applicable law, liable only with the property

which had been taken from him[99]. In other cases, the court found that there was a tacit agreement between the parties that the debtor would be liable only with certain assets; such interpretation of the contract is, however, more an expression of what the court considered to be fair than an expression of the will of the parties at the time of the conclusion of the contract[100].

Several judgments where Russian companies were formally discharged of their liabilities can perhaps be explained by the fact that the liabilities were often greater than the companies' assets outside of Russia. The question of whether the companies were discharged of some of their debts was thus important for the partition of the loss between different groups of creditors and not between the creditors and the debtor company.

There remain cases[101] where the court obviously found it unjust to demand payment from the debtor who had been dispossessed of the means of payment. Also the legislators have sometimes realized that the dispossessed debtors were in need of assistance. Such help can, however, only be expected when the debtors have been dispossessed *en masse* so that they can perform political pressure.

The debtors are considered discharged also when their creditor is identical with the foreign expropriator or acts as the expropriator's instrumentality[102].

In most cases, the courts used the rules governing the relationship of the parties. There are, nevertheless, also examples of decisions where the courts felt that to discharge the debtor would amount to application of the foreign expropriation decree. In these judgments, the courts examined whether the foreign taking was "territorially limited",[103] contrary to public policy[104] or international law[105], etc. However, the results did not differ.

V. Loss caused by foreign exchange control laws

104. Introduction.- States may intervene into the creditor - debtor relationship not only by expropriations, but also by e.g. exchange control legislation. This is, in fact, the most frequent form of intervention. In their pure and simplified form, these regulations make it impossible for the debtor to transfer the payment from the restricting state to the creditor. The regulation varies from state to state and, as long as the debtor obtains permission to transfer the payment, there is no loss. When the exchange regulations become so rigorous as not to allow the debtor to transfer the payment to his creditor abroad, the question of loss partition may arise.

If the debtor owns no property outside of the restricting state and there is no person guaranteeing the debt outside of that state, there will hardly be any lawsuit. But if the creditor sees a possibility of obtaining satisfaction from assets or surety in the forum state, he may sue for payment.

In most cases where the debtor invokes foreign regulations forbidding transfer of funds to the forum state or forbidding payment outside of the restrict-

ing state, there will be no loss if the forum compels him to pay notwithstanding the mentioned regulations. Normally, it can be presumed that the payment outside of the restricting country is equally advantageous for the debtor as payment inside that country. The debtor invokes the regulations because he is required to do so by the laws in the restricting state and not because he would suffer a loss if paying in the forum country. In reality the problem is, however, not that simple: payment in the restricting state may be more advantageous for the debtor, e.g. because of a forced exchange rate applied there, but this interest is hardly worthy of the forum's protection. Provisions of foreign law threatening the debtor by punishment in case he pays outside of the restricting state can normally be ignored, since the debtor will hardly be punished if he pays in the forum state because the forum forces him to do so.

There are, nevertheless, also situations where a payment in the forum country would be much more burdensome for the debtor than a payment in the restricting state because of the foreign currency regulations. Here the regulations cause a certain loss and the court must partition it. There are two main types of such cases.

The first group of decisions involve foreign currency laws which not only prohibit transfers and payments abroad, but also require or allow that the debtor discharges his debt by a payment in the restricting state to a governmental instrumentality (e.g. to a frozen account). If the debtor is forced to pay anew in the forum state, it may be unclear whether he can obtain restitution of the amount he has paid in the restricting state. If restitution is not allowed, the debtor will incur double liability. This is a situation not unsimilar to expropriation of the claim.

The second group of decisions involve foreign rules which simply make it impossible to transfer any of the debtor's assets from the restricting state. When the debtor is not a resident of that state and has no business activities there, the money he cannot take out is almost valueless for him. These cases are similar to those where the property belonging to the debtor and economically connected with the claim has been seized. The assets in the restricting state are almost lost for the debtor who cannot take them home to his country and who only can use them to pay his debts in the restricting state.

The study of the case law from the standpoint of loss partition meets with difficulties. The courts usually omit this aspect in their motivations and it is often unclear whether the debtor would sustain a loss by paying in the forum country. The background facts are often not mentioned in the report, which does not, however, mean that they do not influence the court.

Certain loss partition has been achieved by the Article VIII (2)(b) of the International Monetary Fund Agreement (s. 38 *supra*). This provision renders unenforceable exchange contracts contrary to exchange control regulations of a member state, which can in many cases protect the debtor from the loss caused by the foreign restrictions. This loss partition is, however, only

a side effect of the provision which has been enacted for a different purpose.

105. U.S.A.- Many American judgments involve German exchange regulations during the Nazi period. We can first consider the case of

Gross v. Continental Caoutchouc (N.Y. Sup. Ct. 1939): An Austrian refugee sued his debtor, a German company, for payment. The debtor objected, *inter alia*, that German exchange control regulations forbade payment to the creditor. The debtor had already paid to a frozen account in Vienna (at that time annexed to Germany). The court held the debtor liable. It interpreted the German decrees as not intended to interfere with the fulfilment of the obligation. The "situs" of the debt had followed the person of the creditor. The payment to the frozen account had not discharged the debtor as the creditor had not agreed to it.

The court relied on a restrictive interpretation of the German laws. It is, nevertheless, dubious whether that was the true *ratio decidendi*. Even if the decrees had prohibited payment, there would have been no reasons for American courts to enforce the prohibition. As to the already effected payment to the frozen account, it may have been felt that the debtor would be able to recover the amount after being forced to pay in America. It may have been assumed that the German state would spare debtors of its own nationality from double liability. The debtor was ordered to pay also in

Buxbaum v. Assicurazioni Generali and *Kaplan v. Assicurazioni Generali* (both N.Y. Sup. Ct., aff'd App. Div. 1942): The Italian insurance company sold life insurance in Czechoslovakia and Austria and the holders of the policies demanded payment in the U.S.A. The company objected that exchange regulations valid in Austria and Czechoslovakia (at that time annexed to Germany) prohibited such payment. The court decided that the company had to pay in America where it owned assets. The company was liable for its debts wherever it had funds to pay them. There was nothing in the policies excluding payment in the U.S.A.

The debtor in this case was not a national of the restricting state, but it seems that there were reasons to treat him as if he were. Italy was an ally of Germany and there were no reasons to believe that the company would not do business in the annexed territories of the *Reich* and that it would not have use for money there. Payment in the U.S.A. entailed discharge and a corresponding saving in Germany.

In the 1940's, American courts had to handle a group of cases known as "ticket cases"[106]. In these lawsuits, German emigrants tried to recover from various shipping companies the values of tickets they had bought in Germany for German marks, but had not used. The shipping companies were usually willing to repay the amounts, but only in marks and in Germany. They relied on German exchange regulations forbidding any other form of payment.
In several cases where the company was not German, the real issue was that

of loss partition. The question was who would carry the loss caused by the currency decrees: the emigrants or the companies which could not take money out of Germany in order to use it for payment to the emigrants. The courts usually did not discuss the loss partition, but rather the question whether the German decrees were "applicable" as part of the proper law of the contract. Sometimes the company was allowed to refuse payment in the U.S.A.[107]; sometimes it was held liable to pay in New York, but the claim was found valueless as ascertained in marks[108]. On other occasions, payment was ordered in marks at their free market value in New York which made the claim almost worthless and it was stressed that the company had not been able to transfer the amount from Germany to the U.S.A.[109] The loss partition was openly discussed in

Eck v. Ned.-Am. Stoomvaart (N.Y. App. T. 1944): The receipt given by the company to the passenger in Germany stated the price in dollars, but the court said that it would be unjust to let the passenger recover in dollars the amount he had paid in Germany in marks. The passenger could not have taken the marks with him out of Germany in any case and they would have been lost for him anyway. The dissenting minority argued that the company should be held liable as it had made no reservation as to the manner of repayment.

The "ticket cases" seem to have been decided more favorably for the debtor companies than for the passengers. Even when the company was held liable, it was helped by the depreciation of the mark on American money markets. It may be that the courts wanted to discharge the companies of obligations incurred in Germany where the assets of both the passengers and the companies had been frozen. The reason why the ticket had not been used by the passenger could have been an important factor at the loss partition. Sometimes it was *force majeure* like war, but often it was the passenger who had abstained from using the ticket, e.g. he had bought a return ticket in Germany but, once in the U.S.A., changed it into a single one. Transactions like this could have been intended by the passenger from the very start as a way of smuggling his money out of Germany at the expense of the shipping company. While there were reasons to sympathize with the passengers, usually refugees from racial and political persecution, the legitimate interests of the companies also deserved protection. It has, however, to be mentioned that in some cases the courts decided in favor of *German* shipping companies, where it could not be said that their assets in Germany were frozen or useless for them[110]. Even here, it was argued that the German decrees had to be applied as part of the *lex causae*.

A large group of recent decisions involve Cuban exchange control regulations. American and Canadian insurance companies refused to pay their debts related to their activities in Cuba in dollars in the U.S.A. Instead, they offered payment in pesos in Cuba, relying on Cuban exchange control laws. The Cuban assets of the companies had been lost by expropriation, whether open or concealed.

Whereas in some cases the companies invoked the expropriation as discharging (s. 93 *supra*), on other occasions they preferred to invoke the Cuban exchange control decrees. In some cases the courts ordered the insurer to pay in the U.S.A.:

Pan-American Life v. Raij (Florida District C.A. 1963): The court rejected the defense that the creditor's action was unenforceable because of the Bretton-Woods Agreement: a U.S. contract under which payments were to be made by or to a U.S. corporation in U.S. currency was not an exchange contract in the meaning of the Agreement.

Theye y Ajuria v. Pan-American Life (Louisiana C.A. 1963, Sup. Ct. 1964): The C.A. found the contract to be governed by the law of Cuba and the Bretton-Woods Agreement applicable. The plaintiff could consequently not demand payment in violation of Cuban law. A different result would cause the defendant to pay twice, since the reserves it maintained in Cuba to insure the payment of Cuban debts had been seized. The Sup. Ct. gave judgment for the plaintiff. The contract was governed by American law and the Bretton-Woods Agreement was not applicable since a contract payable in Louisiana in dollars was not a foreign exchange contract.

Varas v. Crown Life (Pennsylvania Superior Court 1964): The exchange control laws of Cuba, where the policy had been issued, were inapplicable since the parties had selected U.S. currency for payment and the insurer was authorized to do business in Pennsylvania. The insured had the right to enforce the cash-surrender-option terms of the policy in the state where she had exercised the option.

Confederation Life v. Vega y Arminan (Florida District C.A. 1968): The insurer had to pay in the U.S.A., since the cash-surrender-value clause of the policy constituted a continuing irrevocable offer which had become a contract on acceptance by the insured, its "situs" being the place of performance rather than the place in which the original contract had been concluded. Cuba's withdrawal from the International Monetary Fund had made the Bretton-Woods Agreement inapplicable.

There are, however, also decisions discharging the insurer:

Confederation Life v. Ugalde (Florida Sup. Ct. 1964): The court applied the Bretton-Woods Agreement and found the action unenforceable. It also mentioned that the contract was governed by Cuban law. The insurer could discharge the obligation by payment in Cuba and in pesos, since any other form of payment was forbidden by the Cuban decrees.

Gonzalez y Camejo v. Sun Life (U.S.D.C. Puerto Rico 1970): According to the Puerto Rican conflict rule, the policy was governed by Cuban law and according to that law, the payment was to be made in Cuba and in pesos. The fact that Cuba had withdrawn from the International Monetary Fund was irrelevant because the application of the Puerto Rican conflict rule was not affected by it.

Johansen v. Confederation Life (U.S.D.C. 1970, C.C.A. 1971): The insurer refused to pay in the U.S.A. arguing that he had invested all funds received in Cuba in Cuban assets for the purpose of meeting Cuban obligations. The U.S.D.C. found Cuban law applicable and held that the policies were payable in Cuba. The C.C.A. affirmed, although with a different motivation. Although the insurer, when selling insurance to Americans

in Cuba, had promised that the policies would be honored in the U.S.A. should the insured move there, the insured were estopped from raising this issue as they had not approached the insurer on the matter until after the changes in Cuba had barred the transfer of the insurer's assets from Cuba. Chief Judge *Lumbard* concluded that the equities of the situation tipped the scale slightly in the defendant's favor. It had been reasonable for the insurer to invest premiums in Cuba and he was not unduly enriched. Judge *Feinberg* dissented pointing out that the insurer's policy of investing in Cuba was irrelevant. On their face, the policies were not restricted to assets in Cuba. While perhaps it was a reasonable practice to invest in Cuba, no Cuban law had required the defendant to do so.

The *Johansen* judgment and the lower instance decision in *Theye y Ajuria* are the most interesting, since the loss partition was openly discussed by the court in these cases.

106. England.- The debtor's defense based on the German exchange control decrees was unsuccessful in

Graumann v. Treitel (K.B. 1940): Both the debtor and the creditor left Germany for good. The creditor sued the debtor for payment of a debt originating from times before the emigration. The debtor was willing to pay from the property he had left in Germany. In fact, he had even paid in Berlin to the creditor's frozen account there. The court obliged him to pay anew. There was nothing in the contract forbidding the creditor to demand payment also outside of Germany. The German exchange control laws were interpreted so as not to oppose payment between two English residents.

The loss caused by the German decrees which made it impossible to transfer money from Germany was put on the debtor. The payment to the frozen account from property which was, in any case, lost for the debtor had hardly caused any additional damage to him and it was thus impossible to speak about double liability. It is of interest to note that the parties subsequently arrived at a compromise that divided the loss: the creditor reduced his claim.

An English "ticket case" is

Ginsberg v. Canadian Pacific Steamship (K.B. 1940): A German emigrant sued the shipping company for recovery of amounts paid to the company in Germany prior to emigration. The court decided against the company. The contract was governed by English law and the German decrees did not intend to prohibit payment by an English company in England.

More recently, the debtor was obliged to pay in

Rossano v. Manufacturers Life (Q.B. 1963): The Canadian insurance company was ordered to pay in England the value of a policy issued in Egypt, although Egyptian exchange control regulations forbade such payment. The court found the contract governed by Canadian law and the Egyptian decrees to be irrelevant as they were not part of the applicable law. See s. 82 *supra*.

A quite special case from the standpoint of loss partition is

Helbert Wagg (Ch. 1956): The British creditor Wagg had a claim against a German debtor. The debtor paid the German *Konversionskasse* as he was required to do under German exchange control laws. After the end of World War II, Wagg sued the British Custodian of Enemy Property who, according to special laws, was to collect and to realize German assets in England and to distribute them among persons having pre-war claims against Germans. The Custodian asserted that the debt had been lawfully discharged by the debtor's payment to the *Konversionskasse*. The court decided that the payment to German authorities had discharged the debtor and that Wagg had no longer a valid claim. The main grounds were that the parties had chosen German law to govern the debt and that the effect of the German decrees depended on the applicable law. The debt was, in any case, situated at the seat of the debtor in Germany and English courts recognize the power of foreign states to expropriate movables situated within their territories, provided that the decrees have been adopted with the genuine intention of protecting the economy of the state issuing them, as was the case in Germany.

It might be surprising that the court discharged the debtor in the enenmy country and put the loss on the English creditor. It has, however, to be kept in mind that the creditor did not sue the German debtor, but the British Custodian. The real issue was whether Wagg would be allowed to take part in the partition of German assets among British creditors. The real parties were thus Wagg on one side, and other British creditors on the other side. It was possible for Wagg to obtain payment in Germany. According to the 1953 London Agreement on German External Debts[111], German debtors could not invoke against their foreign creditors payments that had been made to the *Konversionskasse* or to a Nazi custodian of enemy property. The West German state was, however, to compensate the loss caused to the debtors by the double liability. Keeping this in mind, it is understandable that the court preferred to reserve the assets in England for creditors who could not obtain payments from other sources.

107. Switzerland.- Swiss decisions can be divided into two groups. In the judgments belonging to the first group, the debtors had to pay in Switzerland regardless of the foreign decrees:

Nathan-Institut v. Schw. Bank für Kapitalanlagen (BG 1934): Nathan provided a loan to a German company. The defendant bank guaranteed repayment, which was supposed to take place in Switzerland. In 1933, the German debtor informed Nathan that payment could not be transferred from Germany because of German exchange restrictions. Nathan demanded payment from the surety and the BG obliged the surety to pay. The German restrictions were contrary to Swiss public policy and could be given effect neither directly nor indirectly, e.g. via "impossibility". Further, they were "procedural" and "territorially limited".

Spar- und Leihkasse Rebstein v. Deutsche Reichsbahngesellschaft (Bezirksgericht Zürich 1936): The German debtor company was held liable despite the German exchange restrictions.

Even if the decrees had made it impossible for the debtor to pay in Switzerland, it was the debtor who was responsible for this impossibility. The debtor, being German, enjoyed the benefits of the German legislation and had also to cover the loss caused by it to the creditor.

Rheinisch-Westfälische Elektrizitätswerk v. Anglo-Continentale Treuhand (BG 1942): The German debtor was sued by his Lichtenstein creditor. The debtor contended that he had already paid to the German *Konversionskasse* and that no other form of payment was possible or allowed. The BG found the debtor not discharged. The parties had chosen the law of New York to govern the claim and, according to that law (including New York's public policy), the German decrees had to be ignored.

In all these cases, the debtor had his seat in the restricting state, whereas the creditor had his seat and activities outside of that state. A payment in the restricting state would be of little, if any, value for the creditor. A payment in Switzerland would, on the other hand, present no extra burden for the debtor, who would by such payment be discharged from the debt in his home country where he certainly had use for the money. From the standpoint of loss partition, it was thus reasonable to oblige the debtors to pay in Switzerland. In the *Nathan* case the creditor sued the Swiss surety, but it was obviously felt that the surety had assumed also this type of risks. In the *Rebstein* case, the court admitted that the German decrees had made it impossible for the debtor to pay in Switzerland, but in reality there was no impossibility, provided that the debtor owned assets in Switzerland. The court ordered the debtor to pay in Switzerland and it had obviously not in mind to order something that was impossible. As to the *Rheinisch* case, it should be observed that the debtor had already paid to the *Konversionskasse*. It is possible that the court expected the debtor to recover the amount paid in Germany; it was reasonable to expect the German legislator to protect his own nationals from consequences of his own legislation.

In the second group of cases, the courts held against the creditors:

Sté pour l'exportation des sucres v. Schw. Kreditanstalt (BG 1937): A Belgian company sold goods to an Italian one. Schw. Kreditanstalt guaranteed payment of the price. Italy and Belgium introduced, subsequently, a compulsory clearing for payments between the two countries. The Italian debtor paid the price to the Italian clearing authorities, but the Belgian creditor sued the Swiss surety for payment in Switzerland. The BG found the surety not liable. The clearing treaty was not incompatible with the Swiss public policy. The obligations of the surety were, further, not considered to include also this kind of risks.

If the creditor obtains payment in his home country, there is normally no loss since he will certainly have use for the money there. It seems that the clearing led to the same result. There were thus no reasons why the surety should pay, especially as it probably would be difficult for him to obtain redress from the principal debtor in Italy. The court decided for the debtor also in

Dessauer v. Schw. Lebensversicherungs- und Rentenanstalt (BG 1945): The Swiss insurance company sold insurance to Dessauer, a resident of Germany. In 1933, Dessauer moved to Switzerland. He tried without success to obtain permission of the German exchange control authorities to transfer the insurance from the German to the Swiss portfolio of the insurer. In 1934, he declared in writing that the sums due to him under the policy were payable in Germany. In the present lawsuit, he demanded payment in Switzerland. The BG rejected the action. The policy was governed by German law and the parties had agreed in 1934 to payment in Germany. It was not necessary to discuss whether, even without the 1934 agreement, the place of payment would be in Germany, "wo für diesen Vertrag Sicherheit geleistet ist". The court stressed that foreign insurers in both Germany and Switzerland had to provide security for life insurance contracts and that the German authorities had not allowed the transfer of the claim from the German portfolio of the insurer.

Stransky v. Assicurazioni Generali (BG 1946): Stransky took an insurance at the Prague branch of the defendant Italian insurance company. He left Czechoslovakia and settled down in Switzerland where he demanded payment of the value of the policy. The insurer refused to pay in Switzerland relying on the exchange control laws valid in Czechoslovakia at that time (during World War II). After the end of the war, the insurer paid the sum to an account in Prague. Stransky asserted that the money had been put under a special administration equalling expropriation by the Czechoslovak authorities. The BG found the insurer discharged. It stressed that it did not apply any Czechoslovak currency or expropriation decrees, but only the Czechoslovak proper law of the contract which stipulated, in a provision of private law, that the normal place of payment was Prague.

In the *Dessauer* case, the debtor had agreed to a payment in the restricting state and the considerations of the court, concerning the fact that the debtor's assets (security) covering the debt were subjected to currency restrictions, have only the value of *obiter dicta*. It is, nevertheless, clear that the court was inclined to protect the insurer, even if there had been no agreement as to the place of payment. This is confirmed also by the *Stransky* case. In both cases, the insurers were companies with their seats outside of the restricting state. The creditors could not take money out of Germany and Czechoslovakia, but the same could probably be said about the debtors. To force the debtor to pay in Switzerland when he could pay abroad in local currency which was otherwise of no use for him would be to move the loss caused by the foreign restrictions from the creditor to the debtor[112]. This distinguishes the *Stransky* case from American judgments involving the same Italian insurer, but decided during the time when the insurer could be supposed to continue business in Prague and to have use for money there (s. 105 *supra*). The fact that the proper law of the contract, as ascertained in the *Stransky* case, stipulated that the normal place of payment was in Prague would not have probably been decisive if the debtor had not had any assets in Czechoslovakia. The creditor would have probably been given the right to payment in Switzerland if such payment had not entailed any damage for the debtor. But under such circumstances, the debtor would have probably been willing to pay in Switzerland and there would have been no lawsuit at all.

The special provision on suretyship enacted in 1941 (s. 85 *supra*) protects Swiss sureties also from loss caused by foreign exchange control rules.

108. Other countries. - The following two decisions can be compared:

W. German KG Oct. 27, 1932: The Hungarian debtor owned real property in Germany which secured the debt. Hungarian exchange control laws made it impossible for the debtor to transfer payments from Hungary. Facing the danger of losing his real property, the debtor applied for postponement of the payment according to a special German law. The KG refused to grant the respite, reasoning that it was for the debtor to bear the consequences of the laws in his home country.

Netherlands, Justice of the Peace Emmen July 13, 1936: A Dutchman living in Germany owned real property in the Netherlands which secured his debt. Because of German exchange control laws, the debtor could not pay full interest on the debt and the creditor demanded satisfaction from the mortgage. The debtor asked for respite according to Dutch law. The court decided to grant a respite of one year. The court said that it would be unjust to allow the debtor to invoke his residence in Germany in order to damage the creditor. The debtor had, however, shown that he could not pay only because of the German decrees. It was thus not unjust to grant the respite.

It is not inconceivable that the difference in outcomes in the two cases was caused by the nationality of the debtor. The German court stressed explicitly that the debtor was to bear the loss caused by the decrees of his home country.

Foreign currency laws have given rise to lawsuits also in Austria:

OGH Sept. 5, 1934: The debtor, a Hungarian subsidiary of an Austrian company, could not pay to the Austrian creditor because of the Hungarian exchange regulations. The Austrian mother company of the debtor had guaranteed the claim, but refused to pay pointing out that it could use all objections open to the principal debtor, i.e. also the Hungarian decrees. The OGH held the surety liable. The main debt was governed by Hungarian law, but the securing obligation by Austrian law. Under Austrian law, the surety was to stand also for risks of this type, unless an explicit reservation had been made by the surety when assuming the guarantee.

OGH April 24, 1936: The Austrian surety guranteed a debt owed by a German debtor to a German creditor. The creditor ceded the claim to a Dutchman living in Belgium. The new creditor could not obtain payment from the debtor because of the German exchange decrees. The OGH liberated the surety. The surety had argued that he had assumed the gurantee upon the condition that the claim would not be ceded, but the court used other grounds. The guarantee was, according to the court, governed by German law and, under this law, the surety could invoke all the objections of the principal debtor, thus also the impossibility to pay because of the exchange control decrees.

It seems that *Hjerner* was right when he wrote that the different outcomes in these two cases could hardly be explained by any alleged difference between Austrian and German law as to liabilities of a surety[113]. In the first case, the surety could be considered economically identical with the principal debtor since the latter was a subsidiary of the former; there was thus no real loss when the surety had to pay without being able to obtain redress from the principal debtor. In the second case, the surety and the debtor were not, it seems, economically so close to each other. It seems that the surety in the second case had not assumed the risk of German exchange regulations. At the time the guarantee had been assumed, both the debtor and the creditor were German firms and the surety had not considered the possibility that the creditor would cede the claim to a foreign resident.

The following two French cases can be mentioned:

L'Urbaine v. Et. Bernard et Devavrin (C.A. Paris 1935): A French seller did not obtain full payment from the Hungarian buyer because of the Hungarian exchange regulations. The seller had insured himself in case of insolvency of debtors and demanded that the insurer should cover the loss. The insurer argued that the impossibility for the debtor to pay because of exchange regulations was not insolvency within the meaning of the policy and that the Hungarian decrees constituted *force majeure* liberating the insurer. The court obliged the insurer to pay, arriving at this result by interpretation of the contract.

Setbon v. Lellouche (Trib. Seine 1965): Setbon, a Tunisian living in France, sued Lellouche, a Frenchman, to obtain *exequatur* for a Tunisian judgment obliging Lellouche to pay Setbon a sum in dinars. Lellouche objected that he already had paid in Tunisia, but, according to Setbon, this payment was not discharging as Setbon's assets in Tunisia had been frozen by Tunisian exchange control legislation contrary to French public policy. The court held that Lellouche was discharged. Setbon was a Tunisian citizen and the obligation had originated in Tunisia, where also the fulfilment had taken place.

It seems that the natinality of the creditor influenced the court in the latter case, since it was explicitly invoked in the decision. It was perhaps felt that Setbon, as a Tunisian national, had more use for the dinars in Tunisia than the debtor. It is not mentioned in the decision whether the debtor had paid by a transfer from France or by using his assets in Tunisia, which were subjected to the same exchange control legislation as the assets of the creditor.

109. Comparative remarks.- The described decisions are only examples and not a comprehensive review of the case law. In this thesis, they are of interest as analogies to the cases involving partition of expropriation loss.

The impossibility for the debtor to transfer payment from the restricting state to the forum country does not constitute an impossibility to pay, since the debtor (surety) may own assets in the forum state which can be used for payment. If all the property of the debtor (surety) is in the restricting state, an action in the forum will be meaningless. In most cases when an action has

been instituted, the payment in the forum state is thus possible. It may, however, be disadvantageous for a debtor whose property that has been intended for fulfiment of the obligation is frozen by the exchange control decrees in the restricting state. The courts sometimes explicitly refer to such a disadvantage and refuse to force the debtor to pay in the forum country[114]. In most cases, the courts use other grounds, e.g. public policy[115], "territorial limitation"[116], connection or lack of connection of the decree to *lex causae*[117], various interpretations of the International Monetary Fund Agreement[118], restrictive interpretation of the foreign exchange regulations[119], etc. It is difficult to know to what extent the courts, when invoking these motives, are influenced by considerations of justice and loss partition.

In cases where the loss was to be partitioned between the creditor and a surety, the courts examined whether the surety had assumed also the risk of exchange regulations[120].

In several decisions, the courts expressly stated that the loss was, in the first place, on the party having the nationality of the restricting state[121].

The courts did not accept payment that had been made to a frozen account or to a governmental instrumentality in the restricting state as discharging[122]. It can perhaps be assumed that the courts expected that the debtor, if obliged to pay in the forum country, would be able to recover the amounts paid in the restricting state and thus would not incur double liability.

1) *Williams v. Bruffy* (U.S. Sup. Ct. 1877); *Stevens v. Griffith* (U.S. Sup. Ct. 1884); *Elmassian v. Crédit foncier d'Algérie* (TCom Marseille 1926); *Levi v. Monte dei Paschi di Siena* (Italy Cass. 1947); *Trondhjems Sparbank v. S. Jobs Logen* (Norway Sup. Ct. 1951); *cf.* German RG March 29, 1927.
2) The circumstances and the outcome were almost identical in *Khorosh v. Rossia* (TCiv Seine 1929).
3) *The Adriatic* (U.S.C.C.A. 1919); *Texas Co. v. Hogarth* (U.S. Sup. Ct. 1921); *Plesch v. Banque nationale d'Haiti* (N.Y. App. Div. 1948); *Kobylinsky v. Banco di Chivari* (Italy Cass. 1951).
4) *Marchak v. Rabinerson* (C.A. Paris 1933); *Banque des marchands de Moscou* (England Ch. 1952).
5) *Frumier de Boylesve v. Jordaan* (C.A. Paris 1927), s. 74 *supra.*
6) *Dunker v. Bank Södra Sverige, Traugott v. Svenska Handelsbanken, Lindners v. Skandinaviska Kredit, Skandinaviska Kredit v. Kristiania Bank, Svenska Handelsbanken v. Kristiania Bank* (all Sweden HD 1924).
7) *Hjerner* 321.
8) *Andersson v. Bank Södra Sverige, Andersson v. Svenska Lantmännens Bank* (both Sweden HD 1926).
9) *Thorer v. Nya Banken* (Sweden HD 1924).
10) *Abramson v. Smålands Enskilda Bank* (Sweden HD 1924).
11) *Cf.* German RG Sept. 22, 1930.
12) *Note*, Clunet 1933, 340.
13) *Avi v. Langstaff* (TCom Seine 1922); *Bronstein v. Banque russo-asiatique* (C.A. Paris 1933); W. German BGH April 24, 1954.
14) *Frankl v. Fina* (Swiss BG 1937).

15) *Banque des pays v. Banque française* (C.A. Paris 1936).
16) *But* see *Trondhjems Sparbank v. S. Johs Logen* (Norway Sup. Ct. 1951).
17) Quoted in 61 A.J.I.L. 611 (1967).
18) *Hollweg*, ZaöRV 1969, 322.
19) Ibero-Amerika. Ein Handbuch (ed. 6, Hamburg 1966) 588.
20) *Frenkel v. L'Urbaine* (N.Y.C.A. 1930); *Aninger v. Hohenberg* (N.Y. Sup. Ct. 1939); *Amstelbank v. Guaranty Trust* and *Koninklijke Lederfabriek v. Chase National Bank* (both N.Y. Sup. Ct. 1941); *Tabacalera Jorge v. Standard Cigar* (U.S.C.C.A. 1968). *But. cf. Bercholz v. Guaranty Trust* (N.Y. Sup. Ct. 1943); *Banque de France v. Chase National Bank* (U.S.C.C.A. 1932); *Banque de France v. Equitable Trust* (U.S.D.C. 1929).
21) Art. 501 para. 4; *Hjerner* 557.
22) See *Staudinger (—Weber)* 691-724 with references.
23) BGBl 1952 I 198.
24) BGH Jan. 14, 1959.
25) Reparations for similar policies have been accorded, BGBl 1953 I 1387 § 60; *Mohr* , Versicherungsrecht 1953, 420; *Reiss v. Deutsches Reich,* Decisions of the Sup. Rest. Ct. Berlin XI 115.
26) BGH March 17, 1953 and Oct. 24, 1957.
27) BGH Feb. 21, 1958.
28) BGH March 24, 1955; April 1, 1955; Feb. 18, 1957; April 10, 1957; July 11, 1957 (*cooperative case*); OLG Nürnberg April 25, 1961.
29) LG Hamburg Feb. 15, 1956; LG West Berlin Oct. 28, 1957 and Dec. 9, 1957; KG Feb. 25, 1958.
30) BGH Jan. 14, 1959.
31) OLG Düsseldorf July 10, 1958; OLG Celle Dec. 22, 1959.
32) *Czapski*, NJW 1954, 380; *Bergman*, 11 I.C.L.Q. 755-6 n. 58 (1962).
33) OLG Celle Dec. 22, 1959.
34) BGH May 20, 1955.
35) *Cf. Sokoloff v. National City Bank* (N.Y.C.A. 1924, 1928), s. 81 *supra.*
36) *Witenberg v. Sønderby* (Denmark ØL 1924); *Göteborgs Bank v. Banque russe* (Sweden HD 1931).
37) *Bergman*, 11 I.C.L.Q. 747 (1962).
38) *Gibbs v. Rodriguez* (Philippines Sup. Ct. 1950).
39) *Bergman,* 11 I.C.L.Q. 767, 769 (1962).
40) *Bergman*, 11 I.C.L.Q. 765 (1962).
41) *Petrogradsky Bank v. National City Bank* (N.Y.C.A. 1930).
42) German RG Oct. 4, 1882.
43) *Universale v. Wolff De Beer* (OG Zürich 1940); *cf.* German RG Sept. 22, 1930.
44) *Menendez v. Saks and Co.* (U.S.C.C.A. 1973); *Molnár v. Wilsons AB* (Sweden HD 1954); *Böhm v. Bergsland* (Byrett Oslo 1939); W. German BGH Nov. 11, 1953; OLG Frankfurt June 27, 1952; see also *Wolff v. Oxholm* (K.B. 1817).
45) *Sulyok v. Penzintezeti* (N.Y. App. Div. 1952); OG Zürich Sept. 16, 1952; W. German BGH Jan. 28, 1965; OLG Hamburg Nov. 25, 1959.
46) *Menendez v. Saks and Co.* (N.Y.C.A. 1973); *Molnár v. Wilsons AB* (Sweden HD 1954); see *Oliva v. Pan-American Life* (U.S.C.C.A. 1971).
47) E.g. *Sokoloff v. National City Bank* (N.Y.C.A. 1924, 1928); German BGH Feb. 25, 1960.
48) *Haw Pia v. China Banking* (Philippines Sup. Ct. 1948); W. German BGH Dec. 22, 1953, and April 15, 1955. *But* BGH Nov. 11, 1953; OLG Frankfurt June 27, 1952.
49) *Williams v. Bruffy* (U.S. Sup. Ct. 1877); *Stevens v. Griffith* (U.S. Sup. Ct. 1884);

Levi v. Monte dei Paschi di Siena (Italy Cass. 1947); the Norwegian occupation cases, s. 87 *supra.*

50) *Spiller v. Turner* (England Ch. 1897); *Indian and General Investment Trust v. Borax* (England Ch. 1919); *Héritiers Vogt v. Feltin* (France Cass. 1928); *Rossano v. Manufacturers Life* (England Q.B. 1963); see German RG Oct. 4, 1882.

51) *Rückversicherungsgesellschaft v. Perutz* (Swiss BG 1941); *Rückversicherungsgesellschaft v. Dr. M.D.* (Swiss BG 1941); *Rückversicherungsgesellschaft v. R.A.* (O.G. Zürich 1943); *Samuelsen v. Norges Bank* (Norway Sup. Ct. 1951); W. German BGH Feb. 25, 1960.

52) E.g. *Rückversicherungsgesellschaft v. Perutz* (Swiss BG 1941); *Schw. Lebensversicherungs- und Rentenanstalt v. Elkan* (Swiss BG 1953); *Kleve v. Basler Lebensversicherungsgesellschaft* (N.Y. Sup. Ct. 1943); German RG March 18, 1931; OLG Saarbrücken April 5, 1949; W. German BGH Feb. 1, 1952; Feb. 11, 1953; Nov. 11, 1953; Dec. 22, 1953; April 15, 1955; dissenting opinions in the Norwegian occupation cases, s. 87 *supra.*

53) *Sulyok v. Penzintezeti* (N.Y. App. Div. 1952); OG Zürich Sept. 16, 1952; *cf. Williams v. Bruffy* (U.S. Sup. Ct. 1877); *Stevens v. Griffith*(U.S. Sup. Ct. 1884); *Rückversicherungsgesellschaft v. R.A.* (OG Zürich 1943).

54) *Wolff v. Oxholm* (England KB 1817); German RG April 3, 1925 and June 13, 1934; Norwegian occupation cases, s. 87 *supra.*

55) *Bloch v. Basler Lebensversicherungsgesellschaft* (N.Y. Sup. Ct. 1947); *Trujillo v. Bank of Nova Scotia* (N.Y. Sup. Ct. 1966); *cf. Oliva v. Pan-American Life* (U.S.C.C.A. 1971).

56) *Arab Bank v. Barclays Bank* (England H.L. 1954); *Héritiers Vogt v. Feltin*(France Cass. 1928); *Molnár v. Wilsons AB* (Sweden HD 1954); W. German BGH Feb. 25, 1960; OLG Frankfurt June 27, 1952.

57) *Seidl-Hohenveldern* 78 n. 24.

58) *Perry v. Equitable Life* (K.B. 1929).

59) *Buerger v. New York Life* (C.A. 1927).

60) *Seidl-Hohenveldern* 79 n. 25; *cf.* n. 57 *supra.*

61) *Guenod v. L'Urbaine* (TCiv Seine 1924); *Tessier v. L'Urbaine* (TCom Seine 1925); *Schouster v. L'Urbaine* (TCiv Seine 1927); *Bauchon v. Crédit lyonnais* (C.A. Paris 1927); *Crédit national industriel v. Crédit lyonnais* (Cass. 1929); *Monoszon v. Rossia* (TCiv Seine 1931); *Dvoriantschikoff v. L'Urbaine* (C.A. Paris 1931).

62) See also *Kharon v. Banque russe* (TCom Seine 1921); *Hornstein v. Banque russo-asiatique* (TCom Seine 1924); *Aratzkoff v. Banque russo-asiatique* (C.A. Paris 1929).

63) *Sté Cuirs et Peaux v. Banque russe* (TCom Seine 1925); *Krivitzky v. Banque russe* (TCom Seine 1927); *cf. Kamenka v. Cahn* (TCom Seine 1927).

64) *Zelenoff v. Banque de Sibérie* and *Kahn v. Rossia* (both C.A. Paris 1928).

65) Text in Clunet 1921, 332-3.

66) The circumstances and outcome were similar in *Banque des pays d'Orient v. Zurukzoglu* (Cass. 1929).

67) E.g. *Crédit du Nord v. Brosette* (C.A. Aix 1966); *Sté des viandes v. Cie française de crédit* (C.A. Aix 1966); *B.N.C.I.A. v. Alco et Lavie* (C.A. Paris 1967).

68) E.g. *Crédit industriel et commercial v. Vitielo* (C.A. Aix 1968); *B.N.C.I.A. v. Bandet* (C.A. Agen 1969).

69) E.g. *B.N.C.I.A. v. Narbonne* (C.A. Aix 1965); *Consorts Amsellem v. B.N.C.I.A.* (C.A. Lyon 1967).

70) E.g. *Sirius v. Bracht* (TCom Lille 1965).

71) *Consorts Amsellem v. B.N.C.I.A.* (C.A. Lyon 1967).

72) *Cie algérienne de tracteurs v. Bertagna* (Trib. Seine 1966).

73) E.g. *Richier v. Sté marseillaise de crédit.*
74) E.g. *Crédit foncier v. Narbonne.*
75) *Loussouarn,* Rev. trim. dr. com. 1969, 642.
76) *Frères de Cara v. Comptoir d'escompte de Sidi-Bel-Abbès* (Cass. 1969).
77) J.O. Nov. 7, 1969; La Semaine juridique 1970 I 2293.
78) See *Seidl-Hohenveldern,* Rev. int. dr. comp. 1969, 768-78.
79) Act No. 70-632 of July 15, 1970.
80) See *Siari v. Banque populaire d'Algérie* (Cass. 1971).
81) BGBl 1955 No. 185, § 5.
82) OGH March 11, 1960.
83) See UfR 1925, 265 n. 3.
84) BGBl 1953 I 201, § 82 - 89.
85) § 6 of the 35. Durchführungsverordnung zum Umstellungsgesetz, Verordnungsblatt Brit. Zone 1949, 471.
86) BGBl 1955 I 474.
87) Gesetz- und Verordnungsblatt Berlin (West) 1953, 1483, § 5.
88) Gesetz- und Verordnungsblatt Berlin (West) 1951 I 247, § 7.
89) See also § 26 Heimkehrergesetz BGBl 1950 I 221; § 9 Häftlingshilfegesetz BGBl 1957 I 168; § 87-91 Allgemeines Kriegsfolgengesetz BGBl 1957 I 1947; *Staudinger (-Weber)* 698-9; *Ficker* 113-4; *Köster,* JR 1952, 11-2; *Drobnig,* RabelsZ 1954, 463-75.
90) *Köster,* JR 1952, 11.
91) *Ibid.*
92) Quoted from JR 1951, 628.
93) IPRspr. 1954-5, 84.
94) BGH May 29, 1951 and Oct. 6, 1953; see *Meyer-Cording.*
95) Sup. Ct. Feb. 14, 1951; *Artzt,* NJ 1951, 213. *But* OLG Gera June 4, 1948.
96) Text in ZfO 1928, 1164-9.
97) *Blanco v. Pan-American Life* (U.S.C.C.A. 1966); *Crédit foncier v. Narbonne* (France Cass. 1969).
98) *Wright v. Nutt* (England In. Chancery 1788); *but* see *Crédit ind. et com. v. Borgeaud* (C.A. Paris 1969).
99) *Regina Shorr v. Succession Meir Weizman* (Israel Sup. Ct. 1954).
100) See *Langhard v. AGA* (Sweden C.A. Svea 1953); W. German BGH Dec. 30, 1957.
101) *Dougherty v. Equitable Life* (N.Y.C.A. 1934); *Present v. U.S. Life* (N.J. Sup. Ct. 1967); OLG Hamburg Nov. 7, 1946 and Jan. 6, 1948; KG Dec. 22, 1950; LG Lüneburg Feb. 4, 1954; *d'Aivassoff v. Raedemaekker* (TCiv Brussels 1927); *Pettai v. Schinz* (OG Zürich 1928); see also n. 69, 70, 100 *supra.*
102) *Nationale Handelsbank v. Kat's Handel* (D.C. Amsterdam 1959); see *Siari v. Banque populaire d'Algérie* (France Cass. 1971).
103) W. German BGH Feb. 25, 1960 and Feb. 28, 1972; Sup. Ct. Brit. Zone March 31, 1949.
104) E.g. W. German BGH Nov. 12, 1959; France Cass. April 23, 1969.
105) E.g. *Blanco v. Pan-American Life* (U.S.D.C. 1963); *Banca Nazionale del Lavoro v. Focanti* (C.A. Rome 1968).
106) See *Hjerner* 85-90; *Mann* 403 n. 8.
107) E.g. *Schlein v. Ned.-Am. Stoomvaart* (N.Y. App. T. 1942); *Lowenhardt v. Cie générale* (N.Y. App. T. 1942).
108) E.g. *Halpern v. Ned.-Am. Stoomvaart* (N.Y. Mun. Ct. 1941).
109) E.g. *Baer v. U.S. Lines* (N.Y. App. T. 1943).
110) *Steinfink v. North German Lloyd* (N.Y. App. T. 1941); *Branderbit v. Hamburg–American Line* (N.Y. App. Div. 1943).

111) BGBl 1953 II 331, Annex IV § 9; *Bergman*, 11 I.C.L.Q. 775 (1962).
112) *Hjerner* 155-6.
113) *Hjerner* 545.
114) *Theye y Ajuria v. Pan-American Life* (Louisiana C.A. 1963); *Johansen v. Confederation Life* (U.S.C.C.A. 1971); *Dessauer v. Schw. Lebensversicherungs- und Rentenanstalt* (Swiss BG 1945); see also *Eck v. Ned.-Am. Stoomvaart* (N.Y. App. T. 1944); Justice of the peace Emmen (Netherlands) July 13, 1936; *Baer v. U.S. Lines* (N.Y. App. T. 1943).
115) *Nathan-Institut v. Schw. Bank* (Swiss BG 1934); *Rheinisch-Westfälische v. Anglo-Continentale Treuhand* (Swiss BG 1942); see *Sté pour l'exportation v. Schw. Kreditanstalt* (Swiss BG 1937).
116) *Nathan-Institut v. Schw. Bank* (Swiss BG 1934); *Confederation Life v. Vega y Arminan* (Florida District C.A. 1968).
117) *Schlein v. Ned. -Am. Stoomvaart* (N.Y. App. T. 1942); *Gonzalez y Camejo v. Sun Life* (U.S.D.C. 1970); *Rossano v. Manufacturers Life* (England Q.B. 1963).
118) *Theye y Ajuria v. Pan-American Life* (Louisiana C.A. 1963; Louisiana Sup. Ct. 1964); *Pan-American Life v. Raij* (Florida District C.A. 1963); *Confederation Life v. Ugalde* (Florida Sup. Ct. 1964).
119) *Gross v. Continental Caoutchouc* (N.Y. Sup. Ct. 1939); *Graumann v. Treitel, Ginsberg v. Canadian Pacific* (both England K.B. 1940).
120) Austrian OGH Sept. 5, 1934 and April 24, 1936; *Nathan-Institut v. Schw. Bank* (Swiss BG 1934); *Sté pour l'exportation v. Schw. Kreditanstalt* (Swiss BG 1937); *cf. L'Urbaine v. Et. Bernard et Devavrin* (C.A. Paris 1935); n. 51 *supra*.
121) German KG Oct. 27, 1932; *Spar- und Leihkasse Rebstein v. Deutsche Reichsbahngesellschaft* (Bezirksgericht Zürich 1936); *Setbon v. Lellouche* (Trib. Seine 1965).
122) *Gross v. Continental Caoutchouc* (N.Y. Sup. Ct. 1939); *Rheinisch-Westfälische v. Anglo-Continentale Treuhand* (Swiss BG 1942); *cf. Graumann v. Treitel* (England K.B. 1940); *Rückversicherungsgesellschaft v. Perutz* and *id. v. Dr. M.D.* (Swiss BG 1941).

CHAPTER TEN

SOLUTIONS

I. Private international law or substantive law?

110. Two approaches.- There are two main approaches used by courts and writers when discussing cases involving partition of expropriation loss. The first approach is that of conflict of laws: the courts and authors examine whether the foreign decree can be "applied" and the discussion formally concerns the right of the foreign expropriator to the seized property rather than who is to bear the loss. The courts and authors examine whether the foreign decree is compatible with public policy or international law, whether it is "territorially limited", part of the normally applicable *lex causae*, etc.

The second approach looks for solutions in the substantive law governing the relationship between the parties. The foreign decree is not applied in any way and the only thing that is taken into consideration is the expropriation loss as a fact. The loss is deemed to be a result of some kind of a natural disaster and an effort is made to partition it equitably. The rightfulness and validity of the foreign taking are irrelevant.

In the case law, both approaches are used and it is difficult to say which one prevails (s. 75, 79, 91, 109 *supra*). Sometimes they can both be found in the same decision. In cases concerning partition of the loss caused by expropriation of a specific object of an obligation or by expropriatory intervention into mandate contract, the courts look, with minor exceptions, for solutions in the substantive legal rules governing the relationship between the parties. These rules contain provisions that can be used for loss partitioning and their application seems to lead to just and acceptable results in practically all cases.

The situation is more complicated in cases involving partition of the loss caused by expropriation of generic claims. Here, there are usually no clear rules that can be used for the partitioning. The debtor is normally discharged by paying to his *rightful* creditor and not otherwise (there is no impossibility, *force majeure*, etc.). This has led many courts and writers to believe that the loss partition should depend on the "rightfulness" of the expropriation. In this way, the loss partitioning problem has often been converted into a problem of the expropriator's rights. The reasons used by courts often give the impression that, for example, a coerced payment to the foreign expropriator is not discharging for the debtor, unless the expropriator himself can rightfully demand payment in the forum. In this connection, the courts invoke public policy, "territorial limitation", incompatibility with international law,

etc. The courts seem to believe that discharging the debtor would amount to enforcing the foreign expropriation. This is wrong, since the expropriation has already been enforced or the enforcement cannot be averted (otherwise there would be no loss or risk to partition). The expropriator is not a party to the lawsuit and his interests are normally not at stake. Besides, if a foreign seizure is declared null and void, e.g. because it is contrary to public policy, the loss will not disappear; it will still have to be partitioned in one way or antoher.

Also in cases where the loss has been caused by expropriation of the debtor's property economically connected to the debt there is usually no support in the substantive law for the assertion that the expropriation has discharged the debtor of his liabilities. The courts are, however, often not content with pointing out that the debtor is liable with all his property and they discuss the expropriator's right to the seized assets, as if liberating the debtor would amount to recognition of the rightfulness of the taking.

In the following, it will be shown that both approaches can be found also in legal literature.

111. Private international law approach.- Several authors seem to believe that giving discharging effect to a foreign executed taking would amount to recognition of the right of the expropriator and to application of the foreign decree. Thus, *Zöller* used the following words when commenting on French judgments which had denied discharging effect to the Algerian seizures (s. 95 *supra*)[1] :

". . . to allow that the liabilities be also transferred to the Algerian state is to implicitly acknowledge the application of the Algerian measures in France, and, consequently, their legality."

Similarly, *Laun*[2] wrote that discharge to a debtor who had been forced to pay a foreign expropriator could only take place by application of the expropriation law. The East German seizures could not, consequently, liberate a debtor living in the West, since they were contrary to West German public policy and "territorially limited". *Adriaanse*[3] sees in discharging the debtor a recognition of the expropriation. *Strich*[4] wants to achieve an equitable loss partition by a flexible interpretation of public policy and of "territorial limitation". *Drobnig*[5] discussed the problem of loss partitioning in connection with guaranteeing obligations (mortgages, suretyships, etc.) and suggested that it be solved by granting "international reflection effects" to foreign expropriations, i.e. by applying foreign expropriatory decrees in order to discharge certain obliged persons. To the same group belong also authors who in loss partitioning judgments see a decision in favor of the foreign expropriator. Thus *Bergman*[6] saw in the Indian judgment *Delhi Mills v. Singh* (s. 89 *supra*)

a decision in favor of the expropriator. Similarly, *Niboyet*[7] interpreted the French decision *Banque des pays v. Banque française* (s. 77 *supra*) as a major step on the way towards enforcement of the foreign decree.

Many authors adhering to the doctrine of "territorial limitation" want to find solutions for loss partitioning cases in the "situs" of the expropriated property, e.g. of a debt. According to them, the foreign expropriation is to be given discharging effects provided that the claim is "situated" in the territory of the expropriator, but not otherwise[8]. But as claims cannot have any physical situs, the localization is necessarily fictitious and can be manipulated. The efforts to find a uniform definition of the "situs" of claims have failed. The most frequently used criterion is the seat (residence) of the debtor[9]. It is, however, obvious that a claim can be collected by the expropriator from the debtor in any country where the debtor owns property. Thus a bank or an insurance company can be compelled to pay in any country where it has a branch. This has led some authors to "situate" bank accounts and insurance claims where they are administered[10] which is, however, not a great help since the claim may be collected by the expropriator also from the head office or any other branch.

According to some authors[11], claims can be validly expropriated whereever the debtor owns property. The debtor is discharged, but the discharge is "territorially limited" to the country of expropriation. This solution puts all the loss on the debtor who is not allowed to invoke the discharge granted to him in the expropriating country in courts in other states. This also means that a claim can be collected from the debtor several times in several countries. *Kegel* wants to mitigate the multiple liability by application of the West German substantive law's *Treu und Glauben* provision[12]. *Plassmann*[13] opposed the whole idea of splitting of claims and wrote that repeated seizures of the same claim are no more than "eine reine Willkürhandlung, die gar keinen Bezug auf die Forderung hat".

There are also authors who consider the residence of both the debtor and the creditor to be relevant. *Van Hecke* writes[14]:

"Quant aux biens incorporels tels que les créances, il suffit que soit le débiteur, soit le créancier réside en fait en dehors du territoire de l'Etat expropriant pour que la créance échappe à la mesure d'expropriation."

A similar view has been expressed by *Reichert*:[15]

"Es gibt keine Forderungsenteignung durch einseitiges Handeln des enteignenden Staates, insbesondere nicht des Schuldnerstaates."

The West German LG Tübingen said in its judgment of Dec. 23, 1960, that a state must, in order to seize a debt, have power to address orders to the creditor as well as to the debtor (meaning that they both must reside in that

state). These views lack realism. *Van Hecke* writes that the claim escapes seizure, although it has perhaps already been seized and its value collected by the expropriator. What is apparently the true meaning of these statements is not that there can be no expropriation if the debtor or the creditor reside outside of the expropriating state, but rather that, in such case, the expropriation loss is to be carried by the debtor who will not be allowed to invoke the seizure as a discharge in the forum.

All the efforts to find a rigid formula for determining the "situs" of claims have one common disadvantage. Some localizations are more advantageous for the debtors, others for the creditors, but always without considering the circumstances of each individual case. This may often lead to injustices. Some of the authors who support the "situs" approach have observed it. Thus, *Seidl-Hohenveldern* has submitted that the "situs" of claims should be ascertained so that it would lead to just results:[16]

" . . . erscheint es am besten, die Belegenheit der nichtkörperlichen Werte praktisch durch Billigkeitserwägungen bestimmen zu lassen."

Others criticize the whole idea of "situs", e.g. *Seeger:*[17]

"Die gelehrteste und bestbegründete Beantwortung der Frage nach der Belegenheit vermag den Schuldner-Eigentümer nicht vor der Doppelinanspruchnahme zu bewahren ..."

There are, however, also writers who reproach the courts that they let themselves be influenced by considerations of justice when determining the discharging effects of foreign expropriations[18].

The "situs" of claims is nothing more than a fiction which makes it possible for the court to "situate" the claim inside or outside of the country of expropriation, depending on the intention of the court to grant or to refuse discharge. Several authors have observed that the courts often manipulate the "situs" in order to achieve certain results[19]. Under such circumstances, it would be better to reveal openly the real considerations. It is hard to explain why the courts and authors often prefer to "fence with shadows"[20]. For a conceivable explanation, it is possible to turn to *Vallindas* who wrote, although in a different connection, that[21]:

"les mots ont souvent gouverné les hommes . . . Un terme juridique bien établi peut jouer un grand rôle quant à l'attitude des juristes envers l'essence des règles ou des rapports juridiques y relatifs."

112. Substantive law approach.- The second group of authors believe that a just partition of expropriation loss should be achieved on the basis of the substantive law governing the relationship of the parties and not on the "application" of the foreign decree. Some writers combine both approaches.

Schulze[22] suggests several factors that should influence the loss partition. For example, he writes that agreements between the parties on loss partition should be respected and that each party should bear the loss it had caused. According to *Schulze*, the debtor cannot invoke the payment to a foreign expropriator as discharge, but he may be granted a *Mehrbelastungsausgleich* (adjustment of the extra burden caused by the double liability), provided that the loss partition factors speak in his favor. This adjustment is by *Schulze* considered to be an instrument of substantive law[23].

Madsen-Mygdal[24] mentioned several conceivable methods for solving the problem of loss partition, e.g. special international treaties, special conflict rules, principle of priority according to which the decision of the first court handling the case should be given international recignition, etc. He himself sought to partition the loss by an instrument he called "estoppel". Debtors or creditors would in certain situations be estopped from invoking the foreign expropriatory or similar laws or, depending on the situation, from invoking the non-applicability of such laws. The estoppel is conceived as an instrument of the conflict of laws, although its nature seems to be closer to substantive law. *Madsen-Mygdal* himself called it "a curious medley of substantive law and conflict of laws, that does not conform with orthodox conflicts-principles"[25]. Whether a party is estopped from invoking the application or non-application of the foreign decree depends on the relationship and behavior of the parties, with the result that the decree is "applied" when such "application" leads to the outcome chosen by the court by considerations of justice. This method functions, however, only insofar as the loss can be directly attributed to one of the parties. If both parties are innocent, it is hard to decide which of them is estopped. This solution makes, further, the false impression that the courts apply or refuse to apply foreign public law only on the initiative of the parties.

Also *Hjerner*[26] is conscious of the loss partitioning problem. He sees the main criterion of partition in the nationality of the parties or in other possible "identification" of one of the parties with the foreign expropriator. He writes that this is a problem of substantive law. A similar method has been submitted by *Koeppel*[27] for the partition of the loss caused by foreign currency regulations.

According to *Philip*[28], the permanent residence of the debtor should be decisive. He does not "situate" claims there and it appears that his solution is one of substantive law. Even seizures by states other than the state of the debtor's residence should, in his view, be given discharging effect if the debtor would otherwise have to pay more than once through no fault of his own. This means that if both parties are innocent, the loss falls on the creditor. The same view is embraced by *Mezger*[29] who writes that also expropriations beyond the country of the debtor's residence should be given liberating effect,

but he sees in the discharge an application of the foreign decree. His reasons are, however, of substantive law: "Même l'ordre public français devrait s'effacer, son intervention ne pouvant que déplacer le préjudice . . ."

Seeger[30] has expressed the view that the solution is to be sought in the mutual relationship and behavior of the parties according to *Treu und Glauben.* Similar is also the more recent view of *Van Hecke*[31].

113. Conclusions.- It is submitted that the partition of the expropriation loss is to be carried out according to the mutual relationship and behavior of the parties in each particular case. The discharge that may be granted to a debtor does not imply any application of the foreign decree. To ignore the expropriation loss when the expropriation itself is not recognized is unrealistic. What is more, even such an attitude will result in a certain partition of the loss since the debtor will not be allowed to invoke the seizure as discharge. The expropriation loss is to be treated as a very special type of loss caused by a natural disaster. Nobody asks whether a natural disaster is valid or lawful. It is meaningless to operate with conflict rules, "situs", "territorial limitation", public policy , etc., when it is obvious that acceptable results can only be achieved by artificial manipulations with the connecting factors. It is better to partition the loss openly. Statutory rules concerning certain contract types, e.g. sale, bailment or mandate, contain provisions for the loss partitioning. Expropriation of generic debts entails more complications, since the law does not usually provide solutions that are acceptable for expropriation cases. It is suggested that special loss partitioning rules are to be elaborated also for these cases.

II. Division of the expropriation loss into parts

114. The review of the case law can give the impression that the judgment must always be in favor of only one of the parties. The possibility of letting both the debtor and the creditor carry a part of the loss each has not been used, at least not explicitly. This may perhaps be explained by the grounds invoked by the courts, since it really would be difficult to say that a claim is "situated" up to 50 per cent of its value in one country and the rest outside of that country or that the foreign decree is contrary to public policy up to 50 per cent of the claim. However, if the substantive law approach is used, the division of the loss into parts becomes a most natural solution since it allows a flexible and just distribution of the loss among two often equally innocent parties. The courts sometimes achieve certain loss division indirectly, e.g. by determination of the exchange rate. It is probable that the courts often want to divide the loss so that both parties will bear a share, but they do not feel free to do so openly. When the parties are unwilling to compromise[32], the courts prefer to give judgment in favor of only one of them. *Coons* characterized this very well, although he did not have in mind expropriation losses, but

loss partition in general:[33]

"That which the judge thinks just he cannot order. That which in chambers he calls "unjust" he orders and defends with thirty pages of rethoric."

There have been proposals that the expropriation loss should be divided 50:50 between the debtor and the creditor[34]. Another method of division has been suggested by *Lüderitz*[35] who speculates about the possibility to divide the loss between the debtor and the creditor proportionally to the ratio between the debtor's property inside and outside of the expropriating state. He comes, nevertheless, to the conclusion that "Als *ultima ratio* bleibt, die Forderung zu halbieren". It may also be of interest to quote *Weiss*[36] who wrote about burdensome contracts in general (without mentioning expropriation cases):

"In dealing with those losses which are not coupled with gain to the other party, a court normally cannot resort to damage principles of assumption of risk and fault. Because the occasion for discharge is ordinarily an externally caused, unknown, or unanticipated event, neither party will have assumed the risk in the vast majority of cases and neither party will be a "wrongdoer" to whom the court can easily assign responsibility for loss. Thus only innocent parties will bear losses resulting from a contract discharged as burdensome, and therefore equitable considerations further suggest that at least some non-benefitting losses should not be sustained by one party, but should be evenly shared."

Weiss is to be agreed with, although with the reservation that there are no reasons why the loss should be divided evenly. An automatic division into halves or any other rigid division formula would, in many cases, be very unfair to one of the parties. There are many relevant circumstances (factors) to be considered at the loss partition. The court should be allowed to decide *ex aequo et bono* choosing any loss division it deems to be just. This may sound like a danger to legal security, but as the expropriation normally is unanticipated by the parties at the time of the conclusion of the contract, the possibility to foresee how the loss would be partitioned is hardly important. It can further be expected that if the courts begin to partition the loss without using any "shadow" arguments, the case law will sooner or later formulate certain rules.

III. Basic formulas

115. Problem.- There is a great number of relevant factors (circumstances) that can influence the partition of the expropriation loss. There are both quantitative and qualitative differences between various factors and it is hard to say what importance should be attributed to them in their various combinations. The case law does not provide for a clear lead as the judgments often fail to mention the factors that may have influenced the court. Many circumstances re-

main unknown to a student of the decisions. The currency in which the debt was ascertained may have been worthless at the time of the lawsuit and it was thus easy for the court to hold the debtor liable in principle. It is possible that the debtor or the creditor could, after the court had given judgment against him, obtain compensation elsewhere. The lawsuit may have in reality concerned loss partition between different creditors and not between a creditor and the debtor (s. 103 *supra*). It is also probable that many courts simply followed some previously formulated rules, e.g. about a "situs" of the claim, and did not realize that there was a problem of loss partition. It can, however, be assumed that the courts in most cases try to partition the loss equitably, although they do not always account for these considerations. The following discussion will consequently have a preponderantly *de lege ferenda* character, although the majority of the factors that will be mentioned undoubtedly already influence the courts. Some of the factors speak in favor of the debtor, other in favor of the creditor (mandator or mandatary, owner or bailee, etc.). The factors have to be studied in each particular case as they reflect the position and the behavior of the parties *in casu*.

There may, nevertheless, be cases where there are no relevant factors or where they counterbalance each other. In other words, in these cases there are no reasons based on the behavior and relationship *in casu* why the loss should be carried by the debtor or by the creditor. Both parties are equally innocent. In such a situation, it is the *type* of the legal relationship that becomes decisive. It is submitted that there should be certain basic formulas of loss distribution which could be applied when there are no reasons why the loss *in casu* should be partitioned in a different manner. There should be different basic formulas for expropriations of the object of specific obligations, expropriatory interventions into contracts of mandate, expropriations of generic claims and expropriations of the debtor's property economically related to a generic claim.

Relatively simple is the problem of finding the basic formulas for expropriations of specific objects of contracts and for expropriatory interventions into contracts of mandate. The legal rules governing these contract types contain also provisions for loss partition, for example that property perishes for its owner and that a mandatary acts at the risk and cost of the mandator. These provisions lead to an acceptable loss partition even when both parties are equally innocent. It is more difficult to find a basic formula for loss partition in cases involving expropriations of generic claims or of the debtor's property economically related to such claims.

116. Expropriation of claims.- It is normally for the debtor to make sure that he pays to the rightful creditor and not to somebody else. A debtor who knowingly or by negligence pays to a person other than his rightful creditor is usually not discharged. The debtor may pay with discharging effect also to the creditors of his creditor under a garnishment order. Even here,

the original creditor will profit from the payment, since it discharges his debt. This is not so if the claim has been expropriated. When the debtor is forced to pay the expropriator and the expropriator grants him discharge, to what extent should this discharge be recognized by courts in other countries?

If we invoke the principle that property perishes for its owner, the loss will be on the debtor since the claim is determined generically and it has been collected by the expropriator from the property of the debtor and not from the assets of the creditor, although the seizure was directed against the latter. The prevailing practice favors, however, the debtor (s. 91 *supra*) and also the writers tend to put the loss on the creditor by protecting the debtor against double liability[37]. The explanation is obvious. The seizure of the value of the claim from the debtor cannot be compared to a robbery of the debtor's property. The taking is directed against the creditor. The debtor is usually innocent while the creditor may have given cause to the seizure. But if the debtor is innocent, so may also be the creditor. The taking may, for example, have the nature of a general nationalization. Or if the takings of Jewish property in Germany are taken as an example, the Jewish creditors were hardly guilty of the seizures, although they were directed against them. Such "guilt" should not influence courts in other countries at the loss partition.

If we thus have two equally innocent parties, it appears that the best solution is to divide the value of the claim into halves, so that the debtor and the creditor bear one half of the loss each. The debtor who had paid to the foreign expropriator would have to pay again to his original creditor, but only one half of the value of the claim. This basic formula could, however, be modified by the relevant factors *in casu* (s. 118 - 132 *infra*).

117. Expropriation of the debtor's property economically related to the claim.- According to probably all legal systems, the debtor is not discharged from a personal debt by losing property economically related to it. Should the same be valid also when the property of the debtor is lost by a foreign expropriation or when it is subjected to foreign currency rules that make it impossible to use it for payment?

According to *Wolff*[38], a debtor who is prevented to pay by a foreign governmental measure resembles any debtor who cannot fulfil his obligations because he has been robbed by a gang of highwaymen of all he possesses. *Solheid*[39] asks: if the property of the debtor is destroyed by a bomb, can this discharge his debts? Several other writers[40] are of the view that a loss suffered by the debtor can hardly influence his indebtedness. The only way in which the debtor can be helped, some of these authors assert, is by special legislation.

Other authors would like to see the debtor discharged, at least partially. In their view, the rule that a debtor is liable despite his bad economic situa-

tion should not be valid to the full extent in expropriation cases. Some want to discharge the debtor proportionally to the value of the property lost and that saved from the expropriation[41]. Similar is the view of *Loos*[42] who writes that the creditors of a foreign seized company can demand payment from the property in the forum state, but this gives rise to a compensation claim against the expropriator if the property in the forum state has to cover a disproportional part of the old company's obligations. It is, however, clear that such a claim for redress hardly can succeed, since the foreign expropriator enjoys immunity. *Köster*[43] tried to solve the problem by analogies from the law of nations, invoking the rules involving state debts in cases of state successions. If such state debts are related to a particular piece of territory taken over by a new sovereign, the old sovereign is discharged of the debt which is transferred to the new one. In the same way, *Köster* writes, also a private debtor should be discharged of debts related to the seized property.

Folowing the Algerian expropriations of French-owned property, several French authors expressed the view that the transfer of liabilities is implied in the essence and nature of nationalization[44].

It has been submitted by several writers that insurance companies dispossessed of a branch abroad should not be held liable for obligations which had been assumed by that branch. The branch had kept reserves in the country where it was situated and it would be unfair to hold the company liable after these had been seized[45].

It can be seen that there is a strong feeling among authors that the dispossessed debtors should be absolved of their debts. It can be asked why there is no similar sympathy for debtors who lost their property by a bomb or robbery. The probable answer is that whereas the owner (debtor) is supposed to protect his property against the risks of natural disasters, wars and crimes by means of walls, locks and insurance, he cannot protect it from expropriation. It is, perhaps, also hoped that the expropriator will assume the liabilities.

It is submitted that the expectations of the parties at the time of the conclusion of the contract, if they can be ascertained, should be given decisive importance. The creditor normally expects that the debtor is liable with all his assets. This may be especially important in cases involving insurance companies. The clients often choose a foreign insurance company, because they hope to protect their money from expropriation or exchange control regulations in their own country of residence[46]. The Swiss insurers in Germany or American insurers in Cuba may have derived a great part of their goodwill from the fact that they were foreign companies with their seats in countries where the risk of expropriation or exchange restrictions was deemed to be negligible. On the other hand, foreign insurers are often required by law to secure the policies by reserves in the country where the policies are sold and, from the point of view of the insurers, it may be unfair to hold them liable after they

have lost the reserves by expropriation[47].

If the parties at the time of the conclusion of the contract expected that the debtor would be liable with all his property, the debtor should not be allowed to invoke the expropriation of his assets as a discharge. The burden of proof should here be on the debtor as it can normally be presumed that the debtor is liable with all his assets. The situation may, of course, be different when under the law governing the relationship the debtor is liable only with a particular asset which has been seized[48].

The debtor who does not intend to stand for his debt with all his property should make a reservation to that effect in the contract. Otherwise, he should be held liable with all his assets, although there have been judgments discharging a debtor who had explicitly promised to stand for the debt with assets both inside and outside of the expropriating state[49].

Another question arising in this connection is whether a declaration by the expropriator that he takes over also the liabilities connected to the expropriated property should be given effect as to the discharge of the debtor. Such novation of the debt by change in the person of the debtor normally requires the consent of the creditor. The willingness of the expropriator to take over the liabilities will not automatically liberate the debtor[50], unless the creditor gives his consent which is, however, not probable. The expropriator is not an ideal debtor since he is protected by immunity in all courts but his own. The willingness of the expropriator to assume the liabilities is, nevertheless, not quite without relevance. If the creditor really obtains payment from the expropriator, he shall not be allowed to claim a new payment from the original debtor. It seems reasonable to go a step further: if the creditor has a real possibility to obtain payment from the expropriator, he should turn to him in the first place[51]. It may also happen that the creditor obtains partial satisfaction from the expropriator, e.g. a payment in a depreciated currency at a forced exchange rate. The acceptance of such partial fulfilment from the expropriator should not be interpreted as a consent to the change of debtors and the creditor should be allowed to claim from his original debtor the difference between the value of the claim and the partial fulfilment.

Also the basic formula suggested in this section may be modified by the relevant factors which speak for a different partition of the loss in the particular case. In the following sections, some *examples* of such relevant factors will be discussed. The factors must be balanced in each case in order to show in what direction the scale is tipped. The courts should be given free hands to attribute to each factor the importance they deem reasonable.

IV. Factors which may modify the basic formulas

118. Agreement between the parties.- If the parties have agreed on certain partition of potential or real expropriation losses, there will normally be no reasons not to respect such an agreement. As the parties usually do not envision the possibility of expropriation at the time the contract is concluded,

stipulations explicitly partitioning the expropriation losses are not frequent. They are, nevertheless, fully conceivable.

From express agreements on loss partition, it is necessary to distinguish the tacit or implied conditions which the courts sometimes, with great effort, find in the contract[52]. Such tacit agreements are, of course, also conceivable and they are fully acceptable as long as there are unequivocal indications in the contract pointing to existence of such an agreement. It seems, however, that in the cases where such tacit agreements and implied conditions were discovered by the courts, they were only an instrument for the court to achieve a loss partition according to the court's own ideas as to what was equitable in the particular case.

In cases where it is not quite clear that the parties really intended to partition potential expropriation losses in a certain manner, the court should openly declare why it wants to partition the loss in a certain way instead of relying upon the dubious hypothetical wishes of the parties.

119. Background of the claim.- The legal, economic and social relationship that gave rise to the discussed claim may be of importance at the loss partition, although the law usually treats claims and debts alike without regard to such background. Thus, for example, a debtor *ex delicto* should hardly be allowed to invoke the foreign expropriation as discharge. Here, the creditor did not want to enter into the relationship and his interests deserve to be protected in the first place[53]. On the other hand, if the claim originated as a gift by the debtor to the creditor, there will be strong reasons to protect the debtor from double liability or from having to pay in spite of a seizure of his assets related to the debt[54]. The impact of the origin of the claim may, however, be mitigated if the claim has been assigned by the original creditor to other persons.

It can also be imagined that, for example, a buyer of goods is coerced to pay the purchase price to the expropriator instead of to his original creditor (the seller). Even if it is assumed that the court wants to protect the debtor from double liability and that it will not make him pay again to the seller, it is conceivable that a part of the expropriation loss will be transferred to the buyer by other means. For example, he will lose the right to damages from the seller for inferior quality of the goods. The court may feel that the seller who has not obtained payment for the delivered goods should not be held liable for damages.

120. Party that has caused the loss.- The expropriation loss should be put in the first place on the party that had caused the loss by violation of its legal or contractual duties. It is irrelevant whether the fault had caused the enactment of the seizure as such (for example the taking was a consequence of the party's crimes), or it only had made it possible for the expropriator to enforce the seizure (for example the expropriator collected the value of the claim

from a debtor who was already in delay with payment whereas a payment on time would have made the seizure impossible). A creditor may cause the loss by failing to inform the debtor about the risk of seizure although he can and is expected to do so. A party which had been entrusted some specifically ascertained property belonging to other persons and which took the property, against the instructions of its owners, to a country where it was seized, can also be deemed to have caused the loss.

Some typical situations where one of the parties has allegedly caused the expropriation loss will be handled in the sections which follow.

121. Party against which the expropriation is directed.- The expropriation of a claim is often directed against the person of the creditor, for example because of crimes committed by him or because of his national or racial origin. Similarly, the expropriation of the debtor's assets is often directed personally against the debtor. The seizure of the specifically ascertained object of a contract may also be intended personally against its owner. It can be asked whether the intentions of the expropriator to put the loss on one of the parties should be given any relevance by the forum. There are authors who think it should[55]. *Schulze*[56] wants, *in dubio*, to put the expropriation loss in cases involving seizures of claims on the creditor, since he considers the creditor to stand closer to the cause of the expropriation than the debtor. The practice of courts seems to point in the same direction (s. 91 *supra*).

It is submitted that the intentions of the foreign expropriator to punish or persecute one of the parties should not be given any relevance at all at the loss partition. If the expropriation is, for example, a punishment for a crime committed by the creditor, there will, of course, be strong reasons to protect the innocent debtor from double liability. The reason of this is, however, not the *intention* of the foreign expropriator to punish the creditor, but the fact that the creditor has *caused* the taking by his behavior. This makes a difference as can be illustrated by the example of the German seizures of Jewish proerty. The Nazi expropriator undoubtedly wanted to damage the Jewish creditors by expropriating their claims, but these creditors cannot be said to have caused the taking by their behavior. The courts have, nevertheless, even here preferred to put the loss on the creditors, although some kind of loss division into parts was, it is submitted, more appropriate.

The courts should not partition the expropriation loss in a certain way *merely* because the foreign expropriator had desired it. Here, the forum runs a risk of becoming the foreign state's instrument in carrying out its penal or racial policy. It is submitted that the courts in countries not adhering to the Nazi racial theories should have considered the Nazi expropriations to be similar to a natural disaster, not attributable to any of the parties. There are, on the other hand, no objections against putting the expropriation loss on the party against which the foreign measure was directed, provided that it is the view *of the forum* that this party's *behavior* has caused the loss by bringing about the expropriation.

122. Nationality of the parties.- Some authors[57] suggest that great relevance should be attributed to the nationality of the parties at the partition of the expropriation loss. They are of the view that the loss should, in the first place, be put on the party possessing the expropriator's nationality. It is asserted by these authors that the foreign expropriation is in the interest of the collective to which this party belongs and that it, therefore, should bear its consequences.

It happens that the court refers to the nationality of the parties at the loss partition[58]. There are, however, numerous cases where the forum gave judgment against its own nationals and/or in favor of nationals of the foreign expropriator.

It is submitted that the factor of nationality should be given only a very limited relevance. The party having the nationality of the expropriator is, at the time of the lawsuit, often a refugee who cannot be considered loyal to the expropriator, for example German Jews during the Nazi period or Cuban refugees. But even if the party is a loyal national of the expropriator, the taking is normally caused by forces beyond his immediate control or influence and his profit on the taking is so remote that it can be ignored.

The fact that one of the parties is a national of the forum state should normally be almost irrelevant. It is impossible to agree with an American court which said that[59]

"The interest of the defendant calls especially for the protection of the court because that interest is the interest of a United States citizen; and even if the equities herein are otherwise equally balanced . . . the rule of public policy should be applied by the court to tip the scales of justice in favor of the protection of the interests of our own nationals."

The nationality of the parties may, nevertheless, become relevant in some very special situations, for example when the loss has been caused, in time of war, by an enemy expropriation directly intended against the interests of forum nationals and the forum is to partition the loss between a citizen of the forum country and a loyal citizen of the enemy state. Under such circumstances, it is quite understandable that the court will tend to place the loss on the enemy national, thus defending the interests of the forum state in the war.

123. Duty to resist the seizure.- Let us imagine that the foreign expropriator demands the value of a claim from the debtor or that he demands delivery of some specifically ascertained property from the bailee. Is the debtor (bailee, etc.) under a duty to resist the taking in order to protect the interests of the creditor (owner)? Should he go to courts and protest or should he obey the expropriator's instructions without a word? The answer may be of great importance for the loss partition.

It is obvious that the possibilities of the debtor to resist the expropriation

are small, provided that the expropriator is able to enforce the seizure, for example from the debtor's assets in the expropriating country. It can, in all cases, be required of the debtor that he should not do more than he is compelled to do. He should not actively support the expropriation, for example by informing the expropriator about the existence of the claim or by paying earlier or more than required. It is quite conceivable that the debtor may be interested in paying to the expropriator, for example because of political sympathies or because the expropriator accepts payments in a depreciated currency at an advantageous rate of exchange. The debtor should not be allowed to profit by eager co-operation with the foreign expropriator.

It can perhaps be required of the debtor that he, under normal circumstances, does all he can to avoid the seizure and thus protects the interests of his creditor. This does not mean that the debtor (bailee, etc.) is expected to resist the taking until the expropriator uses physical violence against his person or property. In a decision of the German Reichsgericht[60], the voluntary payment by the debtor to the expropriator was found discharging, since it could be assumed that the debtor would have been coerced to pay even if he had refused to comply with the expropriation order. Similar was the outcome of a more recent West German judgment[61], where the court reproached the debtor that he had paid to the expropriator "too willingly" and that he had not taken any steps to protect the creditor, but the debtor was discharged since it was obvious that not even the most ferocious resistance by the debtor would have averted the seizure. In the Swiss case of *Universale v. Wolff De Beer* (OG Zürich 1940), the debtor was found not liberated and the court criticized him for not having opposed the seizure despite his knowledge that the claim had been assigned by the Jewish creditor to a third person already before the expropriation. Here the resistance could have had some success. In the case of *Schw. Lebensversicherungs- und Rentenanstalt v. Elkan* (Swiss BG 1953), the court declared that the debtor had been under no duty to try to delay payment, in face of a demand by the German authorities - demand based on the laws and decrees in force in Germany at the time.

Bergman[62] expressed the view that the debtor must take all steps legally open to him in order to avoid the consequences of the expropriation upon the interests of his creditor, especially in the case of insurance claims (contracts *uberrimae fidei*). Legal steps by debtors in Nazi Germany could, in his opinion, have helped the Jewish creditors by delaying payment until the fall of the Nazi régime, since the delaying effect of such legal steps would have multiplied in geometric progression if many debtors had taken them[63].

It is submitted that the following two conditions must be fulfilled before the duty to resist the expropriation can be imposed on the debtor:

a) The resistance must not entail for the debtor a risk or loss that is in disproportion to the value of the claim, for example imprisonment or seizure of his own property. The same holds true about the costs of re-

sistance, for example the costs of judicial proceedings: they must not be disproportional to the value of the claim.

b) There must be a reasonable hope that the resistance may be successful. There are no reasons to require of the debtor that he should demonstrate his loyalty to the creditor by meaningless actions that are doomed to fail. The debtor's possibilities to evaluate, at the time of the expropriation, the chances that his resistance will succeed are to be taken into consideration at the loss partition. In the cases of the Nazi seizures of Jewish property, there was hardly any hope that the Nazi courts would protect the dispossessed creditors. It is very doubtful whether a contesting *en masse* recommended by *Bergman* would have had any effect as it would have probably led to a legislative measure making such contesting impossible. The duration and the outcome of the war were, besides, unknown.

It is to be stressed that not even the most ferocious resistance discharges necessarily the debtor, if the court feels that he should bear the loss because of some other reasons. Thus in the case of *Stevens v. Griffith* (U.S. Sup. Ct. 1884), the debtor had paid to the expropriator only under direct threats of imprisonment. He was, nevertheless, to carry the expropriation loss, since he was a member of the expropriating community (the Confederate states) and the taking had been directed against loyal U.S. citizens (see s. 80, 122 *supra*).

124. Quasi-consent of the creditor.- It happens that the debtor pays to the expropriator with a certain degree of the creditor's consent or resignation. Such consent or resignation is caused by the same force that coerces the debtor to pay to the expropriator. In the case of *Bergens Provincialloge v. Norges Bank and Krigsskadetrygden* (Norway Sup. Ct. 1950), the representatives of the creditor had admitted that the debtor had had no choice but to pay to the expropriator. Because of this, the court found the debtor discharged by the seizure. This was a peculiar decision since it gave effect to the creditor's recognition of a certain fact rather than to the fact itself. It can be compared to the judgment of the same court in the case of *Trondhjems Sparbank v. S. Jobs Logen* (1951), where the debtor was not discharged, although the creditor himself had delivered to the expropriator the negotiable receipt giving right to the claim. Why was the debtor expected to resist the taking better than the creditor?

It is submitted that a quasi-acceptance of the expropriation by the creditor should be given neither greater nor smaller relevance than a proof that the debtor really could do nothing to avert the seizure. If it can be shown by other evidence that the debtor could not resist the taking, the willingness of the creditor to recognize this fact should be irrelevant.

The attitude of the creditor can only be of direct relevance if it can be assumed that he had instructed the debtor to obey the orders of the expropri-

ator. Under such circumstances, the debtor need not, of course, resist the expropriation, unless he has reasons to believe that the creditor acted under duress. Normally, the debtor should not be expected to stand duress better than the creditor.

125. Erroneous payment to the expropriator.- It is conceivable that the debtor pays to the expropriator without being coerced to do so. Under such circumstances, it should normally be the debtor who is to carry the loss. It is, however, possible that the debtor has paid to the expropriator in good faith, for example by mistake. If the expropriator seizes a whole juridical person and continues to operate the business in the expropriating country under the original name and address, the debtor may pay to him ignoring the expropriation. The risk that this will happen is greatest immediately after the seizure, before it becomes generally known. At the loss partition, this is to be taken into consideration, together with the possibilities of the dispossessed creditor to inform the debtor about the taking before the payment to the expropriator was made. An erroneous payment to the foreign expropriator may, but need not, be liberating[64]. The decisions where the debtors were held fully liable in spite of their good faith can perhaps be interpreted to mean that the debtors should have known about the expropriation.

126. Right of the debtor to pay his debt.- To pay the debt is not only the debtor's duty, it is also his right. It may happen that there is no original creditor ready to accept the payment when the debtor is ready to pay and the debt becomes due. An expropriator may be willing to accept the payment and he promises discharge to the debtor. A creditor who is in delay should not reproach his debtor who had tried other ways of obtaining discharge. This factor may influence the courts[65].

In many countries, the debtor has the possibility to pay the debt to an official depositum and be discharged. But such payment need not necessarily discharge the debtor in the eyes of the courts in other countries or even in the eyes of the courts in the same country under a different régime[66].

127. Indirect pressure by the expropriator. - The debtor may be coerced to pay the value of the debt to a foreign expropriator even when he does not have his residence in the expropriating state and owns no property there. He may, for example, be compelled to pay the expropriator because his business depends upon good relations to the expropriating state. Thus in the case of *Böhm v. Bergsland* (Byrett Oslo 1939), the Norwegian debtor paid to the German expropriator under menace that otherwise his commercial contacts with Germany would be severed.

It is an open question what importance should be given to such indirect pressure by the expropriator on the debtor. The loss that would be incurred

by the debtor if he resisted the expropriation (for example the loss of his business or persecution of his friends or relatives living in the expropriating country) might be much greater than the value of the expropriated claim. There may be reasons to protect the debtor from such loss, especially when the foreign expropriation has been caused by the creditor himself (s. 120, 121 *supra*).

128. Compensation promise by the expropriator.- It happens that the debtor, when paying to the expropriator, obtains a promise that he will be compensated if he is forced to pay the value of the debt also to the original creditor[67]. To discharge the debtor under such circumstances would amount to enforcement of the foreign expropriation, since the debtor acts only as a go-between on behalf of the expropriator. The fact that the debtor obtained such a promise of compensation may even indicate that he paid to the expropriator of his own will and that he was not acting in good faith.

129. Good faith at the time of the conclusion of the contract.- Sometimes one of the parties is conscious of the risk of expropriation already at the time when the contract is concluded and it enters, nevertheless, into the relationship hoping to make a speculation profit. When the other party is *bona fide*, there might be reasons to protect it from the loss[68]. When both the parties take part in the risky transaction knowingly, on the chance of making a huge profit, the speculatory character of the transaction will, in itself, hardly provide a lead for the loss partition, unless the court is of the view that in these cases the loss lies where it falls.

130. General economic situation of the parties.- It seems that the courts are, to a certain degree, influenced by the economic situation of the parties. If the creditor is very rich and the debtor is very poor or *vice versa*, the courts may tend to protect the economically weaker party, although this is very seldom explicitly mentioned in the judgments[69]. It is possible to trace similar considerations also in legislative measures. The French moratorium granted to the debtors repatriated from Algeria (s. 95 *supra*) and the West German special legislation, for example the *Bundesvertriebenengesetz* (s. 100 *supra*), have been enacted in order to help debtors who had been ruined by large-scale foreign expropriations. As far as the French moratorium law is concerned, the legislator certainly considered also the fact that creditors usually were big French banks. Such factors should, however, be relevant only in very special loss partitioning situations.[70]

The circumstances may sometimes indicate that the creditor would have lost the value of his claim even if he had not concluded the contract with the debtor. This is true, for example, when both the debtor and the creditor are refugees from the expropriating country and they both have lost all their prop-

erty there. In the case of *Pettai v. Schinz* (Obergericht Zürich 1928), it was said that both the debtor and the creditor had been ruined by the seizures in Russia and that the creditor would thus have lost his money even if he had not made a loan to the debtor. In another similar case the debtor was, however, held liable[71].

There seem to be reasons to discharge, at least partially, the debtor of a burdensome obligation, when both he and his creditor have lost all their property in the expropriating state. The creditor would have lost the money in any case and it may be unjust to allow him to transfer the loss to the debtor. If the debtor and the creditor had regularly made business with each other, it is often a matter of chance who owes money to whom at the moment of the expropriation.

131. Identity with the expropriator.- In some cases, one of the parties is, in effect, identical with the foreign expropriator and/or acts as his instrumentality[72]. Under such circumstances, the problem of loss partition is purely fictitious and there will be no reasons to protect the party identical with the expropriator. An opposite solution would, in reality, amount to enforcement of the foreign measure.

132. Degree of the expropriation risk.- The partition of the expropriation risk deserves special attention.

The risk of seizure may range from almost a fact to a situation where it is purely theoretical. When there is no serious expropriation risk, the forum can ignore it. It is, however, not always possible to reject as groundless the objections based on that risk. When the risk is great, there may be reasons to protect the obliged party from the potential loss to the same extent as if the expropriation has already been executed. But what is the court to do when the risk of expropriation is close to neither 0 nor 100 per cent? On the one hand, the risk cannot be ignored, but on the other hand, the risk alone should not liberate the debtor who could otherwise avoid having to pay at all.

There seem to be two acceptable ways of tackling the problem:

a) The risk of expropriation is evaluated by the court and the potential loss is divided accordingly. Factors like the statutes of limitation should also be considered. Sometimes there are reasons to believe that the foreign expropriator himself will protect the debtor from double liability. That was, for example, the attitude in the Netherlands towards debts secured by mortgages in Germany (s. 86 *supra*). Thus if the forum evaluates the expropriation risk to be, for example, 50 per cent, it can divide the loss that would otherwise be put on the creditor into halves and transfer one half of it to the debtor. True, this is an unusual solution, but it will often lie close to a compromise and it may be in the

interest of both parties to accept it.

b) The other method is probably more realistic and it makes it possible for the court to avoid the subjective evaluation of risks. The creditor will be entitled to collect the value of the debt from the debtor, but he will have to promise that he will cover the potential damage the debtor may incur if forced to pay anew by the expropriator. This method may appear to be disadvantageous for the debtor who must be content with a promise, but this problem can be eliminated by good guarantees[73].

V. Security for obligations

133. Problem.- The guarantees for obligations, especially suretyship and mortgage, present special problems for the partition of the expropriation loss. Into this group belong also the cases of jointly and individually responsible debtors.

The guarantee is normally only accessory to the principal obligation. The creditor can demand fulfilment of the accessory obligation only if the main obligation is valid and the principal debtor liable. The surety may use all the objections of the principal debtor which implies that the surety is discharged when the principal debtor is not obliged to pay. If the surety or the owner of the mortgaged property pays the creditor, he may demand recourse (redress) from the principal debtor. In cases involving partition of expropriation loss, these rules do not always lead to acceptable results. There are three basic types of situations.

134. Expropriation of the mortgaged property.- In the first type of cases, it is the mortgaged property that is seized and the debtor, who is also the owner of this property, asserts that the seizure has discharged him of his debt.

The expropriation of the mortgaged property will normally lead to the extinction of the mortgage, provided that the expropriator does not assume the burden of the mortgage together with the property. The extinction of the mortgage does not, however, lead to any automatic extinction of the principal debt of the personally liable debtor. The expropriation of the mortgaged property may discharge the debtor only if he is liable with only that property and not personally[74], but not otherwise[75]. From the standpoint of loss partition, there are usually no reasons to put creditors of obligations secured by mortgages in a situation worse than the situation of creditors of unsecured claims. It is also to be considered that the mortgaged property would have been seized even if it had not secured the debt and that the loss of the property should normally fall on its owner and not on creditors. The relevant factors (s. 118 - 132 *supra*) may, of course, modify the outcome.

In West Germany, it has been pointed out that the debtor dispossessed of the mortgaged property may seek relief in *Treu und Glauben* or in special

laws[76]. In the opinion of *Seeger*[77], a difference should be made between cases depending on the economic background of the mortgage: in the case of a *Realkredit*, where the principal debt is closely connected to the real property, the expropriation of that property should discharge the debtor, whereas the claim should not follow the property, but the person of the debtor, in the case of a *Personalkredit*.

135. Seizure of the claim from the mortgage or the surety.- In the second type of cases, the expropriator collects the value of the principal debt from the mortgage or from the surety. In the debtor-creditor relationship, such seizure need not be given more importance than a direct seizure of the claim from the debtor in any other manner. Complications arise, however, in the relationships debtor - surety or debtor - owner of the mortgaged property (if its owner is not identical with the debtor). The surety or the owner of the mortgaged property will normally demand redress from the principal debtor and the court will have to partition the loss between them.

In the cases mentioned in this thesis and belonging to this group, the loss partition between the principal debtor and the surety or owner of the mortgaged property has not presented any problems. In the decision of the West German Federal Tribunal of Feb. 1, 1952 (s. 86 *supra*), the owner of the mortgaged property had been compensated in advance by a deduction from the purchase price of the property, whereas in the case decided by the appelate court in Hamburg on Nov. 25, 1959 (s. 86 *supra*), the surety was economically identical with the expropriator. Situations where the loss partition can be difficult are, however, quite conceivable.

It is obvious that if the payment to the expropriator by the surety or by the owner of the mortgaged property is considered to discharge the debtor of the principal debt, the debtor can hardly refuse to redress the surety or the owner, since the redress does not entail any double liability for the debtor. But if the debtor is not considered discharged and is obliged to pay to his original creditor, should he also be held liable to compensate the surety or the owner for payments which they had made to the foreign expropriator, payments which had not been of any use for the debtor? It has been suggested that the loss in this situation should be put on the surety (owner of the mortgaged property) and the "situs" of the claim with the "territorial limitation" have been used as reasons[78]. It is, however, dubious whether this method leads to reasonable results. It is, of course, sensible to protect the innocent debtor from double liability, but the legitimate interest of the equally innocent surety (owner) to obtain redress is also worthy of protection. Here again, it seems that the best solution is to be found in dividing the loss into parts, attributing a part of it each to the creditor, debtor and surety (owner).

136. Seizure of the claim from the principal debtor.- Let us assume that the expropriator seizes the claim (or the property related to it) from the main debtor or, in the case of exchange regulations, makes it impossible for the main debtor to transfer payments to the forum state. The original creditor now attempts to obtain payment from the surety or mortgage outside of the decreeing state.

The immediate loss partition is between the creditor and the surety (owner of the mortgaged property). The principal debtor (it is assumed that he is not identical with the owner of the mortgage) is not a party to the lawsuit.

The answer to the question whether the surety (owner) should bear the loss is, in the first place, to be sought in the suretyship and mortgage contracts, i.e. it has to be asked whether the surety (owner) has assumed to cover also this type of risks and losses. If the answer is yes, he has to pay[79], if the answer is no, he is discharged[80]. Normally it is, however, difficult to interpret the suretyship (mortgage) in any other way than that it is supposed to cover the liabilities of the principal debtor. Does this mean that the court has to partition the loss first between the creditor and the principal debtor in order to establish the liability of the latter and then hold the surety liable to the same extent? There are reasons speaking for this solution. If the surety (owner of the mortgaged property) pays the debt, he will have the right of redress as to the principal debtor. The relevant factors speaking in favor of the principal debtor need not, however, speak in favor of the surety and *vice versa*.

In West Germany, the solution has sometimes been sought in the "situs" of the guarantee obligation and of the principal claim. It has been asserted[81] that these claims are "situated" at the situs of the mortaged property or at the residence of the surety and that they cannot be validly expropriated in any other country. Thus discharging a surety living in West Germany or recognizing discharging effect on a mortgage in West Germany is inadmissible because of the "territorial limitation" of the foreign expropriatory law. Whether the surety or the owner of the mortgaged property in West Germany will be able to obtain redress from the principal debtor is considered to be irrelevant[82].

It is submitted that the solution is to be sought in loss partitioning considerations. The guarantor should normally be considered discharged from his obligations to the same extent as the principal debtor[83]. This is motivated not only by the dependence of the guarantee obligation on the principal one, but also by the fact that in most cases it would be unfair to hold the guarantor liable and at the same time make it impossible for him to obtain redress from the principal debtor. It is thus to be agreed with a West German decision according to which the mitigation of the principal debt under the *Vertragshilfegesetz* (s. 86 *supra*) can be invoked also by the surety[84]. The aspect of redress becomes, however, less relevant, when the guarantor is economically identical with the principal debtor[85] or when the guarantor has com-

pensated himself in advance, e.g. the buyer of real property has assumed the burden of the mortgage against a reduction of the purchase price.

Some authors[86] divide the cases involving mortgages into two groups, depending on whether the debtor of the principal claim is at the same time the owner of the mortgaged property. According to *Ficker*, the dependence of the mortgage is less important when the mortgaged property is owned by a person other than the principal debtor. He submits that in such a case, the right of the creditor to obtain satisfaction should even survive the extinction of the principal debt. This means that the pressure on the owner of the mortgaged property should be harder than that on the principal debtor, which is hardly acceptable.

Another proposal has been submitted by *Seeger*[87]. He sees the decisive criterion in the economic background of the mortgage, i.e. whether it is a *Realkredit* or a *Personalkredit*. In the first case, when the claim has a close connection to the mortgaged property, he wants to preserve the right of the creditor to demand satisfaction from the mortgage, even if the debtor had paid the value of the debt to the foreign expropriator. In the second case, the owner of the mortgaged property, whether identical with the debtor or not, should be allowed to invoke the payment to the foreign expropriator as discharge towards the mortgagee.

A quite special situation may arise when the principal debtor, a juridical person, is dissolved by the expropriator. Since the principal debtor ceases to exist without any legal successor, the debt also "disappears". But what is to happen when the debt is secured by a mortgage or surety? Should the guarantors be allowed to rely upon the disappearance of the debt? If they pay the creditor, they will hardly have any possibility to obtain redress from the non-existing principal debtor. The West German courts had here precedents involving domestic, German expropriations:

RG Feb. 8, 1937: The debtor (a juridical person) was expropriated and dissolved by the Nazi authorities in 1933. The RG found the surety liberated. It stressed that it was not the aim of suretyship to protect the creditor from governmental measures against the debtor. As to the question whether this was an equitable solution, the court said that it was not more just to put the loss on the surety than to put it on the creditor.

A special law of 1937 expressly confirmed that claims against the expropriated and dissolved German juridical persons had disappeared, but it referred the creditors to a special procedure for compensation[88].

According to the opinion of *Beitzke*[89], the surety should be discharged if the principal debtor disappeared by expropriation. He invokes not only the dependence of the suretyship on the principal debt, but also the impossibility of redress and the interpretation of the suretyship contract. The loss is, in his view, to be borne by the creditor. Similar in the practical results is the opinion of *Veith*[90], who writes that the sureties of companies seized and

dissolved abroad should be liable only if the expropriated debtor company owns property in the forum country. Under such circumstances, the creditor can, however, demand and obtain satisfaction from that property and also the surety has the possibility to obtain redress. Some writers[91] and the West German courts, including the Federal Tribunal, hold the sureties liable in spite of the disappearance of the principal debtor. The courts held that the expropriation and dissolution of the principal debtor could not be recognized, because they were contrary to West German public policy[92], they were "territorially limited"[93] or because the dissolution of the principal debtor had not been carried out *de jure*, but only *de facto*[94]. The Federal Tribunal used, however, also considerations of loss partition[95].

While the dependence of the guarantee obligation on the principal debt has been pushed aside in the interest of the creditor in the just mentioned cases involving the dissolution of the principal debtor, there have also been decisions where the court modified the dependence in favor of the guarantor. Thus, a surety of a claim of purely national character may be discharged of his obligation when the debt has been changed into an international one (for example by assignment) without his consent and the principal debtor cannot pay to the creditor because of exchange control regulations[96]. Under such circumstances, the surety cannot be considered to have assumed the risk of exchange restrictions. Special provisions limiting the liability of Swiss sureties have been adopted in Switzerland (s. 85 *supra*).

In summary, it can be said that the liability of guarantors to cover losses caused by foreign expropriations or by foreign exchange control regulations is to be determined in the first place by an interpretation of the guaranteeing contract and, in the second place, by loss partitioning considerations in the relationships debtor - creditor, guarantor - creditor and guarantor - debtor. Normally, but not necessarily always, the guarantor will be considered discharged by the foreign decree to the same extent as the principal debtor. It may often turn out to be impossible to partition the loss equitably between the debtor and the creditor and only later consider the existence of the guarantee obligation. The existence of a mortgage or of a surety changes substantially the whole picture and it seems necessary to consider the interests of all the involved parties from the very beginning and to partition the loss simultaneously among all of them.

1) *Zöller*, 6 Journal of World Trade Law 55 (1972); see also *Toubiana* 331.
2) *Laun*, Versicherungsrecht 1951, 92-3.
3) *Adriaanse* 142-6.
4) *Strich* 163-4, 192-7.
5) *Drobnig*, RabelsZ 1953, 659-83.
6) *Bergman*, 11 I.C.L.Q. 747 (1962).
7) *Niboyet*, Rev. 1936, 489.
8) *Dicey and Morris* 802; *Reithmann* 143; *Schmidt*, Versicherungsrecht 1950, 153; *Seidl-Hohenveldern* 88; *Staudinger (-Weber)* 704; *Vannod* 61-2; *cf. Schulze* 84.

9) *Beitzke*, JZ 1951, 368; *Drobnig*, RabelsZ 1953, 673; *Raape* 677; *Rabeling*, MDR 1951, 715; *Reithmann* 143; *Schmidt*, Versicherungsrecht 1950, 153; *Seidl-Hohenveldern* 88; *Staudinger (-Weber)* 704; *Strich* 156-7; *Vannod* 61-4; *cf. Plassmann*, JZ 1962, 17; *Schulze* 84.
10) *Reithmann* 193; *Seidl-Hohenveldern* 94; *Vannod* 62.
11) *Kegel* 447-8 and in Probleme 27 ff.; *Lüderitz*, JZ 1961, 444; *cf. Drobnig* 208; *Schulze* 244-5 about the *"Spaltforderung"*.
12) *Kegel*, Probleme 20, 30-2.
13) *Plassmann*, JZ 1962, 20.
14) *Van Hecke*, Les effets 571.
15) *Reichert*, WM 1961, 12-3.
16) *Seidl-Hohenveldern* 102.
17) *Seeger*, JR 1951, 360.
18) *Schmidt*, Versicherungsrecht 1950, 173.
19) *Heiz* 281; *Carlston*, 54 Nw. U.L.R. 418 (1959-60); *cf.* Justice *Cardozo*, 255 N.Y. 123-4.
20) *Hjerner* 318.
21) *Vallindas* 509.
22) *Schulze* 253-65.
23) *Schulze* 250.
24) *Madsen-Mygdal* 371-5, 487 ff.
25) *Madsen-Mygdal* 823.
26) *Hjerner* 315-23, 367-8.
27) *Koeppel* 148.
28) *Philip* 391.
29) *Mezger*, Rev. 1956, 652.
30) *Seeger*, JR 1951, 359-62 and NJW 1952, 211.
31) *Van Hecke*, 126 RC 555-6 (1969).
32) See *Graumann v. Treitel* (England K.B. 1940), s. 106 *supra*.
33) *Coons*, 58 Nw. U.L.R. 751 (1963-4).
34) *Beemelmans* 116; *Garcke*, Recht in Ost und West 1961, 208; *Kegel*, Probleme 20-3.
35) *Lüderitz*, JZ 1961, 446.
36) *Weiss*, 69 Yale L.J. 1058-9 (1959-60).
37) *Adriaanse* 144; *Beitzke*, JZ 1951, 368 and JR 1951, 706-8; *Cohn*, NJW 1954, 406; *Drobnig*, RabelsZ 1953, 672; *Kegel*, Probleme 32; *Küster*, JZ 1953, 722; *Philip* 391; *Schmidt*, Versicherungsrecht 1950, 154; *Schulze* 262; *Staudinger (-Weber)* 711-24. *But Laun*, Versicherungsrecht 1951, 92-3. *Adriaanse* 144-5 wants to put the double liability *risk* on the debtor.
38) *Wolff*, PIL 475.
39) *Solheid* 45; *cf. Solheid* 17.
40) *Adriaanse* 146; *Batiffol*, Travaux du Comité français d.i.p 1962-4, 190-1; *Ficker* 114; *Givord*, Recueil Dalloz-Sirey 1968, 20-2; *Laun*, Versicherungsrecht 1951, 62; *Pruvost*, Gaz. Pal. 1968. I.Doctr. 76-9; *Staudinger (-Weber)* 692-703; *Strich* 170. *Cf. Meyer-Cording* 68-9, 78-9, 88.
41) *Köster*, JR 1952, 9-12; *Stöcker*, WM 1964, 539; see the West German 35. Durchführungsverordnung, s. 100 n. 85 *supra*.
42) *Loos*, AWD 1958, 111.
43) *Köster*, JR 1952, 10.
44) *Ghanassia*, Gaz. Pal. 1967.2.Doctr. 52; *Goldman*, Travaux du Comité français d.i.p. 1966-9, 61-2; *Loussouarn*, Rev.trim.dr.com. 1968, 215-22 and 1969, 640-3; *cf. Gannagé*,

Clunet 1972, 91-2.

45) *Prölss*, RabelsZ 1951, 206-12; *Reithmann* 193; *Seidl-Hohenveldern* 96 n. 30; *cf. Wahle*, Versicherungsrecht 1960, 647-8.

46) See *Cohn*, NJW 1954, 407.

47) *Cf. Dessauer v. Schw. Lebensversicherungs- und Rentenanstalt* (Swiss BG 1945); *Johansen v. Confederation Life* (U.S.C.C.A. 1971).

48) *Regina Shorr v. Succession Meir Weizman* (Israel Sup. Ct. 1954).

49) Austrian OGH March 11, 1960; *cf. Johansen v. Confederation Life* (U.S.C.C.A. 1971). The W. German BGH disregarded a reservation by the debtor in the contract in its decision of Oct. 6, 1953.

50) S. 103 n. 97 *supra.*

51) S. 103 n. 98 *supra; Batiffol*, Travaux du Comité français d.i.p. 1962-4, 190; *Loussouarn*, Rev.trim.dr.com. 1969, 1169-70.

52) E.g. *Texas Co. v. Hogarth* (U.S.Sup. Ct. 1921); *Pan-American Life v. Recio* (Florida District C.A. 1963); *Sté des cirages v. Van der Haegen* (C.A. Paris 1927); *Langhard v. AGA* (Sweden C.A. Svea 1953).

53) *Hjerner* 463.

54) *Schulze* 254, 261-2.

55) *Beitzke*, JZ 1951, 368; *Drobnig*, RabelsZ 1953, 671-2; *Staudinger (-Weber)* 710-1.

56) *Schulze* 262.

57) *Hjerner* 185-6, 575, 577-8; *Koeppel* 148; *Schnitzer* II 609.

58) *Bercholz v. Guaranty Trust* (N.Y. Sup. Ct. 1943); *Setbon v. Lellouche* (Trib. Seine 1965); *Hirschfeld v. Wuhler* (France Cass. 1934); German KG Oct. 27, 1932; *Spar- und Leihkasse Rebstein v. Deutsche Reichsbahngesellschaft* (Bezirksgericht Zürich 1936); *cf.* W. German BGH Sept. 19, 1957; *Cie algérienne de tracteurs v. Bertagna* (Trib. Seine 1966); *Stevens v. Griffith* (U.S. Sup. Ct. 1884).

59) *Bercholz v. Guaranty Trust* (N.Y. Sup. Ct. 1943), 12 A.D. 429.

60) German RG March 18, 1931.

61) W. German BGH Feb. 11, 1953.

62) *Bergman*, 11 I.C.L.Q. 753 (1962).

63) *Bergman*, 11 I.C.L.Q. 756 (1962).

64) *Staudinger(-Weber)* 722; W. German BGH Dec. 22, 1953 and April 15, 1955. *But*, BGH Nov. 11, 1953; OLG Frankfurt June 27, 1952.

65) See *Haw Pia v. China Banking Corp.* (Philippines Sup. Ct. 1948).

66) *Samuelsen v. Norges Bank* (Norway Sup. Ct. 1951); East German Sup. Ct. May 9, 1951.

67) *Molnár v. Wilsons AB* (Sweden HD 1954); *cf. The Jupiter No. 3* (England C.A. 1927).

68) *Quigley v. Desjardins* (Cour supérieure Québec 1903); *Banque des pays v. Banque française* (C.A. Paris 1936).

69) See W. German BGH Sept. 19, 1957.

70) *Strich* 188 n. 408.

71) *Graumann v. Treitel* (England K.B. 1940).

72) S. 91 n. 45 and s. 103 n. 102 *supra*; C.A. Beirut May 31, 1968.

73) W. German BGH March 17, 1953 and Oct. 24, 1957; *cf. Wingårdhs AB v. Banca Commerciale Italiana* (Sweden HD 1948).

74) N. 48 *supra.*

75) West German BGH Sept. 19, 1957; LG Lüneburg Feb. 8, 1951; LG Hamburg July 5, 1956; *Drobnig*, RabelsZ 1953, 671; *Strich* 170. *But, cf.* LG Lüneburg Feb. 4, 1954.

76) *Kegel*, Probleme 32; *Letschert*, NJW 1951, 217-8; LG Lüneburg Feb. 4, 1954; see W. German BGH Sept. 19, 1957; LG Lüneburg Feb. 8, 1951; LG Hamburg July 5, 1956.

77) *Seeger,* JR 1951, 362.
78) *Drobnig,* RabelsZ 1953, 673, 681; *Strich* 205.
79) E.g. *Rückversicherungsgesellschaft v. Perutz* (Swiss BG 1941); Austrian OGH Sept. 5, 1934.
80) Austrian OGH April 24, 1936; *Sté pour l'exportation v. Schw. Kreditanstalt* (Swiss BG 1937).
81) *Seidl-Hohenveldern* 97; BGH Jan. 14, 1959 and Feb. 25, 1960; OLG Celle Dec. 22, 1959.
82) BGH Feb. 25, 1960; *Drobnig,* RabelsZ 1953, 680-1; *Raape* 681-2.
83) *Staudinger(-Weber)* 703.
84) BGH July 3, 1952. The report does not say whether it was an expropriation that had caused the mitigation of the claim.
85) Austrian OGH Sept. 5, 1934; W. German BGH Feb. 25, 1960.
86) *Drobnig,* RabelsZ 1953, 664-75; *Ficker* 118-9.
87) *Seeger,* JR 1951, 362 and NJW 1952, 211.
88) *Beitzke,* NJW 1952, 842.
89) *Beitzke,* NJW 1952, 840-2.
90) *Veith,* MDR 1951, 258-9.
91) *Bettermann,* NJW 1953, 1818.
92) BGH Nov. 12, 1959.
93) LG West Berlin Dec. 1, 1950.
94) LG West Berlin Oct. 13, 1950.
95) N. 92 *supra.*
96) Austrian OGH April 24, 1936; *Schulze* 243.

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TABLE OF CASES

Numbers refer to section or to section and footnote. Thus, 73 means section 73 and 129:68 means section 129 footnote 68.

Austria

Belgium

1910, May 20 (C.A. Brussels) *Chartreuse*: Rev. 1911, 732...55:53
1927, Feb. 28 (TCiv Brussels) *d'Aivassoff v. Raedemaekker*: 4 A.D. 70...98; 103:101
1930, Jan. 8 (TCiv Charleroi) *Caisse générale v. S.A. des Ateliers:* 5 A.D.101 ...19:21
1937, July 7 (C.A. Brussels) *Urrutia et Amollobieta v. Martiarena:* 8 A.D. 237 ...14:34
1938, June 9 (TCom Brussels) *Eismann v. Melzer:* La Belgique judiciaire 1938, 563...42:35
1939, Feb. 21 (TCiv Antwerpen) *Propetrol v. Cia Mexicana:* 9 A.D. 25...12:24; 29:1
1947, June 26 (C.A. Brussels) *Cie lithuanienne d'électricité* : Clunet 1950, 864...40:14
1951, May 17 (C.A. Liège) *Bertrand v. Bontemps*: 18 I.L.R. 683...61:31, 36
1952, March 28 (Cass.) *Etat belge v. Etat suédois*: Rev. 1953, 132...15:1
1960, June 2 (Cass.) *Hardtmuth Koh-I-Noor:* Rev.de dr.int.et de dr.comp. 1962, 31...16:4; 35:33; 40:19; 42:35; 55:54
1969, Oct. 23 (Cass.) *Allemagne v. Bureau belge des assureurs*: Rev. 1970, 690 ...19:21; 26:49

Canada

Brown v. Beleggings Societeit (Ontario High Ct. 1961): 42 I.L.R. 409...46:73; 48:2
Couch v. Desjardins 24 Les rapports judiciaires de Québec. Cour supérieure 543 (1903)...73
Estonian Line v. Elise (Sup. Ct. 1949): 15 A.D. 176...42:35
Juelle v. Trudeau (Cour supérieure Québec 1968): 7 D.L.R. 3d 82...33:22
National Surety Co. v. Larsen (B.C.C.A.): [1929] 4 D.L.R. 918...88
Quigley v. Desjardins 24 Les rapports judiciaires de Québec. Cour supérieure 434 (1903)... 73; 129:68

Denmark

UfR 1911, 724 and 1921, 449 (Sup. Ct.) *Chartreuse*...55:53
UfR 1922, 473 (Sup. Ct.) *Grammophone*...55:54
UfR 1924, 860 (ØL) *Witenberg v. Sønderby*...87:36
UfR 1925, 260 (Sup. Ct.) *Svendsen v. Bruevitsch*...99
UfR 1939, 588 (SH) *Eisner v. Nilwa*...42:35
UfR 1939, 919 (ØL) *Eisman v. Hafnia*...40:14

UfR 1948, 837 (Sup.Ct.) *Statens Jordlovsudvalg v. Pedersen*...61:35
UfR 1948, 1237 (Sup.Ct.) *Blue Star Line v. Burmeister & Wain*...73
UfR 1952, 856 (VL) *Banska a hutni v. Hahn*...40:14; 42:35
UfR 1955, 1070 (ØL) *U.S.S.R.'s Representation v. Narva Flachs*...42:35; 53:40
UfR 1957, 144 (Sup. Ct.) *Steinberg v. Handelsbanken*...44:56

France

1921, May 20 (TCom Seine) *Kharon v. Banque russe*: Clunet 1923, 533 ...95:62
1922, Aug. 31 (TCom Seine) *Avi v. Langstaff*: Clunet 1922, 992...78; 79:13
1923, Dec. 12 (TCiv Seine) *Héritiers Bouniatian v. Optorg*: Clunet 1924, 133...33:22; 36:39; 58:11
1924, April 15 (TCom Seine) *Hornstein v. Banque russo-asiatique*: Clunet 1927, 1075...95:62
1924, Aug. 20 (TCom Seine) *Mkeidze v. Banque russo-asiatique*: Clunet 1925, 384...95
1924, Dec. 11 (TCiv Seine) *Guenod v. L'Urbaine*: Clunet 1927, 1066...95:61
1925, Jan. 9 (TCom Seine) *Tessier v. L'Urbaine*: Clunet 1927, 1066...95:61
1925, Nov. 26 (TCom Seine) *Sté Cuirs et Peaux v. Banque russe:* Clunet 1927, 354...95:63
1926, Jan. 20 (TCom Marseille) *Elmassian v. Crédit foncier d'Algérie*: Clunet 1927, 67...72:1; 95
1926, July 9 (TCom Seine) *X. v. Agence Y.*: ZfO 1933, 451...72
1927, Jan. 11 (TCom Seine) *Kamenka v. Cahn*: Clunet 1927, 362...95:63
1927, Feb. 8 (C.A.Paris) *Frumier de Boylesve v. Jordaan*: Clunet 1927, 650...74; 76:5
1927, March 25 (TCiv Seine) *Schouster v. L'Urbaine*: Clunet 1927, 1066... 95:61
1927, June 17 (C.A. Paris) *Bauchon v. Crédit lyonnais*: Clunet 1927, 1061... 95:61
1927, Nov. 19 (TCom Seine) *Krivitzky v. Banque russe*: Clunet 1928, 132... 95:63
1927, Nov. 28 (C.A. Paris) *Sté des cirages v. Van der Haegen*: Clunet 1928, 119...95; 118:52
1928, Jan. 2 (C.A. Bordeaux)*Banque de Sibérie v. Vairon*: Clunet 1929, 115...52:35
1928, Jan. 31 (C.A. Paris) *Zelenoff v. Banque de Sibérie*: Clunet 1928, 679...52:35; 95:64
1928, March 3 (Cass.) *ROPIT*: Clunet 1928, 674...40:14
1928, March 8 (C.A. Paris) *Kahn v. Rossia*: Clunet 1928, 682...95:64

1928, July 3 (Cass.) *Héritiers Vogt v. Feltin*: Clunet 1929, 385...83; 86; 91:50, 56

1929, Feb. 25 (Cass.) *Crédit national industriel v. Crédit lyonnais* : Clunet 1929, 1306. Lower instances TCom Seine 1925, Clunet 1926, 376 and C.A. Paris 1926, Clunet 1927, 1061...72; 95:61

1929, June 11 (Cass.) *Banque des pays d'Orient v. Zurukzoglu*: Clunet 1930, 634...95:66

1929, June 26 (TCiv Seine) *Khorosh v. Rossia*: Clunet 1929, 1119...73:2; 75

1929, July 22 (C.A. Paris) *Aratzkoff v. Banque russo-asiatique*: Clunet 1929, 1095...95:62

1929, July 22 (C.A. Paris) *Teslenko v. Banque russo-asiatique*: Clunet 1929, 1095. Lower instance TCom Seine 1927, Clunet 1929, 78...95

1930, Dec. 23 (C.A. Paris) *Cockerill v. La Union et le Phénix espagnol*: Clunet 1934, 662...58

1931, Feb. 14 (TCiv Seine) *Bessel v. Sté des auteurs*: Clunet 1932, 113... 54:49

1931, Feb. 23 (TCiv Seine) *Monoszon v. Rossia*: Clunet 1931, 396...95:61

1931, May 23 (C.A. Paris) *Dvoriantchikoff v. L'Urbaine*: Clunet 1932, 441 ...95:61

1932, June 24 (C.A. Colmar) *Vogt v. Muller*: Clunet 1933, 337...78

1933, Feb. 15 (C.A. Paris) *Marchak v. Rabinerson*: Clunet 1933, 959...72; 75; 75:4

1933, June 30 (C.A. Paris) *Bronstein v. Banque russo-asiatique*: Clunet 1933, 963...77; 79:13

1934, April 14 (Cass.) *Hirschfeld v. Wuhler*: Clunet 1935, 372...83; 122:58

1935, Feb. 20 (TCiv Seine) *Vve Philipoff v. Jaudon*: Clunet 1936, 338... 45:59

1935, April 3 (TCom Le Havre) *Affaire Venizelos*: Clunet 1935, 940...42:35

1935, Nov. 8 (C.A. Paris) *L'Urbaine v. Et. Bernard et Devavrin*: Clunet 1937, 66...108; 109:120

1936, March 26 (C.A. Paris) *Banque des pays v. Banque française*: Clunet 1936, 931...77; 79:15; 111; 129:68

1936, Dec. 15 (Cass.) *U.R.S.S. v. Chaliapine*: Rev. 1937, 710

1937, Feb. 16 (C.A. Colmar) *Geissmann v. Bentzinger*: Clunet 1937, 784...78

1937, Dec. 20 (C.A. Potiers) *Cementos Resola v. Larrasquitu*: Clunet 1938, 287...12:24; 29:2; 67:78

1938, March 11 (C.A. Colmar) *Voglet v. Schenker*: Clunet 1938, 812...95

1938, March 28 (C.A. Bordeaux) *Lafuente v. Llaguno y Duranona*: 9 A.D. 152...12:24; 29:2; 67:78

1938, April 14 (C.A. Paris) *Hertzfeld v. U.R.S.S.*: Clunet 1938, 1034... 14:40

1939, March 14 (Cass.) *Potasas Ibericas v. Bloch:* Clunet 1939, 615...33:32; 35:28

1944, Jan. 3 (C.A. Paris) *Banque russe v. Technogor*: Rev. 1948, 81...95
1950, Dec. 2 (C.A. Paris) *Hardtmuth No.1*: Clunet 1952, 1200...42:35; 46:75; 55
1951, Feb. 15 (Cass.) *Et. Graf v. Sté La Mure*: 18 I.L.R. 678...61:31
1954, July 12 (TCiv Seine) *Stchoukine Case*: Clunet 1955, 119; Rev. 1955, 503; 21 I.L.R. 21...14:40; 29:1; 35:31
1955, Dec. 7 (Cass.) *Blum v. Sté d'injection rapide*: 22 I.L.R. 1007...61:31
1956, Jan. 4 (TCiv. Seine) *Spitzer v. Amunategui*: Rev. 1956, 679...19:18; 78
1957, April 11 (C.A. Paris) *Ex-Roi Farouk v. Dior*: Clunet 1957, 716; 24 I.L.R. 228...95
1958, June 25 (C.A. Paris) *Hardtmuth No. 2*: Clunet 1959, 1104; 26 I.L.R. 50...40:14; 42:35; 55; 55:54, 58
1959, May 14 (C.A. Besançon) *Vve Dornier v. Louis Dornier*: Clunet 1960, 778; Rev. 1960, 67...19:21
1961, March 15 (Cass.) *Sidney Merlin v. Directeur des domaines:* Clunet 1961, 1072; Rev. 1961, 738...41:31; 42:35; 55:54
1963, March 19 (C.A. Paris) *Agfa*: Annales de la prop. ind. 1963, 125...42:35; 55:54
1963, April 2 (C.A. Paris) *Saatsucht v. Deutsche Saatgut*: Annales de la prop. ind. 1963, 125...55:54
1963, May 8 (C.A. Paris) *Philips v. Noel:* Rev. 1964, 265...54:50
1963, Oct. 23 (Cass.) *Union-Vie v. Hazan*: Bull. civ. I 383; Rev. 1964, 723...95
1965, Feb. 9 (Trib. Seine) *Setbon v. Lellouche*: Rev. 1966, 284...108; 109:121; 122:58
1965, June 5 (TCom Lille) *Sirius v. Bracht*: Clunet 1966, 357; 47 I.L.R. 119...95:70
1965, June 30 (Trib. Seine) *Epoux Reynolds v. Ministre des affaires étrangères*: Rev. 1966, 481; 47 I.L.R. 53...12:24; 29:1; 35:31
1965, Dec. 2 (C.A. Aix) *B.N.C.I.A. v. Narbonne*: Clunet 1966, 108; 47 I.L.R. 120...95:69
1966, Jan. 12 (Trib. Seine) *Stroganoff-Scherbatoff v. Bensimon*: Rev. 1967, 120; 47 I.L.R. 72...29:1; 35:31
1966, Jan. 25 (Cass.) *Labadie v. Royal Dutch*: Rev. 1966, 238...51:28
1966, Jan. 25 (Cass.) *Cassan v. Royal Dutch No.1*: Clunet 1966, 631; 47 I.L.R. 58...51:28
1966, March 15 (Cass.) *Zeiss*: Clunet 1966, 622; Rev. 1967, 147; 47 I.L.R. 129...42:35; 55:54
1966, March 17 (Trib. Seine) *Cie algérienne de tracteurs v. Bertagna*: Clunet 1966, 831...95:72; 122:58
1966, May 11 (Trib. Seine) *Sté Shell v. Mary*: Rev. 1967, 784; 47 I.L.R. 63...95

1966, May 26 (C.A. Aix) *Sté des viandes v. Cie française de crédit et de banque*: Clunet 1966, 830...95:67

1966, June 29 (Trib. Seine) *Plichon v. Royal Dutch*: Clunet 1966, 631; 47 I.L.R. 67...51:28

1966, July 12 (C.A. Aix) *Crédit du Nord v. Brosette*: Clunet 1966, 830; 47 I.L.R. 60...95:67

1967, Jan. 17 (C.A. Paris) *B.N.C.I.A. v. Alco et Lavie*: Clunet 1967, 370; 41 I.L.R. 266...95:67

1967, April 5 (C.A. Lyon) *Consorts Amsellem v. B.N.C.I.A.*: Clunet 1967, 859; 41 I.L.R. 272...95:69, 71

1968, Oct. 1 (C.A. Aix) *Crédit industriel et commercial v. Vitielo*: JCP 1969 II 15706...95:68

1969, Jan. 21 (C.A. Agen) *B.N.C.I.A. v. Bandet*: JCP 1969 II 15817... 95:68

1969, April 23 (Cass.) *B.N.C.I.A. v. Narbonne, Crédit foncier v. Narbonne, Cie française de crédit et de banque v. Atard, Kassab v. Crédit foncier d'Algérie, Distillerie Phénix v. Cie française de crédit et de banque, C.I.C. v. Cara, Humbert et Sidobre v. B.N.C.I.A., Richier v. Sté marseillaise de crédit*: Clunet 1969, 913; Rev. 1969, 717; JCP 1969 II 15897...35:28; 95; 103:97, 104

1969, June 25 (Trib. Le Mans): Gazette du Palais 1969, 2, 262...95

1969, July 1 (C.A. Paris) *Crédit ind. et com. v. Borgeaud*: Rev. trim. dr.com. 1969, 1169...103:98

1969, July 8 (Cass.) *Frères de Cara v. Comptoir d'escompte de Sidi-Bel-Abbès*: Rev. 1972, 100...95:76

1970, March 17 (Cass.) *Reyes v. U.S.A.*: Clunet 1970, 923; Rev. 1970, 688...19:21; 26:49

1970, Dec. 8 (Cass.): Rev. 1971, 797; Bull. civ. 1970, I, 267...83

1971, March 9 (Cass.) *Siari v. Banque populaire d'Algérie*: Bull. civ. 1971, I, 64; A.F. 1972, 953...95:80, 103:102

1971, Dec. 15 (Trib. Paris) *Zeiss v. Au Bon Marché*: Clunet 1972, 608... 55

1972, Oct. 17 (Cass.) *Cassan v. Royal Dutch No.2*: Clunet 1973, 716; Rev. 1973, 520...48:2; 51:28

1972, Nov. 29 (Trib. Paris) *Codelco v. Braden*: Clunet 1973, 227; RabelsZ 1973, 574; 12 I.L.M. 182 (1973)...35:28; 60:25

East Germany

1948, June 4 (OLG Gera): IzRspr. 1945-53, 250...100:95

1948, Dec. 10 (LG Leipzig): NJ 1949, 93...49:9

1951, Feb. 14 (Sup. Ct.): 1 OG DDR 94...100:95

1951, May 9 (Sup.Ct.): 1 OG DDR 137...126:66

Germany (except East Germany)

1882, Oct. 4 (RG): 9 RGZ 3...86; 91:42, 50
1908, May 29 (RG): 69 RGZ 1...55:53
1917, Nov. 13 (RG): 91 RGZ 260...70
1921, June 7 (RG): 102 RGZ 251...42:35
1924, May 2 (RG): 108 RGZ 265...86
1924, Dec. 20 (RG): 109 RGZ 357...86
1925, April 3 (RG): 110 RGZ 380...86; 91:54
1927, March 29 (RG): 116 RGZ 330...72:1; 100
1928, Nov. 1 (LG Berlin): Clunet 1929, 184...29:1
1928, Dec. 11 (LG Berlin): IPRspr. 1929, 18...29:1
1929, Oct. 15 (RG): Clunet 1934, 550...55:54
1930, May 20 (RG): 129 RGZ 98...58:11
1930, Sept. 22 (RG): 130 RGZ 23...77:11; 91:43; 100
1931, March 18 (RG): 132 RGZ 128...86; 91:52; 123:60
1932, Oct. 27 (KG): IPRspr. 1932, 26...108; 109:121; 122:58
1934, June 13 (RG): IPRspr. 1934, 268; 7 A.D. 501..86; 91:54
1937, Feb. 8 (RG): 153 RGZ 338...136
1946, Nov. 7 (OLG Hamburg): MDR 1947, 26...100; 103:101
1948, Jan. 6 (OLG Hamburg): MDR 1948, 244...103:101
1948, Jan. 6 (OLG Braunschweig): MDR 1948, 256...73
1948, June 26 (AG Waiblingen): RabelsZ 1949-50, 139...33:22
1948, July 19 (OLG Hamburg): MDR 1948, 283...55:54
1948, July 20 (LG Kassel): RabelsZ 1949-50, 138...44:53
1948, Dec. 7 (AG Dingolfing): RabelsZ 1949-50, 141...33:22
1949, March 31 (Sup. Ct. Brit. Zone): 16 A.D. 21...42:37; 100; 103:103
1949, April 5 (OLG Saarbrücken): Saarländische Rechts- und Steuerzeitschrift 1949, 78...91:52
1949, June 1 (OLG Nürnberg): 16 A.D. 25...33:22
1949, Sept. 19 (OLG Nürnberg): NJW 1950, 228; 16 A.D. 19...33:22
1949, Oct. 13 (Sup. Ct. Brit. Zone): 16 A.D. 16...61:34
1950, Oct. 13 (LG Berlin): JR 1951, 24...100; 136:94
1950, Dec. 1 (LG Berlin): NJW 1951, 238; 18 I.L.R. 38...100; 136:93
1950, Dec. 15 (KG): JZ 1951, 367; 18 I.L.R. 197...40:14
1950, Dec. 22 (KG): JR 1951, 627; NJW 1951, 486...100; 103:101
1951, Feb. 8 (LG Lüneburg): MDR 1951, 430...100; 134:75, 76
1951, May 29 (BGH): 2 BGHZ 218...100:94
1951, June 14 (OLG München): MDR 1952, 425; Clunet 1954, 1012...33:22; 60:26; 62
1952, Jan. 8 (OLG Düsseldorf): IzRspr. 1945-53, 237...50:10
1952, Feb. 1 (BGH): NJW 1952, 420...86; 91:52; 135
1952, June 27 (OLG Frankfurt): NJW 1953, 105; 19 I.L.R. 14...86; 91:44,

48, 56; 125:64

1952, July 3 (BGH): 6 BGHZ 385...136:84

1953, Feb. 11 (BGH): IPRspr. 1952-3, 121; NJW 1953, 542...86; 91:52; 123:61

1953, March 17 (BGH): NJW 1953, 861...86:26; 132:73

1953, Oct. 6 (BGH): 10 BGHZ 319...100; 100:94; 117:49

1953, Nov. 11 (BGH): NJW 1954, 310...86; 91:44, 48, 52; 125:64

1953, Dec. 22 (BGH): 12 BGHZ 79...86; 91:48, 52; 125:64

1954, Jan. 15 (BGH): MDR 1954, 286...86

1954, Feb. 4 (LG Lüneburg): IPRspr. 1954-5, 82...100; 103:101; 134:75, 76

1954, April 24 (BGH): 13 BGHZ 127...78; 79:13

1954, Dec. 4 (OLG Düsseldorf): Clunet 1958, 245...53:40

1955, March 24 (BGH): NJW 1955, 869...86:28; 86

1955, April 1 (BGH): NJW 1955, 1065; MDR 1955, 404...86:28

1955, April 15 (BGH): BB 1955, 459...86; 91:48, 52; 125:64

1955, May 10 (BGH): NJW 1955, 1151; 22 I.L.R. 14...55:54, 57

1955, May 20 (BGH): IPRspr. 1954-5, 76...86:34

1955, June 7 (BGH): NJW 1955, 1434; 22 I.L.R. 17...55:54, 58

1955, June 16 (BAG): Der Betrieb 1955, 607...100

1955, June 22 (OLG Düsseldorf): NJW 1955, 1797...73

1955, Nov. 21 (BGH): 19 BGHZ 102...51:24

1955, Nov. 25 (OLG Neustadt): IPRspr. 1954-5, 84...100

1956, Jan. 30 (BGH): NJW 1956, 785...49:5

1956, Feb. 15 (LG Hamburg): IPRspr. 1956-7, 141...86:29

1956, May 7 (KG): IzRspr. 1954-7, 191...50:10

1956, June 29 (BGH): GRUR 1956, 553...55:54

1956, July 5 (LG Hamburg): NJW 1957, 505...100; 134:75, 76

1956, Dec. 13 (BGH): NJW 1957, 217; 23 I.L.R. 21...51:24

1957, Jan. 15 (BGH) Recht in Ost und West 1957, 125...55:54

1957, Feb. 18 (BGH): JZ 1957, 475; 24 I.L.R. 28...86:28

1957, April 10 (BGH): IzRspr. 1954-7, 34; NJW 1957, 1070...50:10; 86:28

1957, July 11 (BGH): 24 I.L.R. 35...42:35; 86:28

1957, July 24 (BGH): NJW 1958, 17...50:14; 55:54

1957, Sept. 19 (BGH): MDR 1958, 86...100; 122:58; 130:69; 134:75, 76

1957, Oct. 24 (BGH): WM 1958, 20...86:26; 132:73

1957, Oct. 28 (LG Berlin): IPRspr. 1956-7, 140...86:29

1957, Nov. 13 (OLG Hamburg): WM 1958, 227...4:1; 67:84

1957, Dec. 9 (LG Berlin): IPRspr. 1956-7, 140...86:29

1957, Dec. 30 (BGH): WM 1958, 131...100; 103:100

1958, Feb. 14 (BGH): NJW 1958, 671; WM 1958, 353...55:54

1958, Feb. 21 (BGH): NJW 1958, 745; MDR 1958, 426, 484...86:27

1958, Feb. 25 (KG): IPRspr. 1958-9, 201; WM 1958, 604...86:29

1958, June 11 (LG Hamburg): AWD 1958, 151...49:8

1958, July 10 (OLG Düsseldorf): IPRspr. 1958-9, 206...86:31

1958, Nov. 6 (BGH): MDR 1959, 100...86
1959, Jan. 14 (BGH): IPRspr. 1958-9, 210...86:24, 30; 136:81
1959, Feb. 2 (KG): IzRspr. 1958-9, 138...50:10
1959, Feb. 6 (BGH): GRUR 1959, 367...50:14; 55:54
1959, March 26 (OLG München): IPRspr. 1958-9, 219...54:49
1959, Aug. 21 (OLG Bremen): 28 I.L.R. 16...29:1; 31:15; 35:34; 60; 62; 62:44, 46; 63:49; 67:81
1959, Nov. 12 (BGH): 31 BGHZ 168; NJW 1960, 189...100; 103:104; 136:91
1959, Nov. 25 (OLG Hamburg): IPRspr. 1958-9, 237...86; 91:45; 135
1959, Dec. 17 (BGH): NJW 1960, 1101...20; 21:23; 22; 43:43
1959, Dec. 18 (BGH): NJW 1960, 1103; GRUR 1960, 372...55:54, 58
1959, Dec. 22 (OLG Celle): IPRspr. 1958-9, 245...86:31, 33; 136:81
1960, Feb. 25 (BGH): IPRspr. 1960-1, 247...41:28; 86; 91:47, 51, 56; 100; 103:103; 136:81, 82, 85
1960, May 5 (BGH): IPRspr. 1960-1, 255; 32 I.L.R. 12...42:35; 51:24; 52:36
1960, Oct. 6 (BHG): IPRspr. 1960-1, 261; 32 I.L.R. 19...42:35; 52:36
1960, Dec. 21 (BGH): AWD 1961, 102...19:18
1960, Dec. 23 (LG Tübingen): IPRspr. 1960-1, 267; 32 I.L.R. 33...111
1960, Dec. 30 (LG Offenburg): IPRspr. 1960-1, 550...19:21; 39:5; 45
1960, Dec. 30 (LG Berlin): WM 1961, 217...50:10
1961, Jan. 23 (BGH): IPRspr. 1960-1, 275; 32 I.L.R. 26...51:24
1961, Feb. 3 (KG): IPRspr. 1960-1, 277...53:40
1961, Feb. 20 (BGH): IPRspr. 1960-1, 283; 32 I.L.R. 30...1:9; 42:35; 51:25; 52:36
1961, March 7 (BGH): MDR 1961, 569...55:54
1961, April 25 (OLG Nürnberg): IzRspr. 1960-1, 366...86:28; 100
1961, June 30 (BGH): IzRspr. 1960-1, 432; GRUR 1962, 91...50:14; 55:54
1962, May 24 (BGH): AWD 1962, 208...19:18
1962, Oct. 12 (BGH): IzRspr. 1962-3, 215; GRUR 1963, 263...55:54; 57:69
1962, Oct. 31 (BGH): IPRspr. 1962-3, 160...51:24
1963, Jan. 23 (BGH): IzRspr. 1962-3, 242; GRUR 1963, 473...55:54
1963, March 8 (BGH): AWD 1963, 178; GRUR 1963, 527...40:14; 42:35; 55:54, 58
1963, May 30 (OLG Frankfurt): IzRspr. 1962-3, 2...14:34
1963, Dec. 18 (BGH): NJW 1964, 1620...33:22
1964, Jan. 17 (OLG Hamm): AWD 1964, 124...55:52
1964, July 2 (Oberverwaltungsgericht Berlin): Recht in Ost und West 1965, 90...50:10
1965, Jan. 28 (BGH): IzRspr. 1964-5, 226...21:23; 40:14; 42:35; 44:56; 91:45
1965, March 23 (ObLG Bayern): 44 I.L.R. 50...50:11
1965, March 25 (OLG Celle): IPRspr. 1964-5, 562...53:40

1965, April 14 (BGH): IzRspr. 1964-5, 271...55:54
1965, May 31 (LG Berlin): IzRspr. 1964-5, 109...50:10
1965, Nov. 29 (BGH): IPRspr. 1964-5, 565...42:35; 50:13; 52:36
1969, Jan. 30 (BGH): MDR 1969, 570...55:54
1970, April 27 (BGH): IPRspr. 1970, 329...38:4
1970, June 1 (BGH): IPRspr. 1970, 18...52:36
1971, March 31 (BGH): IPRspr. 1971, 354...42:35
1971, Oct. 21 (BGH): WM 1971, 1502...50:10; 51:24
1972, Feb. 28 (BGH): MDR 1972, 494...52:36; 100; 103:103
1972, June 22 (BGH): 59 BGHZ 83...19:18
1973, Jan. 22 (LG Hamburg): RabelsZ 1973, 578; 12 I.L.M. 251 (1973)... 60; 62; 62:46; 66
1974, March 13 (LG Hamburg): AWD 1974, 410, 494...51:25; 52:36

Italy

1922, July 26 (C.A. Milano) *Italian Black Sea Co. v. Russian Soviet Government*: 1 A.D. 26...13:33
1924, June 25 (Cass.) *Federazione Italiana Consorzi Agrari v. Commissariat of the Soviet Republic and Stà Romana*: 2 A.D. 15...29:1
1930, March 7 (C.A. Genoa) *Nomis v. Federazione*: 5 A.D. 45...58; 58:11, 16
1940, June 4 (Trib. Milano) *Eulenburg*: Clunet 1951, 1157...46:72
1947, Dec. 17 (Cass.) *Levi v. Monte dei Paschi di Siena*: Foro Italiano 1948 I 202...72:1; 84; 91:49
1950, Feb. 8 (Cass.) *Ministerio Difesa v. Salamone*: 18 I.L.R. 686...61:34, 37
1951, April 28 (Cass.) *Kobylinsky v. Banco di Chivari*: 18 I.L.R. 693...72; 75:3
1951, June 15 (Cass.) *Ministerio Difesa v. Ambriola*: 18 I.L.R. 690...61:31
1953, March 11 (Trib. Venice) *Anglo-Iranian Oil Co. v. SUPOR*: 22 I.L.R. 19...12:25; 29:1; 30:12; 60
1954, Sept. 13 (TCiv Rome) *Anglo-Iranian Oil Co. v. SUPOR*: 22 I.L.R. 23; Rev. 1958, 519...29:1; 36:38; 60; 62:43; 67:79
1956, April 28 (C.A. Bologna) *Svit and Bata v. BSF Stiftung*: 5 A.J.C.L. 642 (1956)...40:14
1956, Oct. 17 (Cass.) *Pauer v. Hungary*: 24 I.L.R. 211...14:34
1958, Dec. 9 (State Council): Rivista Diritto Internazionale 1960, 321...84
1959, Oct. 5 (Cass.) *Ornati v. Archimedes*: 28 I.L.R. 39...55:54
1960, Feb. 19 (Cass.) *Hardtmuth*: 40 I.L.R. 17...40:14; 55:54, 55
1964, Jan. 29 (C.A. Genoa) *Petrolifera Muntenia v. Child*: Rivista Diritto Internazionale 1964, 639...46:75; 48:2
1968, May 29 (C.A. Rome) *Banca Nazionale del Lavoro v. Focanti*: Banca, borsa e titoli di credito 1968 II 562...97; 103:105
1973, March 12 (Trib. Siracusa) *British Petroleum v. SINCAT*: 13 I.L.M. 106 (1974)...29:1; 60

Netherlands

1908, March 5 (HR) *Chartreuse*: Rev. 1908, 843...55:53
1936, July 13 (Justice of the Peace Emmen): RabelsZ 1937, 198...108; 109:114
1938, Dec. 13 (Justice of the Peace Hilversum)*Manes v. Komm. Verwalter*: 11 A.D. 20...46:74
1939, June 14 (Ct. Hague) *Komotau Firma v. Komm. Verwalter*: 11 A.D. 21 ...46:74
1941, Feb. 7 (HR) *Petroservice v. El Aguila*: 11 A.D. 17. Lower instance C.A. Hague 1939...12:24; 29:1; 60:30; 62:41; 67:78, 80
1942, Nov. 4 (C.A. Amsterdam) *Herani v. Wladikawkazsky Ry*: 11 A.D. 21 ...58:11
1942, Dec. 3 (C.A. Amsterdam) *Poortensdijk v. Latvia*: 11 A.D. 142...12:24; 14:34
1946, Sept. 25 (D.C. Hague, aff'd C.A. Hague 1950) *Latvian Shipping v. Montan Export*: 17 I.L.R. 32...46:74; 48:2
1946, Nov. 8 (C.A. Hague) *Scheepvaarten v. Schneider*: 13 A.D. 17...42:35
1951, May 5 (Council for the restoration of legal rights Hague) *Christen v. Onderlinge*: 18 I.L.R. 681...61:34
1951, Nov. 28 (C.A. Amsterdam) *Pensioenfonds v. P.C.G.*: 18 I.L.R. 682 ...61:31, 39
1952, March 11 (C.A. Arnhem) *S.A. Banska*: 19 I.L.R. 16; Clunet 1955, 894...40:14
1953, Feb. 6 (D.C. 's-Hertogenbosch) *Philips v. Tesla*: RabelsZ 1959, 316 ...32:20
1953, Aug. 2 (C.A. Hague) *Belgium v. E.M.J.C.H.*: 20 I.L.R. 26...6; 46:73
1954, June 29 (C.A. 's-Hertogenbosch) *Belgium v. Wannijn*: 20 I.L.R. 28... 46:73
1955, Nov. 3 (C.A. Hague) *De V. v. Belgium*: 24 I.L.R. 38...46:73
1956, Nov. 16 (HR): RabelsZ 1959, 314...19:18
1956, Dec. 11 (D.C. Hague) *Amato v. Keilwerth*: 24 I.L.R. 435...55:54, 56
1957, Nov. 8 (HR) *Zeiss*: Clunet 1964, 616; RabelsZ 1966, 701; GRUR Int. 1958, 341...40:14; 55:54
1958, May 27 (D.C. Hague, aff'd C.A. Hague 1958) *Indonesia v. Van der Haas*: 26 I.L.R. 181...14:34
1959, April 9 (C.A. Amsterdam) *Lembaga and Indonesia v. Brummer et al.* 30 I.L.R. 25; RabelsZ 1962-3, 629...38
1959, April 22 (D.C. Amsterdam) *Nationale v. Kat's Handel*: 30 I.L.R. 375...98; 103:102
1959, June 4 (C.A. Amsterdam) *Bank Indonesia v. Senembah*: 30 I.L.R. 28...12:24; 33:22; 42:35; 60:27
1962, Feb. 21 (D.C. Amsterdam) *Volker v. Hollandsche Ass.*: Clunet 1969, 976...60:27

1964, April 17 (HR) *De Nederlanden van 1845 v. Escompto Bank*: 40 I.L.R. 7; Clunet 1969, 978...12:25; 60:27, 28; 62:46

1965, Jan. 15 (HR) *Kjellberg*: Clunet 1969, 983...40:14; 55:54

1966, March 17 (C.A. Amsterdam) *Breitkopf und Härtel KG*: RabelsZ 1970, 118...55

1969, Oct. 17 (HR) *U.S.A. v. Bank voor Handel en Scheepvaart*: 9 I.L.M. 758 (1970)...12:25; 60:29; 62:43

Norway

1939, Dec. 6 (Byrett Oslo) *Böhm v. Bergsland: Hjerner* 377...29:1, 5; 87; 91:44; 127

Rt 1947, 235 (Sup. Ct.) *Andresens Bank v. Norges Rederforbund*...87; 91:49, 52, 54

Rt 1948, 275 (Sup. Ct.) *Kongeriket Norges Hypotekbank v. Bergens Provincialloge*...87; 91:49, 52, 54

Rt 1949, 357 (Sup. Ct.) *Sobral v. Bergens Privatbank*...87; 91:49, 52, 54

Rt 1950, 1012 (Sup. Ct.) *Bergens Provincialloge v. Norges Bank and Krigsskadetrygden*...87; 124

Rt 1951, 523 (Sup. Ct.) *Norges Bank v. Polski Komitet Azotowy*: 18 I.L.R. 684...87; 91:49, 54

Rt 1951, 727 (Sup. Ct.) *Trondhjems Sparbank v. S.Johs Logen*...72:1; 80:16; 87; 91:49, 52, 54; 124

Rt 1951, 905 (Sup. Ct.) *Samuelsen v. Norges Bank*...87; 91:51; 126:66

Rt 1951, 1035 (Sup. Ct.) *Randfjordsbruket v. Viul Tresliperi*: 18 I.L.R. 635 ...61:31

1959, July 11 (Byrett Oslo) *Hardtmuth*: Rettens Gang 1961, 538; 30 I.L.R. 33...40:14; 55:54, 55

Sweden

1912, April 26 (Ct. Stockholm) *Chartreuse*: Arkiv för patent-, mönster- och varumärkesskydd 1920, 63...55:53

NJA 1914, 409 (HD) *Drätselkammaren i Åbo v. Fitinghoff*...39:5

NJA 1914, 411 (HD) *Drätselkammaren i Nikolaistad v. Procopé*...39:5

NJA 1924, 359 (HD) *Thorer v. AB Nya Banken*...77:9

NJA 1924, 401 (HD) *Lindners AB v. Skandinaviska Kredit*...77:6

NJA 1924, 407 (HD) *Dunker v. Bank Södra Sverige*...77:6

NJA 1924, 411 (HD) *Traugott v. Svenska Handelsbanken*...77:6

NJA 1924, 413 (HD) *Abramson v. Smålands Enskilda Bank*...77:10

NJA 1924, 635 (HD) *Norge v. Bruhn*...39:5

NJA 1924, A 325 (HD) *Skandinaviska Kredit v. Kristiania Bank*...77:6

NJA 1924, A 326 (HD) *Svenska Handelsbanken v. Kristiania Bank*...77:6

Switzerland

1925, July 13 (BG) *Wilbuschewitsch v. Waisenamt Zürich*: BGE 51 II 225 ...40:14

1926, June 4 (BG) *Schinz v. Bächli*: BGE 52 I 218...58:11

1928, Dec. 19 (OG Zürich) *Pettai v. Schinz*: ZfO 1929, 1403...97; 103:101; 130

1934, March 9 (HG Zürich) *Dr. W. v. Privat- und Verwaltungsgesellschaft*: ZüR 1935, 135...77

1934, Sept. 18 (BG) *Nathan-Institut v. Schw. Bank*: BGE 60 II 294...107; 109:115, 116, 120

1935, May 8 (HG Zürich) *B. v. Lombardbank*: ZüR 1935, 140...77

1936, Oct. 19 (Bezirksgericht Zürich) *Spar- und Leihkasse Rebstein v. Deutsche Reichsbahngesellschaft*: Clunet 1937, 991...107; 109:121; 122:58

1937, Sept. 21 (BG) *Sté pour l'exportation des sucres v. Schw. Kreditanstalt*: BGE 63 II 303...107; 109:115, 120; 136:80

1937, Sept. 28 (BG) *Frankl v. Fina*: Clunet 1939, 192...77; 79:14

1940, Feb. 20 (BG) *Seligmann-Gans v. Zivilgericht Basel*: BGE 66 II 37 ...53:44

1940, Sept. 13 (OG Zürich) *Universale v. Wolff De Beer*: ZüR 1941, 164 ...85; 91:43; 123

1941, Nov. 19 (BG) *Rückversicherungsgesellschaft v. Dr. M.D.*: ZüR 1942, 301...85; 91:51; 109:122

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1942, July 7 (BG) *Rheinisch-Westfälische Elektrizitätswerk v. Anglo-Continentale Treuhand*: BGE 68 II 203...107; 109:115, 122

1942, Dec. 22 (BG) *Böhmische Union Bank v. Heynau*: BGE 68 II 377... 29:6; 33:22

1943, Dec. 8 (OG Zürich) *Rückversicherungsgesellschaft v. R.A.*: Schw. JIR 1947, 229...85; 91:51, 53

1945, Nov. 2 (BG) *Dessauer v. Schw. Lebensversicherungs- und Rentenanstalt*: BGE 71 II 287...107; 109:114; 117:47

1946, April 12 (BG) *Stransky v. Assicurazioni Generali*: BGE 71 III 52... 107

1948, June 3 (BG Restitution Chamber) *Rosenberg v. Fischer*: Schw. JIR 1949, 139; 15 A.D. 467...61:33

1948, June 24 (BG Restitution Chamber) *P. v. AG K. and P.*: 15 A.D. 594...61:33

1948, Oct. 28 (BG) *Wichert v. Wichert*: BGE 74 II 224...42:35; 45:58

1949, Aug. 26 (Bezirksgericht Zürich) *I.G. Farben*: Schw. JZ 1949, 342; 16 A.D. 84...40:14

1952, Jan. 8 (Bezirksgericht Horgen) *Pribyl v. Cotona*: Schw. JZ 1953,

343; Schw. JIR 1954, 182...40:14; 42:35

1952, Sept. 16 (OG Zürich): Schw. JZ 1953, 281...85; 91:45, 53

1953, Jan. 23 (BG) *Zivnostenska Banka v. Wismeyer*: BGE 79 II 87; 20 I.L.R. 34...15:1; 17:8; 45:59; 46:74

1953, March 26 (BG) *Schw. Lebensversicherungs- und Rentenanstalt v. Elkan*: BGE 79 II 193; 20 I.L.R. 36...40:19; 85; 91:52; 123

1954, Feb. 2 (BG) *Ammon v. Royal Dutch*: BGE 80 II 53; 21 I.L.R. 25... 16:4; 51:28

1955, March 15 (BG) *Hardtmuth*: BGE 81 II 312...40:14; 42:35; 55:54

1956, Sept. 25 (BG) *Carborundum*: BGE 82 I 196; 23 I.L.R. 24...55:54

1957, Sept. 13 (BG) *Koh-I-Noor*: BGE 83 II 312; 24 I.L.R. 46...55; 55:54, 55

1958, March 12 (Bezirksgericht Zürich): AWD 1958, 80...40:14; 42:35; 49:8

1960, Feb. 24 (BG) *Upské papírny v. B.*: Schw. JIR 1962, 248...48:2

1961, June 16 (Cour de justice civile Genève) *Dana v. Royal Dutch*: Clunet 1966, 151; Schw. JIR 1961, 250...51:28

1965, March 30 (BG) *Zeiss*: BGE 91 II 117; Clunet 1970, 411...55; 58:11

1967, Dec. 27 (C.A. Basel): Schw. JZ 1968, 135...19:21

1968, Feb. 27 (BG) *Union Nasic*: La Semaine judiciaire 1969, 433; Schw. JIR 1971, 115...17:8; 45:58

1968, Dec. 13 (BG) *Koerfer v. Goldschmidt*: BGE 94 II 297; Schw. JIR 1969-70, 315...36:42

United Kingdom and Colonies

The Alar 84 Ll.L.R. 513 (S.C.T. 1950)...44:47

Re Amand No.2 [1942] 1 K.B. 445...67:82

Anglo-Iranian Oil Co. v. Jaffrate 20 I.L.R. 316 (Aden Sup. Ct. 1953)...8; 33:22; 60; 62:42, 45; 63:49

Arab Bank v. Barclays Bank [1954] A.C. 495 (H.L.)...82; 91:56

Banco de Bilbao v. Sancha and Rey [1938] 2 K.B. 176 (C.A.); 9 A.D. 75... 58:7

Bank voor Handel en Scheepvaart v. Slatford [1953] 1 Q.B. 248; 18 I.L.R. 171...42:35; 46:73

Banque des marchands de Moscou [1952] 1 T.L.R. 739 (Ch.); Clunet 1954, 210...52:34; 72; 75:4; 94

Boissevain v. Weil [1949] 1 K.B. 482 (C.A.)...24

Buerger v. New York Life 43 T.L.R. 601 (C.A. 1927)...94:59

Carl Zeiss Stiftung v. Rayner and Keeler Ltd. [1967] A.C. 853 (H.L.); 43 I.L.R. 23...58:6

El Condado 9 A.D. 225 (Scotland Ct. of Seesions 1939)...14:35, 37; 29:2; 58:7

United States

Other countries

Lebanon, C.A. Beirut May 31, 1968: Clunet 1972, 89...40:14; 203:72

Lithuania, Sup. Ct. 1931 *Ministry of Interior v. Helperin*: ZfO 1933, 818... 47:84

Monaco, TCiv 1948 *Perrin-Jannès v. Masi* : Rev. 1948, 306...29:1; 42:35

Philippines, Sup. Ct. 1948 *Haw Pia v. China Banking Corp.*: 18 I.L.R. 642 ...90; 91:48; 126:65

Philippines, Sup. Ct. 1950 *Gibbs v. Rodriguez*: 18 I.L.R. 661...90:38

Philippines, Sup. Ct. 1954 *Brownell v. Sun Life Ass.*: 21 I.L.R. 39...47:84

Poland, Sup. Ct. 1929 *Muszkat v. Rossia*: Clunet 1931, 770...102

Singapore, C.A. 1956 *Bataafsche v. War Damage Commission*: 23 I.L.R. 810...61:31, 36

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Expropriation in Private International Law

This book examines court decisions about seizures of property by foreign states. It is divided into three main parts.

The first part is devoted to preliminary problems. The examination of the requirements imposed on the courts by international law is followed by a discussion of the special status of foreign expropriatory and similar laws in private international law.

The second part concerns the foreign state's right to the property affected by the seizure. An examination of recognizing the expropriator's title to property which has already been effectively seized is followed by a study of the enforcement of foreign expropriatory laws. This part also discusses foreign seizures marked by special defects, in particular seizures violating the law of nations.

The focus of the book is on its third part, which handles the problems connected with distributing the losses caused by foreign seizures. Many lawsuits have considered which of the parties is to bear the consequences of the foreign action but this problem has been discussed in legal literature much less than the validity and enforcement of a seizure. Therefore, this part is more detailed than the previous ones.