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The Introduction of the Euro and Its Implications for Obligations Denominated In Currencies Replaced by the Euro

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Michael Gruson

Abstract

This Article will discuss to what extent fears that debt in a country's national currency will no longer be enforceable under U.S. law after the introduction of the Euro are justified. The article assumes that the European Council, as provided for in the Treaty Establishing the European Community ("EC Treaty") and the European Commission's European Council Regulation, will establish a fixed rate of conversion for the old national currencies of all participating Member States in relation to the Euro. The subject of our inquiry, thus, is whether, following the introduction of the single currency, U.S. courts will acknowledge the abolition of the old national currencies and apply the above-mentioned Council Regulations and relevant legislation of participating Member States, in suits for payment on obligations denominated in these abolished currencies.

ARTICLE

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*Michael Gruson**

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INTRODUCTION

Some authors have expressed concern that long-term payment obligations, notably bonds,¹ denominated in the national currency of a Member State of the European Union ("EU") participating in the third stage of the Economic and Monetary Union² ("EMU"), will no longer be enforceable in U.S. courts after the introduction of the Euro.³ For instance, an ECU Banking Association working group concluded in its final report that New York courts' precedents regarding the enforceability of foreign currency debt obligations in the event of a fundamental change in the nature of the currency are uncertain.⁴ The European Mortgage Federation also expressed concern that after the introduction of the single European currency, payment obligations denominated in old national currencies may be considered invalid in non-European countries, in particular the United

1. This Article will not address the special problems that may arise in connection with liabilities under derivative financial instruments.

2. The summit meeting of heads of state and government of the European Commission's ("EC") Member States, which took place at Maastricht on December 9 and 10, 1991, ended with a historic agreement on a new Treaty on European Union (the "Maastricht Treaty"), dated February 7, 1992, and effective January 1, 1993, which incorporated into the Treaty Establishing the European Community (the Treaty of Rome) provisions relating to the Economic and Monetary Union ("EMU") and political union and establishing the European Community. Treaty Establishing the European Community, Feb. 7, 1992, [1992] 1 C.M.L.R. 573 [hereinafter EC Treaty], *incorporating changes made by Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992)*, [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU]. The TEU, *supra*, amended the Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973, Gr. Brit. T.S. No. 1 (Cmd. 5179-II), *as amended by Single European Act, O.J. L 169/1 (1987)*, [1987] 2 C.M.L.R. 741, in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987). The first stage of the EMU began on July 1, 1990. Pursuant to Article 109e(1) of the EC Treaty, the second stage for achieving EMU began on January 1, 1994. EC Treaty, *supra*, Art. 109e(1), [1992] 1 C.M.L.R. at 647. In the second stage the Member States are to endeavor to avoid excessive government deficits, and to start the process leading to the independence of their central banks. *Id.* Art. 109e(4)-(5), [1992] 1 C.M.L.R. at 648. If, by the end of 1997 the date for the beginning of the third stage of EMU has not been set, the third stage shall start on January 1, 1999. *Id.* Art. 109j(4), [1992] 1 C.M.L.R. at 653.

3. The national currencies of Member States participating in the third stage of the EMU are referred to herein as "old national currencies."

4. See ECU Banking Association, *Legal Aspects of the Transition to the Single Currency*, 7 DE PECUNIA 33, 46 (1995).

States and Japan.⁵

This Article will discuss to what extent such fears are justified under U.S. law. It assumes that the European Council, as provided for in the Treaty Establishing the European Community⁶ ("EC Treaty") and the European Commission's European Council Regulation,⁷ will establish a fixed rate of conversion for the old national currencies of all participating Member States in relation to the Euro.⁸ The subject of our inquiry, thus, is whether, following the introduction of the single currency, U.S. courts⁹ will acknowledge the abolition of the old national cur-

5. See "European Report," published by "Europe Information Service" (October 28, 1995). See also Fischer & Klanten, *Langfristige Bankverträge und die Euro-Währung*, 8 ZEITSCHRIFT FÜR BANKRECHT UND BANKWIRTSCHAFT 1, 7 (1996); Cunningham, Jones & Hogan, *Economic and Monetary Union and Continuity of Contract Under New York Law* (April 10, 1997) (on file with the *Fordham International Law Journal*).

6. See EC Treaty, *supra* note 2, arts. 109l(4), 235, [1992] 1 C.M.L.R. at 655, 716.

7. See Commission of the European Communities, COM (96) 499 Final (Oct. 16, 1996) (providing secondary legislation for introduction of Euro and some provisions relating to introduction of Euro) [hereinafter Council Document COM (96) 499]. This Communication contains two proposals for regulations, "Proposal for a Council Regulation (EC) on some provisions relating to the introduction of the euro" (document 96/0249(CNS)) and "Proposal for a Council Regulation (EC) on the introduction of the euro" (document 96/0250(CNS)), each of which contains draft regulations and an explanatory memorandum. The necessity for two separate regulations results from the fact that the third sentence of Article 109l(4) of the EC Treaty, pursuant to which the European Council has authority to take all "other measures necessary for the rapid introduction of . . . the single currency," will not be available as a legal basis before 1998, when, pursuant to Article 109j(4) of the EC Treaty, it will have been decided which Member States fulfill the necessary conditions for the introduction of the single currency. Regulations for which there exists an urgent need for legal certainty may be enacted in reliance on Article 235 of the EC Treaty. The proposed Council Regulation on the introduction of the euro ("Article 109j(4) Council Regulation") will be promulgated on the basis of Article 109j(4) of the EC Treaty. See O.J.C. 236/7 (1997) (containing draft of Article 109j(4) Council Regulation as approved by the European Council on July 7, 1997) [hereinafter Art. 109j(4) Council Regulation]. The Council Regulation on certain provisions relating to the introduction of the euro ("Article 235 Council Regulation") has been promulgated on the basis of Article 235. Council Regulation No. 1103/97, O.J.L 162/1 (1997) [hereinafter Art. 235 Council Regulation].

For a summary of the contents of both proposed Regulations, see Schefold, *Die Europäischen Verordnungen über die Einführung des Euro*, 50 *Zeitschrift für Wirtschafts- und Bankrecht*, WERTPAPIER-MITTEILUNGEN 1 (Supp. 4 1996); v. Borries & Repplinger-Hach, *Auf dem Weg zur "Euro-Verordnung"*, 49 *NEUE JURISTISCHE WOCHENSCHRIFT* 3111 (1996).

8. See Art. 235 Council Regulation, *supra* note 7, art. 4; Art. 109j(4) Council Regulation, *supra* note 7, art. 3.

9. This Article primarily addresses the law of the State of New York. It can be assumed that, with regard to the issues discussed herein, the laws of the other states of the United States will not differ significantly from the law of New York. Under the *Erie* doctrine, the U.S. federal courts apply both the substantive law of the state in which the

rencies and apply the above-mentioned Council Regulations and relevant legislation of participating Member States, in suits for payment on obligations denominated in these abolished currencies.

Following the abolition of the old national currencies, this question could arise in three different contexts, depending on the currency in which the judgment of the U.S. court is sought:

(1) When sued for payment in *U.S. dollars*, a *debtor* could claim that its obligation to pay has become worthless, because the old national currency in which the obligation is denominated no longer has any value in relation to the U.S. dollar.

(2) When sued for payment in an *old national currency*, a *debtor* could claim that the fulfillment of its obligation is legally impossible because of the abolition of the currency in which the obligation was denominated.

(3) In a suit for payment in *Euro*, the *creditor* would have to prove that under U.S. law the old national currency has been validly replaced by the Euro and that a judgment in Euro, calculated by means of the fixed legal rate of exchange for the old national currency, is equivalent for purposes of U.S. law to a hypothetical judgment in the old national currency. The *debtor* could claim that he or she was contractually obligated to pay in the old national currency only.

I. *SUITS FOR PAYMENT IN U.S. DOLLARS*

A. *Availability of U.S. Dollar Judgments*

U.S. courts' judgments are ordinarily in U.S. dollars even on causes of action denominated in a foreign currency.¹⁰ Thus, judgments in U.S. dollars are always available even though the obligation being enforced is denominated in a foreign currency. In order to translate the value of such a foreign currency obligation into U.S. dollars, the court must determine the appropriate date for establishing the rate of exchange between the foreign

court is located (*Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)) and the conflict-of-laws rules of that state (*Klaxon Co. v. Stentor Electrical Manufacturing Co.*, 313 U.S. 487 (1941); *Johansen v. Confederation Life Ass'n*, 447 F.2d 175, 178 (2d Cir. 1971)) when their subject-matter jurisdiction is based on diversity (28 U.S.C.A. § 1332).

10. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 823 (1987) [hereinafter RESTATEMENT OF FOREIGN RELATIONS LAW]. See N.Y. U.C.C. Law § 3-107 (McKinney 1991).

currency and the U.S. dollar.¹¹ According to the Restatement of Foreign Relations Law, if a court gives a judgment in U.S. dollars in a case arising out of a foreign currency obligation, the currency conversion is to be made at such a rate as to make the creditor whole and to avoid rewarding the debtor who has delayed in carrying out the obligation.¹² Pursuant to the so-called "New York Rule," followed by the New York courts, most other state courts, and, under certain circumstances, federal courts,¹³ courts will determine the conversion rate of an obligation to pay a sum of money as of the date of breach of the contract.¹⁴ Federal courts, however, when deciding federal law issues,¹⁵ often employ the rate of exchange on the date of judgment.¹⁶

B. *Currency Conversion Date Before the End of the Transitional Period*

If the date of the breach of an obligation or the judgment date occurs before the end of the transitional period, while both the Euro and the old national currencies remain in circulation,¹⁷ courts will not be faced with the problem of converting an obsolete, old national currency into U.S. dollars. Courts still must, however, determine the appropriate exchange rate between the

11. See *Trinh v. Citibank, N.A.*, 623 F. Supp. 1526, 1537 (E.D. Mich. 1985) (noting U.S. Supreme Court's position on this matter), *aff'd*, 850 F.2d 1164 (6th Cir. 1988).

12. RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 10, § 823(2). See also *id.*, cmt. d (noting that court may, in interests of justice, refer to date at which obligation first became due, date when judgment was rendered, or date when judgment is paid or enforced).

13. In cases in which subject-matter jurisdiction is based on diversity, U.S. courts apply the New York rule. See *supra* note 9 (discussing *Erie* doctrine and subject-matter jurisdiction of federal courts based on diversity of parties); see also RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 10, § 823, Reporters' Note no. 2 (citing further authority).

14. RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 10, § 823, cmt. d; *Dougherty v. Equitable Life Assurance Soc'y of the United States*, 193 N.E. 897 (N.Y. 1934).

15. In such situations, these courts are exercising "federal jurisdiction," see, e.g., 28 U.S.C.A. § 1331.

16. The precedent of the federal courts is far from unanimous. See RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 10, § 823, Reporters' Note no. 2 (citing further authority).

17. See Art. 109j(4) Council Regulation, *supra* note 7, arts. 5-9. See also Bundesministerium der Finanzen, Finanznachrichten Nr. 43/95, Dec. 19, 1995 (stating conclusions concerning EMU by chair of European Council held in Madrid on December 15/16, 1995).

old national currency and the dollar.¹⁸ Two alternatives for determining this exchange rate are available to U.S. courts, which can lead to different results:

- (1) the courts could use the exchange rate between the old national currency and the U.S. dollar quoted in Europe, which, owing to the irrevocably fixed rate of exchange between the old national currency and the Euro, will be economically equivalent to using the Euro-U.S. dollar exchange rate, or
- (2) the courts could use the exchange rate between the old national currency and the U.S. dollar quoted in New York, which, even though the old national currency will be simply a different expression of the Euro during the transitional period,¹⁹ will not necessarily be economically equivalent to using the Euro-U.S. dollar exchange rate quoted in New York.

Normally, U.S. courts use the rate of exchange prevailing in the forum state or an important financial center, for example New York, for the conversion of a foreign currency obligation into U.S. dollars.²⁰ Courts may look to the official rate for U.S. dollars existing in the country of issue of the foreign currency only when there was no market for the currency in question in the United States on the applicable date.²¹ It is possible that a direct exchange rate between the U.S. dollar and old national currencies will be ascertainable during the transitional period and that exchange rates for the old national currencies in New York will not be linked to the Euro exchange rates fixed by law

18. In the transitional period between January 1, 1999 and January 1, 2002, the Euro and the old national currencies of participating Member States will circulate one alongside the other, while the European Council will on January 1, 1999 have established an irrevocable exchange rate between the Euro and the participating currencies. The old national currency will simply be another form of expression for the Euro which will be the single and sole currency. See U.H. Schneider, *Die Vereinbarung und die Erfüllung von Geldschulden in Euro*, 49 *DER BETRIEB* 2477, 2478 (1996); Schefold, *supra* note 7, at 11. See also Commission of the European Communities, Green Paper of the European Commission on the Practical Arrangements for the Introduction of the Single Currency, COM (95) 333 Final (May 31, 1995).

19. See Art. 109j(4) Council Regulation, *supra* note 7, Recitals 8 and 13 and art. 6; comments on art. 6 of the art. 109j(4) Council Regulation, *supra* note 7, contained in Council Document COM (96) 499, *supra* note 7.

20. RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 10, § 823, Reporters' Note no. 5.

21. *Id.*

in Europe.²² U.S. courts would probably use this New York market rate to calculate a judgement amount because this rate would be a market rate reflecting the true value²³ of the old national currency, in contrast to the artificial rate set by the European Council for the exchange of the old national currency to the Euro. According to the Restatement of Foreign Relations Law, the court must also ensure that the parties are neither preferred nor prejudiced in any way by the currency conversion.²⁴

C. Currency Conversion Date After the End of the Transitional Period

Should the breach date or the judgment date occur after the transitional period ends, the issue arises as to what significance a court would attach to the final abolition of the old national currency when valuing the obligation in U.S. dollars.

If the court recognizes the abolition of the old national currency and the introduction of the Euro, then it also will have to take account of the old national currency-Euro exchange rate set by the European Council. In this case, the court could calculate the U.S. dollar value of the obligation on the basis of the exchange rate between the U.S. dollar and the relevant amount in Euro.

If the court does not recognize the currency transition, however, the U.S. dollar value of the obligation must be based on the old national currency. As the old national currency will already have been abolished, the currency itself will no longer be traded on the currency markets. Even so, *securities* denominated in the old national currencies could still be traded on the securities markets.²⁵ In this event, the nominal value of the securities would be calculated on the basis of the legal exchange rate between the old national currency and the Euro, for which an exchange rate to the U.S. dollar would exist on the market.

22. A discrepancy of this kind will arise when foreign currency traders do not believe that the EMU will last.

23. *Vishipco Line v. Chase Manhattan Bank, N.A.*, 754 F.2d 452, 456 (2d Cir. 1985). See *Trinh v. Citibank, N.A.*, 623 F. Supp. 1526, 1538 (E.D. Mich. 1985) (court applied black market exchange rate because evidence showed that no individual could really trade at official rate).

24. See RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 10, § 823(2), cmt. c.

25. In determining the relevant exchange rate, a U.S. court is not limited to the U.S. market. See *Vishipco Line*, 754 F.2d at 456-57 (encouraging district court, in determining the relevant exchange rate for Vietnamese currency, "to pursue an innovative approach.").

Through this circuitous means, the U.S. court could determine a U.S. dollar value for any obligations denominated in an old national currency. Furthermore, it will be theoretically possible, even after the end of the transitional period, to extrapolate from the market value of a security denominated in an old national currency the factor which reflects the market value of the old national currency. This market value could be different from the official old national currency-Euro exchange rate.

Thus, in a suit for payment in U.S. dollars, it will not matter whether or not the courts recognize the abolition of the old national currency. In either case, the court could determine the U.S. dollar value of the obligation expressed in the old national currency.

II. *SUITS FOR PAYMENT IN AN OLD NATIONAL CURRENCY OR IN EURO*

A. Judgments in Foreign Currencies

The traditional U.S. rule has been that U.S. courts are required to render money judgments payable in U.S. dollars only, even if the currency of the obligation is a foreign currency.²⁶ This legal principle, however, no longer enjoys unconditional acceptance in the U.S. courts.²⁷ In several states, for example New York,²⁸ the entry of judgments in foreign currency has since been authorized by legislation. However, a judgment in a foreign currency should be issued only when requested by the judgment creditor.²⁹

The legal analysis necessary to answer the question of whether a U.S. court will recognize the currency laws of a country which has abolished the stipulated contractual currency in favor of a new currency depends on whether the contracting parties have chosen the law of the country in whose currency the

26. RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 10, § 823, cmt. b, Reporters' Note no. 1.

27. RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 10, § 823, cmt. b.

28. N.Y. JUD. LAW § 27 (McKinney Supp. 1997); U.C.C. § 3-107(2) (1995) (stating that, if instrument specifies foreign currency as medium of payment, such instrument is payable in that currency). New York deleted this clause when adopting the U.C.C. As to other states, see Peter Hay, *Fremdwährungsansprüche und-urteile nach dem US-amerikanischen Uniform Act*, 49 *Zeitschrift für Wirtschafts-und Bankrecht WERTPAPIER-MITTEILUNGEN* 113 (1995).

29. See RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 10, § 823, cmt. b.

obligation is denominated or New York law to govern their agreement.

B. *Obligations Governed by the Law of the Country of the Foreign Currency*

If the parties to an agreement elect to have their contract governed by the law of a foreign country, such choice of law will be recognized under New York law as long as the transaction bears a "reasonable relationship"³⁰ to the law chosen or, more precisely stated, to the jurisdiction whose law has been chosen. Generally, an obligation denominated in a foreign currency will have a reasonable relationship to the country of that currency.³¹ A valid governing law clause stipulating a foreign law effectively precludes the application of New York law to the contract, not only New York's facultative, but also its mandatory provisions.³² The choice of law prevails as long as it does not conflict with an important public policy of New York or, under certain conditions, of another state or country.³³ There are very few New York cases in which the court has restricted the application of an otherwise valid choice of a foreign law clause on account of a

30. See Gruson, *Governing Law Clauses in Commercial Agreements—New York's Approach*, 18 COLUM. J. TRANSNAT'L L. 323 (1979) [hereinafter Gruson, *Governing Law Clauses*]; Gruson, *Rechtswahlklauseln in Handelsverträgen in New York*, 29 RECHT DER INTERNATIONALEN WIRTSCHAFT 393 (1983); SCOLES & HAY, CONFLICT OF LAWS 669-74 (2d ed., 1992); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187 (1971) [hereinafter RESTATEMENT OF CONFLICT OF LAWS]; N.Y. U.C.C. LAW § 1-105 (McKinney 1993). Restatement of Conflict of Laws Section 187(2)(a) requires that the state of the chosen law have a substantial connection to the transaction. According to Scoles & Hay, *supra*, at 673, the *substantial* test is no stricter than the *reasonable* test developed by case law.

31. *But see* Libyan Arab Foreign Bank v. Bankers Trust Company, [1989] 1 QB 728. If, as the court found in that case, which did not involve choice of law, dollar transactions are not necessarily cleared in New York, the mere fact that the contract currency is the currency of the country of the stipulated law, arguably does not by itself establish a reasonable relation between the transaction and the country of the currency.

32. See Gruson, *The Act of State Doctrine in Contract Cases as a Conflict-of-Laws Rule*, 1988:2 U. ILL. L. REV. 519, 521-22 (1988) [hereinafter Gruson, *Act of State Doctrine*]; Gruson; *Legal Opinions of New York Counsel in International Transactions*, 1989 COLUM. BUS. L. REV. 365, 372 (1989) [hereinafter Gruson, *Legal Opinions*]; RESTATEMENT OF CONFLICT OF LAWS, *supra* note 30, § 187(2), cmts. d, e.

33. RESTATEMENT OF CONFLICT OF LAWS, *supra* note 30, § 187(2)(b). As to public policy of the forum, see Gruson, *Governing-Law Clauses in International and Interstate Loan Agreements—New York's Approach*, 1982:1 U. ILL. L. REV. 207, 220-22 (1982) [hereinafter Gruson, *Governing-Law Clauses in Loan Agreements*]; Gruson, *Governing Law Clauses*, *supra* note 30, at 374-78; as to public policy of third countries, see Gruson, *Act of State Doctrine*, *supra* note 32, at 522-24.

conflicting public policy of New York or another jurisdiction.³⁴ It is difficult to conceive of a New York public policy that would be offended by application of the laws governing the introduction of the Euro.

If the parties to a contract selected as governing law the law of the country of the contract currency, a court would treat the country's laws governing such currency as part of the law governing the contract.³⁵ Thus, the law of the chosen European country would be applied along with the monetary laws of the chosen country, including the regulations governing the replacement of the old national currency with the Euro.

The New York State Court of Appeals reached this conclusion in *Dougherty v. Equitable Life Assurance Society of the United States*.³⁶ In *Dougherty*, the Court considered the validity of obligations to pay under Russian insurance policies entered into by the insured prior to 1918, which were subsequently declared null and void by Soviet legislation in 1919.³⁷ One of the questions raised concerned the effect upon these obligations of the introduction of a new currency. The insurance contracts provided for payment in the old czarist ruble, which was the currency in Russia at the time the contracts were signed. During the period from 1919 to 1924, the Soviet government repeatedly issued decrees in which a new legal tender was introduced.³⁸ After 1924, the "Chervonetz gold rubles" and state treasury notes became the only legal tender in the Soviet Union.

The parties had agreed on Russian law.³⁹ The Court held that Russian law should govern the contracts, as they were de-

34. See Gruson, *Act of State Doctrine*, *supra* note 32, at 522, 524 (providing examples of cases in which New York courts have restricted application of otherwise valid choice of foreign law clause on account of conflicting public policy); Gruson, *Legal Opinions*, *supra* note 32, at 375-76, 381 (providing further examples of cases in which New York courts, on public policy grounds, have restricted application of foreign law provisions).

35. See RESTATEMENT OF CONFLICT OF LAWS, *supra* note 30, § 206 ("Issues relating to details of performance of a contract are determined by the local law of the place of performance.").

36. *Dougherty v. Equitable Life Assurance Soc'y of the United States*, 193 N.E. 897 (N.Y. 1934). In *Tillman v. Russo Asiatic Bank* the court reached the same result although in that case the law governing the contract at issue (Russian law) was determined by way of the objective connections test (Tubel bank account with a Russian bank in Petrograd). *Tillman v. Russo Asiatic Bank*, 51 F.2d 1023, 1025 (2d Cir. 1931).

37. *Dougherty*, 193 N.E. at 900.

38. *Id.* at 904-06.

39. *Id.* at 898-99.

nominated in rubles, had been entered into between Russian citizens, and were to be performed in Russia.⁴⁰ Because the insurance contracts had been declared null and void in Russia by legislation, the court held that the plaintiffs had no further rights under the policies pursuant to Russian law.⁴¹ The Court further held that New York public policy was not offended by the application of Russian law.⁴² The Court argued in dicta that the plaintiffs would not have had any further claims under these insurance contracts even if the contracts had not been declared null and void, because the contractual currency, czarist Russian rubles, was now worthless under Russian law.⁴³ The Soviet government had not set a rate of exchange for pre-revolutionary obligations when making the transition to the Chervonetz gold ruble.⁴⁴ Thus, the Court took the position that the whole Soviet law, including its monetary laws, governed the contract.⁴⁵

When the disputed contract does not contain a choice of law clause, modern U.S. conflict-of-laws rules require the court to determine the effect of a currency substitution by evaluating the contract's objective connections to the relevant jurisdictions. In particular, the New York State Court of Appeals applies the "center of gravity test" or the "grouping of contacts test."⁴⁶ Under these tests, a court would apply the law of the state which has the most significant relationship to, or contacts with, the matter in dispute.⁴⁷ The Restatement (Second) of Conflict of

40. *Id.* The Court revealed in dicta that it continued to apply the "vested rights" theory of the first Restatement of Conflict of Laws (1934) and did not necessarily give effect to the choice of law clause. Today, a court would apply the criteria of objective connections only if the parties had not agreed to subject their agreement to the laws of any specific jurisdiction.

41. *Id.* at 900-01, 903.

42. *Id.* at 903.

43. *Id.* at 903-07.

44. *Id.* at 906-07.

45. The *Dougherty* case would today be decided on the basis of the act of state doctrine, through which the court would nevertheless have come to the same result, because it would have located the situs of the contracts in the Soviet Union. See *infra* notes 81-84 and accompanying text for a discussion of the situs concept.

46. See *Auten v. Auten*, 124 N.E.2d 99, 102 (N.Y. 1954); Gruson, *Act of State Doctrine*, *supra* note 32, at 525; Gruson, *Governing Law Clauses*, *supra* note 30, at 327.

47. See *Auten*, 124 N.E.2d at 101-02; *Index Fund, Inc. v. Insurance Co. of N. Am.*, 580 F.2d 1158, 1162 (2d Cir. 1978), *cert. denied*, 440 U.S. 912 (1979); *Johansen v. Confederation Life Ass'n*, 447 F.2d 175 (2d Cir. 1971); *Uniroyal, Inc. v. Heller*, 65 F.R.D. 83, 90 (S.D.N.Y. 1974). See also Gruson, *Act of State Doctrine*, *supra* note 32, at 525. The points of connections or "contacts" to be considered are listed in Section 188(2) of the

Laws also follows this approach.⁴⁸ Other courts apply, instead, the "governmental interest analysis."⁴⁹ Under this theory, the court applies the law of the state or country that has the "greatest" or "dominant" interest in regulating the disputed issue.⁵⁰

In *Johansen v. Confederation Life Association*,⁵¹ the Court of Appeals for the Second Circuit unequivocally treated a Cuban currency law as an integral component of the laws governing the contract at issue. The Court applied the U.S. conflict-of-laws principles described above⁵² in a case presenting issues comparable to those raised in this Article. In *Johansen*, the plaintiffs demanded payment on life insurance policies that had been issued in 1937, 1939, and 1946 by the Cuban branch of the defendant Canadian insurance company. The contracts did not contain a governing law clause, but all three contracts named Havana as the place of payment. The contracts also contained a clause providing that amounts payable under the contracts should be paid in the "lawful currency of the United States of America."⁵³ At the time of signing of the contract, both the U.S. dollar and the Cuban peso were lawful currency in Cuba. In 1951, the Cuban Government enacted a law under which the U.S. dollar was no longer to be lawful currency in Cuba and all obligations denominated in this currency were to be settled in Cuban pesos. The plaintiffs nevertheless demanded their insurance payments in

Restatement (Second) of Conflict of Laws. RESTATEMENT OF CONFLICT OF LAWS, *supra* note 30, § 188(2).

48. See RESTATEMENT OF CONFLICT OF LAWS, *supra* note 30, §§ 188-89; Gruson, *Act of State Doctrine*, *supra* note 32, at 523.

49. See, e.g., *Lilienthal v. Kaufman*, 395 P.2d 543 (1964); *SCOLES & HAY*, *supra* note 30, at 688-90.

50. See, e.g., *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 248 N.E.2d 576 (N.Y. 1969); *Johansen v. Confederation Life Ass'n*, 447 F.2d 175, 179-80 (2d Cir. 1971). See also Gruson, *Act of State Doctrine*, *supra* note 32, at 525; Gruson, *Governing Law Clauses*, *supra* note 30, at 329.

51. *Johansen v. Confederation Life Ass'n*, 447 F.2d 175 (2d Cir. 1971). A similar fact pattern was presented to the court in *Confederation Life Ass'n. v. Ugalde*, 164 So.2d 1 (Fla. 1964), *cert. denied*, 379 U.S. 915 (1964).

52. The Court of Appeals confirmed the interpretation of the lower court, the District Court for the Southern District of New York, which had determined the law governing the contract in accordance with the "center of gravity" or "grouping of contacts" test. The criteria that led to the application of Cuban law included: the place where the contract was concluded, the residence of the plaintiff at the time of the contract was concluded, the payment of premiums in Cuba, the maintenance of reserves on account of the plaintiff by the insurance company in Cuba, and maintenance of the insurance policies in Cuba. See *Johansen*, 447 F.2d at 178-80.

53. *Id.* at 177.

U.S. dollars. The Court interpreted the currency clause cited above as requiring payment in the lawful currency of Cuba at the time of payment.⁵⁴

The Court decided that both the “grouping of contacts test” and the “governmental interest analysis” required application of Cuban law and, therefore, of the 1951 currency law, to the insurance contracts. Thus, the Court dismissed the complaint, holding that the defendants were prohibited from making payments under the insurance contracts in U.S. dollars and that the contracts should be converted from “dollar contracts” into “peso contracts.”⁵⁵ It is possible, however, that the Second Circuit might have disregarded the Cuban currency law and allowed the complaint if a law other than Cuban law had governed the contracts.

In light of these decisions, a U.S. court would probably regard the EU regulations governing the introduction of the Euro as part of the law of the contract in the three fact patterns presented under the Introduction above if the contract were governed by the law of a participating EU Member State.

C. *Obligations Governed by New York Law*

A choice of law clause, in which the parties elect New York law, generally precludes the application of all other law.⁵⁶ Under New York law, a “reasonable relationship” need not exist between the State of New York and the transaction.⁵⁷ The laws of a jurisdiction other than the chosen New York law may be applicable despite a valid choice of law clause, however, with respect to issues of corporate law relating to a foreign corporate party to the agreement,⁵⁸ the consequences of a foreign bank-

54. *Id.*

55. *Id.* at 180-81.

56. See Gruson, *Governing Law Clauses*, *supra* note 30, at 362-70; Gruson, *Legal Opinions*, *supra* note 32, at 372; RESTATEMENT OF CONFLICT OF LAWS, *supra* note 30, § 187, cmts. c-e.

57. See N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 1989) (providing that in cases of choice of New York law, reasonable relationship between transaction and New York is unnecessary when transaction volume exceeds US\$250,000 and certain other conditions are met). The reason for this rule is to allow parties to take advantage of the highly developed commercial law of the State of New York in arranging their business transactions. Further, this rule helps to reinforce New York's role as an international financial center. SCOLAS & HAY, *supra* note 30, at 670-71.

58. See Gruson, *Governing Law Clauses*, *supra* note 30, at 365-66; Gruson, *Governing-Law Clauses in Loan Agreements*, *supra* note 33, at 223-24.

ruptcy,⁵⁹ the act of state doctrine,⁶⁰ and in the case of a conflicting principle of public policy of a jurisdiction other than the one chosen by the parties.⁶¹ The question is whether there is a further exception to choice of law clauses under New York law that allows New York courts to apply the currency or monetary laws of the country in whose currency an obligation is denominated, even though New York law governs the obligation. This rule is frequently referred to as the *lex monetae*, i.e. law of the money.

1. Application of the *Lex Monetae*

According to several authors,⁶² the U.S. courts recognize the conflict-of-laws principle applied in many other jurisdictions,⁶³ namely that each sovereign state possesses exclusive competence to decide what constitutes legal tender within its territory. The recognition of a currency as legal tender for a given state, as well as the determination of that currency's nominal value, would thus, under U.S. conflict-of-laws rules, be determined by the "law of the money" (*lex monetae*), i.e., by the law of the state that issued the currency in question as legal tender. Under this view, the "law of the money" would govern regardless of which substantive law applied to the contract as a result of the parties' choice of law or its objective connections to a country.⁶⁴ Each country would have exclusive authority to replace its lawful currency with a new currency and to fix the conversion rate for the old currency in relation to the new.⁶⁵ The abolition of a currency would lead only to the extinction of that currency and

59. See *Canada Southern Railway Co. v. Gebhard*, 109 U.S. 527 (1883); Gruson, *Act of State Doctrine*, *supra* note 32, at 558-60.

60. See Gruson, *Act of State Doctrine*, *supra* note 32, at 529-38; RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 10, § 443. See *infra* notes 74-88 and accompanying text for a discussion of the act of state doctrine.

61. See RESTATEMENT OF CONFLICT OF LAWS, *supra* note 30, § 187(2). See *infra* notes 89-95 and accompanying text for a discussion of public policy.

62. F.A. MANN, *THE LEGAL ASPECT OF MONEY*, 266-79 (5th ed. 1992); NUSSBAUM, *MONEY IN THE LAW NATIONAL AND INTERNATIONAL*, 353-59 (1950); see also WOOD, *COMPARATIVE FINANCIAL LAW* 15-11, at 177 (1995).

63. See MANN, *supra* note 62, at 271-79. In Germany, the law governing a currency in connection with international contracts is determined by the law of the state in whose currency the debt is denominated. See Martiny in MÜNCHENER KOMMENTAR, BÜRGERLICHES GESETZBUCH (Civil Code) (2d ed., 1990), nach Art. 34 Einführungsgesetz zum Bürgerlichen Gesetzbuch (Introductory Act to the Civil Code), Anhang I, margin note 5.

64. See MANN, *supra* note 62, at 267.

65. *Id.* at 267, 272.

would not extinguish payment obligations denominated in the old currency. The establishment of a rate of conversion by the country of the currency would serve to safeguard the continuity of the obligation as an obligation in the new currency.⁶⁶

The United States recognizes the view that the *lex monetae* is based in part on the New York State Court of Appeals decision in *Dougherty v. Equitable Life Assurance Society of the United States*.⁶⁷ In *Dougherty*, however, the New York State Court of Appeals only applied an exchange rate fixed by the Soviet Government, (or rather recognized the failure to fix an exchange rate) because the contract was governed by Russian law. Thus, the New York State Court of Appeals regarded the determination of the appropriate exchange rate as a question governed by the law of the contract, not by the "law of the money." It is thus entirely possible that the Court would have reached a different result had the insurance contract in question been governed by the law of another state, such as New York.⁶⁸ As a result, *Dougherty* does not support the strict separation between the law of the contract and the "law of the money" made by the authors referenced above.⁶⁹

In *Trinh v. Citibank, N.A.*,⁷⁰ the District Court applied Vietnamese currency law and converted an old Vietnamese currency into the new Vietnamese currency by means of the official conversion rate.⁷¹ *Trinh*, however, was also a case in which the contract was governed by Vietnamese law.⁷²

66. See *id.* at 266-68, 271-79.

67. *Dougherty v. Equitable Life Assurance Soc'y of the United States*, 192 N.E. 897 (N.Y. 1934). This opinion is cited by F.A. Mann in support for the view that the *lex monetae* represents U.S. law. MANN, *supra* note 62, at 275 n.9.

68. Today, if the situs of the contracts had been located in Russia, a court, applying the act of state doctrine, probably would have recognized the currency laws or the laws that had declared the insurance contract void, even if the parties had chosen to be subject to New York law. If the court had found the situs of the contract in New York, it would not have recognized the currency laws as foreign acts of state. See *infra* notes 81-86 and accompanying text for a discussion of the situs rules.

69. See MANN, *supra* note 62, at 272 n.3 (stating that *lex monetae* applies irrespective of whether law of obligation in question is identical to or different from law of currency in question). There is no support for this statement in U.S. case law.

70. *Trinh v. Citibank, N.A.*, 623 F. Supp. 1526 (E.D. Mich. 1985), *aff'd*, 850 F.2d 1164 (6th Cir. 1988).

71. *Id.* at 1536-38. This case is also cited by Mann, *supra* note 62, at 267 n. 44 in support of the proposition that U.S. courts apply the *lex monetae*.

72. *Trinh*, 623 F. Supp. at 1531; *Trinh*, 850 F.2d at 1167. The bank deposit agreements in *Tillman v. Russo Asiatic Bank* were governed by Russian law under the objective connections test. *Tillman v. Russo Asiatic Bank*, 51 F.2d 1023 (2d Cir. 1931). Although

It must be concluded that no U.S. court and no New York State court has had the opportunity to decide whether it would apply the national law of a foreign currency to an agreement governed by the law of a state of the United States but denominated in such foreign currency. This is not to say that a court in the United States should not apply the *lex monetae* in such a case.⁷³

2. The Act of State Doctrine

Under the act of state doctrine, courts may apply the European currency legislation to contracts governed by New York law. The act of state doctrine is a conflict-of-laws principle developed in the U.S. jurisprudence of the 1970s and 1980s, which was used to determine the effects of foreign sovereign acts, notably expropriations, in the United States.⁷⁴ The act of state doctrine holds that U.S. courts shall not examine the legality of acts of a foreign country done within that country's own territory.⁷⁵ Rather, in deciding cases, the U.S. courts should regard these sovereign measures as valid and applicable.⁷⁶ Since the early 1980s, U.S. courts have extended the act of state doctrine to cases in which a

the court did not discuss this issue of governing law in *Deutsche Bank Filiale Nurnberg v. Humphrey*, the agreement relating to a German currency demand deposit by a U.S. citizen with the Nürnberg branch of Deutsche Bank would be governed by German law under the objective connections test. *Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517 (1926). This case only addressed the value of the claim, computed by translation into dollars on the judgment date, not the issue of the replacement of the contractual one by a new currency. Russian law must also have governed the rubel checking account of plaintiff in the Vladivostok branch of a Russian bank in *Klochkov v. Petrogradski Mejdunarodni Commercheski Bank*. *Klochkov v. Petrogradski Mejdunarodni Commercheski Bank*, 268 N.Y.S. 433 (App. Div. 1934).

73. Some courts have applied *lex monetae* not as a principle of conflict of laws, but as a matter of contract law as a result of an interpretation ascertaining the understanding of the parties. See *infra* text accompanying notes 119-23 for a further discussion of this issue.

74. See RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 10, § 443, cmts. a-d; Gruson, *Act of State Doctrine*, *supra* note 32, at 529-38.

75. See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964); RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 10, § 443.

76. RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 10, § 443, cmt. d. In *Martinez v. Crown Life Insurance Co.*, the court held that the Cuban currency law, as an act of state, must be recognized by a U.S. court. *Martinez v. Crown Life Insurance Co.*, 136 S.E.2d 912, 915 (Ga. Ct. App. 1964). Where the act of state doctrine is applied to contracts, the issue is one of applicable law: does the law of the contract or the act of state determine the issue in question? The issue is really no longer whether the court should inquire into the validity of the act of a foreign state under the law of the forum. Gruson, *Act of State Doctrine*, *supra* note 32, at 560.

sovereign act modifies the contractual relations between foreign and U.S. parties.⁷⁷

The act of state doctrine as a conflict-of-laws principle helps to explain why U.S. courts must respect the sovereign acts of a country other than the one whose laws the parties have chosen to govern their contract.⁷⁸ The act of state doctrine is also used in cases where the parties have not agreed on a choice of law. In such cases, the act of state doctrine serves in effect to determine the law applicable to the agreement.⁷⁹

The act of state doctrine only exempts public acts of foreign sovereigns from judicial scrutiny if such acts were committed within the territory of the sovereign.⁸⁰ Thus, U.S. courts will only find contracts that have their situs⁸¹ in a foreign country's territory to have been affected by that country's acts of state.⁸² The determination of the situs of a contract raises a number of problems⁸³ and causes uncertainties.⁸⁴ The majority of U.S. courts have tended to locate the situs of a loan agreement in the country that was contractually stipulated by the parties as the place of payment and jurisdiction for the settlement of disputes.⁸⁵ According to these principles, if the situs of the loan agreement is located outside the foreign country whose act of state has been invoked by the debtor, for instance to justify a

77. See Gruson, *Act of State Doctrine*, *supra* note 32, at 532-38.

78. *Id.* at 539. The same result can be reached by application of traditional conflict-of-laws concepts under Restatement (Second) of Conflict of Laws. *See id.*; RESTATEMENT OF CONFLICT OF LAWS, *supra* note 30, § 187(2). *See also* Triad Financial Establishment v. Tumpane Co., 611 F. Supp. 157 (N.D.N.Y. 1985) (containing contract that stipulated New York law, but court applied Saudi Arabian decree reflecting a fundamental public policy, citing Restatement (Second) of Conflict of Laws Section 187(2)(b)). *See infra* note 91 for a further discussion of the *Triad* case.

79. See Gruson, *Act of State Doctrine*, *supra* note 32, at 542-47.

80. RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 10, § 443, Reporters' Note no. 4 (citing further authority).

81. Black's Law Dictionary defines "situs" as "the place where a thing is considered, for example, with reference to jurisdiction over it." BLACK'S LAW DICTIONARY 1387 (6th ed. 1990).

82. See Gruson, *Act of State Doctrine*, *supra* note 32, at 542-47.

83. *Id.* at 543.

84. See RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 10, § 443, Reporters' Note no. 4 (citing further authority). For a good discussion of the problem of locating the situs *see* Note, *The Act of State Doctrine: Resolving Debt Situs Confusion*, 86 COLUM. L. REV. 594 (1986).

85. See RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 10, § 443, Reporters' Note no. 4 (citing further authority); Gruson, *Act of State Doctrine*, *supra* note 32, at 542-47.

refusal to make payment, then the U.S. court will not apply the foreign sovereign act to modify the contractual obligation.⁸⁶

By invoking the act of state doctrine, foreign debtors have successfully defended themselves against U.S. creditors on grounds that capital export prohibitions or expropriations made the performance of their debt obligations impossible.⁸⁷ In such cases, the act of state doctrine allowed U.S. courts to avoid passing judgment on the foreign sovereign acts upon which a debtor's defense rested.⁸⁸ To be sure, a court would give effect to a foreign act of state only when a finding of liability on the part of the debtor would cause the debtor to violate the sovereign act upon satisfaction of the judgment.⁸⁹

The replacement of national European currencies with a unitary European currency is a foreign act of state and a judgment against a debtor for payment in an old national currency would violate the EU currency regulations. It is thus probable that, when one of the parties invokes the European currency conversion to its advantage, U.S. courts will use the act of state doctrine in order to determine to what extent it should recognize that party's claim. In each of the three fact patterns outlined above, this could lead to the following results:

- (1) Where a *debtor* has been sued for payment in an old national currency, he or she will be able to invoke successfully the official substitution of the Euro for such currency, in reliance on the act of state doctrine, only if the situs of the payment obligation, as determined by the standards discussed above, is located in an EU Member State that is participating

86. See RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 10, § 443, Reporters' Note no. 4; Gruson, *Act of State Doctrine*, *supra* note 32, at 542-47, 550-54. See *Trinh v. Citibank, N.A.*, 623 F. Supp. 1526, 1536 (E.D. Mich. 1985) (holding that Vietnamese decree of confiscation should not be recognized, because situs of obligation, arising from bank deposit, no longer lay in Vietnam after closure of defendant's bank branch in Saigon, but rather in New York, where bank had its seat). In *Trinh*, the court thus decided that Citibank was not subject to Vietnamese acts of state following the closure of its branch in Vietnam. Citing *Vishipco Line v. Chase Manhattan Bank, N.A.*, 660 F.2d 854 (2d Cir. 1981), the court held that, under the act of state doctrine, it was not required to respect a Vietnamese act of state which concerned obligations whose situs was located outside the sovereign territory of Vietnam. *Trinh*, 623 F. Supp. at 1536.

87. See Gruson, *Act of State Doctrine*, *supra* note 32, at 533-38.

88. See, e.g., *Johansen v. Confederation Life Ass'n*, 447 F.2d 175, 180 (2d Cir. 1971).

89. *Id.* See also Gruson, *Act of State Doctrine*, *supra* note 32, at 533-38 (citing additional cases).

in the third stage of the EMU. If this is the case, a U.S. court would be compelled to recognize the abolition of the old national currency and to dismiss the creditor's complaint. Should the situs lie outside the participating EU Member States, however, for example because the parties have chosen New York as place of payment and forum state, the court would not be compelled by the act of state doctrine to recognize the currency conversion.

(2) For the *creditor* who sues for payment in Euro of an obligation denominated in an old national currency, the situation is similar to that in (1) above. In order to establish that the old national currency obligation has been validly transformed into an obligation to pay in the new Euro currency, the creditor must prove under the act of state doctrine that the situs of this claim is located in a participating EU Member State. The court would reject the debtor's claim that he or she is in all events obligated to pay only in the old national currency, because such a payment would violate the EU currency regulations.

(3) Where the *creditor* demands payment of an old national currency obligation in U.S. dollars, a different result would arise. Even if the debtor could show that the situs of the obligation lies in a participating EU Member State, this defense would not be sufficient for dismissal of the complaint because a judgment against the debtor in U.S. dollars would not violate the EU currency regulations. Additionally, as discussed above, it is unlikely that a U.S. court would conclude that the payment of a debtor's obligation had become unenforceable simply because the contractual currency had been replaced by another currency.

3. Public Policy

Where the parties to an agreement include a choice of law clause, but chose the law of a state that is not a participating Member State of the EU, such as New York law, the question arises to what extent a U.S. court under traditional conflict-of-laws rules could nonetheless give effect to the EU currency conversion regulations.

To answer this question, a U.S. court would probably turn to the solution suggested in Section 187(2) of the Restatement (Second) of Conflict of Laws.⁹⁰ This provision sets out the ex-

90. RESTATEMENT OF CONFLICT OF LAWS, *supra* note 30, § 187(2).

ceptional circumstances under which the parties' choice of law should yield to the stronger public policy of another jurisdiction. The position taken by the Restatement of Conflict of Laws has been widely accepted by U.S. courts.⁹¹ Section 187(2)(b) provides that the state law chosen by the parties to govern their contract will not be applied if such application would be contrary to a fundamental policy of a different state which has a materially greater interest than the chosen state in the determination of the particular issue, and which, under the rule of Section 188 of the Restatement, would be the state of the applicable law in the absence of an effective choice of law by the parties. Section 188 provides that in the absence of an effective choice of law by the parties, the law of the state which, with respect to a particular issue, has the most significant relationship to the transaction and the parties will apply to that issue.

According to Section 187(2), the law chosen by the parties should not be applied to a specific issue if the court finds that (i) a jurisdiction other than the jurisdiction of the chosen law has, with respect to the particular issue, the most significant relationship to the transaction and the parties,⁹² (ii) the jurisdiction with the most significant relationship has a materially greater interest than the jurisdiction whose law was chosen in determining the particular issue, and (iii) the jurisdiction with the most significant relationship and the materially greater interest has a

91. See SCOLES & HAY, *supra* note 30, at 665, 674; Gruson, *Act of State Doctrine*, *supra* note 32, at 524 nn. 21-22. *Triad Financial Establishment v. Trumpane Co.* is a good example of the application of Section 187(2) of the Restatement (Second) of Conflict of Laws. *Triad Financial Establishment v. Tumpane Co.*, 611 F. Supp. 157 (N.D.N.Y. 1985); RESTATEMENT OF CONFLICT OF LAWS, *supra* note 30, § 187(2). *Triad* involved a suit for an agent's fees in connection with a military procurement contract. The defendant principal had engaged the plaintiff agent to assist in obtaining certain service contracts in connection with the sale of arms by the United States to Saudi Arabia. The agency agreement stipulated New York law, but the court held that Saudi Arabia had a materially greater interest in the controversy than New York and that a Saudi Arabian decree prohibiting payment of agent's fees in connection with the sale of armaments reflected a fundamental policy, namely an attempt to root out corruption and bribery in military contracts. *Triad*, 611 F. Supp. at 162-66. The court also found that Saudi Arabia had significant connections with the transaction and New York had very few. *Id.* at 163. The court presumably intended to show that in the absence of an effective choice of law by the parties, Saudi Arabia would be the state of the applicable law. Consequently, the court applied the Saudi Arabian decree, in spite of a valid stipulation by the parties of New York law. The court based its decision on Restatement of Conflict of Laws Section 187(2)(b). *Id.* at 162 n.3.

92. RESTATEMENT OF CONFLICT OF LAWS, *supra* note 30, §§ 187(2)(b), 188.

fundamental public policy that would be violated by the application of the contractually chosen law.⁹³ In order to determine whether a jurisdiction other than the one chosen by the parties has a more significant relationship to a specific issue of a given case, the court must take into consideration the same contacts that are significant in determining what law should govern a contract in the absence of an effective choice of law by the parties.⁹⁴ The more significant the relationship between the contract and the country of the law chosen by the parties, the stronger the conflicting public policy of the country whose law would apply in the absence of an effective choice of law must be to override the chosen law.⁹⁵

Similar to the case where no choice of law clause exists, the court in this case would probably give effect to the EU currency regulations pursuant to Section 187(2) of the Restatement only if the place of performance of the loan were a participating EU Member State.⁹⁶ If this condition were met, a court would probably find that the EU Member State had a materially greater interest in the regulation of the contract currency than the country whose law had been chosen by the parties, and that the application of the chosen law would violate the public policy underlying the EU currency regulations.

The following consequences for each of the three fact patterns outlined above result from the foregoing "public policy" analysis:

(1) Where a *debtor* has been sued for payment in an old national currency, he or she will be able successfully to invoke the substitution of the Euro for such currency in reliance on the "public policy" exception of Section 187(2) of the Restatement of Conflict of Laws only if the contractual place of payment and other contacts are located in an EU Member State participating in the third stage of the EMU. Provided this is the case, it is likely that the court would also regard the other conditions of Section 187(2) as fulfilled. The court would conclude that the EU Member State had a significant interest in regulating the issue in dispute, that is, the regula-

93. *Id.*, § 187(2). See Gruson, *The Remedies Opinion in International Transactions*, 27 INT'L LAW. 911, 923 (1993).

94. RESTATEMENT OF CONFLICT OF LAWS, *supra* note 30, §§ 187(2) (b), 188.

95. *Id.* § 187 cmt. g.

96. *Id.* §§ 187(2)(b), 188(2)(c).

tion of the contract currency, and that a judgment against the debtor for payment in the old national currency would violate a fundamental public policy of the EU Member State.

(2) The *creditor* suing for payment in Euro on an obligation denominated in an old national currency would likewise have to prove under the “public policy” exception to Section 187(2) that the place of payment and other contacts are located in a participating EU Member State. It is likely that the court would then, as in (1) above, consider the other conditions of Section 187(2) to have been fulfilled.

(3) The *debtor* who is sued for payment in U.S. dollars on an old national currency obligation could similarly invoke the abolition of the old national currency if the debt is to be paid in a participating EU Member State. As explained above, however, this will not sufficiently prove the invalidity of a payment obligation.⁹⁷ Moreover, a judgment against the debtor for payment in U.S. dollars would not violate any “public policy” underlying the EU currency regulations.

D. *Application of U.C.C. Section 2-614(2)*

Section 2-614 of the New York Uniform Commercial Code⁹⁸ (“U.C.C.”) allows the debtor under certain circumstances to pay an obligation, denominated in a currency that may no longer be tendered for payment owing to a foreign act of state, in the manner provided for by that act of state. Article 2 of the U.C.C., however, applies only to contracts for the sale of goods.⁹⁹ In the United States, foreign currency is treated essentially as a “commodity,”¹⁰⁰ and thus as a “good,”¹⁰¹ but only when the foreign currency does not serve as a medium of payment, that is, as consideration.¹⁰² In the case of a long-term payment obligation, for

97. See *supra* notes 10-25 and accompanying text (discussing suits for payment in U.S. dollars).

98. N.Y. U.C.C. LAW § 2-614 (McKinney 1993).

99. *Id.* §§ 2-102, 2-105(1).

100. *Vishipco Line v. Chase Manhattan Bank, N.A.*, 754 F.2d 452, 455 (2d Cir. 1985).

101. *Richard v. American Union Bank*, 204 N.Y.S. 719 (Sup. Ct.), *rev'd on other grounds*, 205 N.Y.S. 622 (App. Div. 1924), *aff'd*, 149 N.E. 338 (N.Y. 1925); *Richard v. American Union Bank*, 170 N.E. 532, 535 (N.Y. 1930).

102. N.Y. U.C.C. LAW § 2-105(1) notes (McKinney 1993) (New York Annotations); QUINN, QUINN'S UNIFORM COMMERCIAL CODE COMMENTARY AND LAW DIGEST § 2-105 [A][5] (Supp. 1997) (noting difference between buying and selling of money as commodity (i.e., currency trading) and exchange of money in payment for goods or services or in payment of loan). See *Saboundjian v. Bank Audi (USA)*, 556 N.Y.S.2d 258, 261 n.2

example a DM-Bond due after the year 2001, the German Mark is merely the expression by the issuer of its duty to repay. Because there is no "sale," Article 2 of the U.C.C. cannot be applied directly.

The legal rationale for U.C.C. Section 2-614 is that a debtor should not be freed from his or her duty to pay simply because it is no longer possible to make payment in the currency originally agreed to by the parties, provided a reasonable alternative form of payment is available. By way of analogy, this rationale could be applied by a U.S. court to contracts not governed by Article 2 of the U.C.C.

E. *Contract Interpretation*

A U.S. court could solve the currency conversion problem in the three scenarios we are considering by applying substantive contract law rather than by applying rules of conflict of laws. The court could interpret the agreement that payment be made in a specific currency to mean that payment be made in the currency that is legal tender at the time of performance in the country which issued the originally stipulated currency. For instance, the term "Deutsche Mark" could be interpreted as being a shorthand expression for "the currency of the Federal Republic of Germany that is legal tender at the time of performance."

1. Interpretation

A court could reach this result by way of ascertaining the meaning that it will give to the contract term "Deutsche Mark" in determining the legal effect of the contract.¹⁰³ This process is known as "interpretation." Such interpretation would be appropriate if the court found the meaning of the term "Deutsche Mark" to be ambiguous in light of the replacement of the German currency.¹⁰⁴ According to one view, an objective standard of reasonableness should always be applied to determine the

(App. Div. 1990) (holding that U.C.C. is applicable to foreign exchange transactions because U.C.C. excludes money only when it is medium of payment, not when treated as commodity). The nature of foreign currency as commodity was at issue in *A Ltd. v. B Bank and Bank of X*, [1997] F.S.R. 165, 172-73 (Ct. App., July 31, 1996).

103. See 2 FARNSWORTH, FARNSWORTH ON CONTRACTS § 7.7, at 237 (1990). Some writers refer to the process of determining the legal meaning of a contract term as "construction." *Id.*

104. *Id.* at 240.

meaning of an ambiguous term.¹⁰⁵ The prevailing view, however, would give effect to the common meaning shared by both parties in preference to the objective meaning.¹⁰⁶ If a lender and a borrower agreed on a loan denominated in Deutsche Mark, and the lender had in mind payment in the currency that would be legal tender in Germany at the time of repayment of the loan, whereas the borrower was of the view he would be free from the obligation of repayment if the German currency in effect at the time they entered into the contract was replaced by a common European currency, the parties would not have had a "meeting of the mind" on a significant issue and there would be no contract—unless the court could tip the scales of interpretation in favor of the meaning of lender or borrower.¹⁰⁷ There, the borrower knew, or had reason to know, that a lender would never agree to an interpretation of the repayment clause in the loan agreement that freed the borrower from its obligation altogether if the Deutsche Mark were replaced by a European currency. Thus, the loan agreement would be interpreted as having been entered into on lender's terms.¹⁰⁸

If the parties to the agreement gave no thought to the meaning of the word "Deutsche Mark," the court must interpret the word applying a standard of reasonableness. In this case, the interpretation would turn on the meaning that a reasonable person in the position of the parties would have attached had they given thought to the matter.¹⁰⁹ The rules of interpretation assume that an interpretation resulting in a bargain that a reasonable person would have made will be preferred over an interpretation that would result in such bargain.¹¹⁰ Any interpretation of an agreement that would free a party from its obligation to pay because a country has substituted a new currency for its old currency would be found unfair or unconscionable.¹¹¹

105. *Id.* at 245-46 (citing additional authority); *Eustis Mining Co. v. Beer, Sondheimer & Co.*, 239 F. 976, 984-85 (S.D.N.Y. 1917).

106. *See* FARNSWORTH, *supra* note 103, § 7.9, at 246-47.

107. *Id.* at 248.

108. *Id.* at 248-49; RESTATEMENT (SECOND) CONTRACTS § 201(2) (1981) [hereinafter RESTATEMENT OF CONTRACTS].

109. *See* FARNSWORTH, *supra* note 103, § 7.9, at 254; *Southern Bell Tel. & Tel. Co. v. Florida E.C. Ry.*, 399 F.2d 854 (5th Cir. 1968).

110. FARNSWORTH, *supra* note 103, § 7.11, at 264-65.

111. *Id.*

2. Omitted Case

The above discussion deals with the interpretation of the word "Deutsche Mark." A court might take the view that the parties to a contract stipulating Deutsche Mark as contract currency have *omitted* addressing the issue of a currency conversion.¹¹² The parties may not have foreseen the problem or may have made a conscious decision not to deal with it, for instance, because they were confident that the law will provide reasonable solutions for issues arising in connection with the currency substitution.¹¹³ It is the task of the court to supply "implied" terms to fill the gap in the agreement.¹¹⁴ This process, frequently called implication, could be based on either the actual expectations of the parties not reduced to writing or, if the expectations of the parties were different, the objective test of whether one party reasonably should have known the other's expectations.¹¹⁵ If the court cannot find an indication of the parties' expectations, it would apply principles of justice to solve the situation for which the parties did not provide.¹¹⁶ Again, an interpretation of a contract that would free an obligor from his or her obligation to pay because the country of the contract currency has changed its currency would not meet standards of justice.

Courts do not always state which of these interpretative methods they employ. For instance, in *Johansen v. Confederation Life Association*,¹¹⁷ the court did not state that it had engaged in contract interpretation as such. In that case, the parties had selected U.S. currency as the means of payment in contracts which were to be performed in Cuba. Both the Cuban peso and the U.S. dollar were legal tender in Cuba at the time the contracts were entered into and could be used interchangeably. Given the interchangeable nature of the two currencies, the court interpreted the payment clause to the effect that the parties could pay in either currency, or, presumably, in whatever currency was legal tender in Cuba at the time of payment.¹¹⁸ Nevertheless,

112. *Id.* § 7.16, at 304.

113. *Id.* § 7.15, at 299-300.

114. *Id.* § 7.16, at 302-03; RESTATEMENT OF CONTRACTS, *supra* note 108, § 204.

115. See FARNSWORTH, *supra* note 103, §§ 7.15, at 305. 7.16, at 298-99.

116. *Id.* § 7.16, at 307.

117. *Johansen v. Confederation Life Ass'n*, 447 F.2d 175 (2d Cir. 1971); see *supra* notes 51-55 and accompanying text (discussing *Johansen*).

118. *Johansen*, 447 F.2d at 177 ("Thus, it is evident that when the policies in ques-

the court went on to examine the applicability of the 1951 and 1959 Cuban currency laws, using the conflict-of-laws analysis.

In *Sternberg v. West Coast Life Insurance Co.*,¹¹⁹ an action for payment of a life insurance policy payable in California but denominated in Tael, Shanghai Sycee, the court held that the plaintiff could recover only "in the current Chinese currency determined as of the date of requested payment."¹²⁰ The court concluded that the Chinese currency decrees, which altered the value of the currency, did not apply directly by virtue of law¹²¹ but rather because the parties who agreed on payment in a foreign currency had also agreed to be subject to the currency laws of the country of issue.¹²² Thus, the court rejected the *lex monetae* as a mandatory conflict-of-laws rule and reached the same result by way of contract interpretation.¹²³

3. Impossibility and Impracticability of Performance

It could be argued that the substitution of the Euro for the old national currencies will make performance of the contract

tion here stated that United States currency was to be paid, it was referring to a legal Cuban tender which after 1939 could be paid in either dollars or pesos.").

119. *Sternberg v. West Coast Life Insurance Co.*, 16 Cal. Rptr. 546 (Cal. Ct. App. 1961).

120. *Id.* at 548.

121. The court rejected the argument that the "foundation of the judgment rests solely upon the concept that the Chinese decrees in themselves altered the value of the currency." *Id.* at 550.

122. The court noted that "[w]hen parties name a specified currency for the payment of an obligation, they know that such a currency falls under the control of the government that issues it." *Id.* at 548-49. In addition, the court stated that the judgment "relies upon the parties' inclusions in their agreements that payment be made in Chinese currency." *Id.* at 550. Whether California or Chinese law governs the agreement is irrelevant for this analysis. *Id.*

123. The court, at times, mixes the concept of the currency of payment with the concept of the value of the stipulated currency and the date on which the value must be determined. The court emphasized that the parties stipulating a foreign currency realize that currency is subject to fluctuation. *Id.* at 549 (citing extensively from *Deutsche Bank Filiale Nurnberg v. Humphrey*, 272 U.S. 517 (1926)). The Court also stressed the Chinese Government's central control over the "value of the currency" and that the parties had accepted the "fluctuating value" of the currency. *Id.* at 550. Interpretation of the meaning of a contractually stipulated currency in light of the replacement of that currency in the country of issuance, China, was at issue in *Judah v. Delaware Trust Company*. *Judah v. Delaware Trust Company*, 378 A.2d 624 (Del. 1977). In *In re Lendle's Estate*, the Court interpreted a will containing a legacy in German marks to mean the German marks in existence at the time the legacies are paid. *In re Lendle's Estate*, 166 N.E. 182 (N.Y. 1929). See also *In re Illfelder's Estate*, 240 N.Y.S. 413 (Sup. Ct. 1930) (expanding upon interpretation of will), *aff'd*, 249 N.Y.S. 903 (App. Div. 1931).

denominated in an old national currency impossible or, in today's usage, impracticable. Impossibility is the inability to perform as promised due to intervening events, such as an act of state or the destruction of the subject matter of the contract.¹²⁴ The principles of contract construction are also used to solve problems of impossibility¹²⁵ or impracticability.¹²⁶ Courts have frequently rationalized an excuse from performance on grounds of impossibility by stating that it is an "implied condition" of the duty to perform that performance remains possible.¹²⁷ Thus, in *Taylor v. Caldwell*,¹²⁸ the court found an "implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing" which legal construction would fulfill the intention of the parties.¹²⁹ In *Taylor*, Taylor rented Caldwell's music hall for performances, but the hall was accidentally destroyed before the first performance, and Taylor sued Caldwell for breach of contract. Other opinions have not so much read implied conditions into the contract as they have sought to supply by way of implication a term to govern an issue that in the court's view is not covered by the agreement.¹³⁰ The modern view on impossibility is reflected in the doctrine of impracticability,¹³¹ which recognizes that justice requires a departure from the rule that a promisor bears the risk of increased difficulties in performance.¹³² In order for a party to claim that a superseding event or "contingency" prevented his or her performance under the doctrine of impracticability, he or she must show that (i) the event must have made "performance as agreed . . . impracticable," and (ii) that nonoccurrence of the

124. *Bank of America Nat'l Trust and Savings Ass'n v. Envasos Venezolanos, S.A.*, 740 F. Supp. 260, 267 (S.D.N.Y. 1990) (quoting *United States v. Gen. Douglas MacArthur Senior Village, Inc.*, 508 F.2d 377, 381 (2d Cir. 1974)).

125. FARNSWORTH, *supra* note 103, § 9.5; U.C.C. § 2-613 (1995).

126. FARNSWORTH, *supra* note 103, § 9.6.

127. *Id.* § 9.5, at 541.

128. *Taylor v. Caldwell*, 122 Eng. Rep. 309 (K.B. 1863).

129. *Id.* at 312.

130. See FARNSWORTH, *supra* note 103, § 9.5, at 541-42; *Lord Sands in Scott & Sons v. Del Sel*, [1922] Sess. Cas. 592, 596-97, *aff'd*, [1923] Sess. Cas. 37 (H.L.). The court is supplying a term to deal with an omitted case. See *supra* notes 112-123 and accompanying text (discussing omitted case).

131. See FARNSWORTH, *supra* note 103, § 9.6, at 542; U.C.C. § 2-615 (1995); RESTATEMENT OF CONTRACTS, *supra* note 108, § 261.

132. See FARNSWORTH, *supra* note 103, § 9.6, at 543; *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966).

event must have been a "basic assumption on which the contract was made."¹³³

It would be difficult to argue that contracts based on an old national currency contain an implied condition that a debtor should be excused from payment because a participating Member State has legitimately substituted the Euro for the stipulated old national currency. After all, the abolition of the old currency cannot be analogized to the destruction of the music hall because the old currency will be replaced by a new currency, the Euro. The music hall has been rebuilt simultaneously with its destruction. The new music hall has a somewhat different façade, but the hall is available for the musical performance.

Furthermore, the nonoccurrence of the introduction of the Euro in substitution of the old national currency is not a basic assumption on which the parties rely when entering into the contract. If an obligor and an obligee agreeing on a Deutsche Mark denominated obligation had known that the Deutsche Mark would be replaced by the Euro, they would not have abstained from entering into the agreement. They would have agreed on performance in the new currency. The substitution does not make performance of the payment obligation impossible. It permits performance by a substitute method. Courts have been reluctant to excuse a party from performance where a substitute arrangement for performance is available.¹³⁴

Some courts have said that if an event is foreseeable, a party who makes an unqualified promise to perform necessarily assumes an obligation to perform, even if the occurrence of the event makes performance impracticable.¹³⁵ In the cases under

133. U.C.C. § 2-615 (1995). See FARNSWORTH, *supra* note 103, § 9.6, at 544, 549; RESTATEMENT OF CONTRACTS, *supra* note 108, Chapter 11, Introductory Note. There are other requirements for a finding of impracticability; however, they are not relevant for this discussion.

134. See FARNSWORTH, *supra* note 103, § 9.6, at 548-49; U.C.C. § 2-614, cmt. 1 (1995).

135. See, e.g., *Eastern Air Lines v. Gulf Oil Corp.*, 415 F. Supp. 429, 441 (S.D. Fla. 1975); *John Soley & Sons v. Jones*, 95 N.E. 94 (Mass. 1911). But see FARNSWORTH, *supra* note 103, § 9.6, at 554-56 (stating that foreseeability should not be conclusive although it is one factor suggesting that promisor assumed risk of its occurrence, and that parties may fail to provide for risks, even though they are foreseeable, because they do not consider it to be significant enough to make it subject of bargaining or because they regard their bargaining position as too weak to risk broaching the subject); accord RESTATEMENT OF CONTRACTS, *supra* note 108, Chapter 11, Introductory Note. If the substitution of the Euro for the old national currencies would lead to unenforceability, the

examination, the parties entering into contracts since the mid-1960s could foresee the potential impossibility to perform in the stipulated national currencies.¹³⁶ Discussions regarding a monetary union had already begun in the mid-1960s, so parties to agreements could have foreseen the consequences resulting therefrom. The absence of a contractual provision for this event does not imply that the parties entered into a commercial transaction knowing that performance would become impossible. Rather, the parties expected their contract to be payable as a matter of course in the new European Monetary Unit, never doubting that the new European Monetary Unit, if introduced, would be democratically legitimized and properly incorporated into the existing fabric of the law.¹³⁷

4. Frustration of Contract

Frustration of purpose refers to a situation where an unforeseen event has occurred which, even though performance is possible, destroys the underlying reason for performing the contract and operates to discharge a party's duty of performance.¹³⁸

The doctrine of frustration of purpose¹³⁹ was first announced in the case of *Krell v. Henry*.¹⁴⁰ Henry rented rooms from Krell on specified days to watch the coronation procession of King Edward VII. The procession was canceled and Henry refused to pay the balance of the rent. The Court of Appeals held for Henry because "the coronation procession was the foundation of this contract, and . . . the object of the contract was frustrated by the non-happening of the coronation."¹⁴¹ The doc-

foreseeing parties would not have considered this event insignificant. The foreseeing parties probably considered the introduction of the new currency insignificant because in their mind it did not affect enforceability; they expected performance in the new currency.

136. *Cf.* *Transohio Savings Bank v. Office of Thrift Supervision*, 967 F.2d 598, 619-20 (D.C. Cir. 1992) (discussing foreseeability of legislative changes).

137. *See* N.Y. U.C.C. Law § 2-614(2) (McKinney 1993) (stating that debtor is entitled to make payment in new currency provided act of state introducing new currency is not "discriminatory, oppressive or predatory").

138. *Bank of America Nat'l Trust and Savings Ass'n v. Envasas Venezolanos, S.A.*, 740 F. Supp. 260, 266 (quoting *Matter of Fontana D'Oro Foods, Inc.*, 472 N.Y.S.2d 528, 532 (Sup. Ct. 1983), *aff'd as modified*, 484 N.Y.S.2d 644 (App. Div.), *aff'd*, 482 N.E.2d 1216 (N.Y. 1985)).

139. *See* FARNSWORTH, *supra* note 103, § 9.7.

140. *Krell v. Henry*, [1903] 2 K.B. 740 (C.A.).

141. *Id.* at 751, 754.

trine of frustration has been generally accepted by U.S. courts,¹⁴² and has been incorporated into the Restatement of Contracts.¹⁴³ The Restatement requirements for the doctrine of frustration are quite similar to those for the doctrine of impracticability of performance, except that the event must have “substantially frustrated” the “principal purpose” of the party claiming frustration.¹⁴⁴ As in the case of impracticability, it must have been “a basic assumption on which the contract was made” that the event would not occur.¹⁴⁵ The frustration of purpose defense may not be available where the event, which allegedly frustrated the purpose of the contract, was clearly foreseeable.¹⁴⁶

Neither the claim for payment nor the obligation to pay is frustrated if payment upon performance is made in a substitute currency of the country of the original contract currency. As in the case of impracticability, if an obligor and an obligee agreeing on a Deutsche Mark denominated obligation had known that the Deutsche Mark would be replaced by the Euro, they would have agreed on performance in the new currency. The substitution does not frustrate the performance of the payment obligation because the Euro reflects the value of the Deutsche Mark at the time of performance. This conclusion is appropriate, even if the Euro has less value against the U.S. dollar than the Deutsche Mark. According to case law, the mere fact that what was expected to be a profitable transaction has turned out to be a losing one is not enough to claim frustration.¹⁴⁷

142. See FARNSWORTH, *supra* note 103, § 9.7, at 559.

143. RESTATEMENT OF CONTRACTS, *supra* note 108, § 265.

144. See FARNSWORTH, *supra* note 103, § 9.7, at 561; RESTATEMENT OF CONTRACTS, *supra* note 108, § 265.

145. RESTATEMENT OF CONTRACTS, *supra* note 108, § 265 and ch. 11, Introductory Note.

146. Bank of America Nat'l Trust and Savings Ass'n v. Envases Venezolanos, S.A., 740 F. Supp. 260, 266 (quoting VJK Productions, Inc. v. Friedman/Meyer Productions, Inc., 565 F. Supp. 916, 921 (S.D.N.Y. 1983)). *But see* FARNSWORTH, *supra* note 103, § 9.7 (noting that foreseeability of frustrating event does not always bar relief for frustration).

147. See Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 519 (1926) (stating that if debt in question “had been due here and the value of dollars had dropped before suit was brought the plaintiff could recover no more dollars on that account. A foreign debtor should be no worse off.”); Bank of America Nat'l Trust and Savings Ass'n v. Envases Venezolanos, S.A., 740 F. Supp. at 266 (quoting 407 E. 61st Garage, Inc. v. Savoy Fifth Avenue Corp., 244 N.E.2d 37, 42 (N.Y. 1968)); Dougherty v. Equitable Life Assurance Soc'y of the United States, 193 N.E. 897, 906 (N.Y. 1934) (“Money does not keep at a uniform rate of exchange or purchasing power; with the crises which come to all nations at some time, debts must follow the ups and downs of

In conclusion, a New York court applying modern common law principles would either interpret the contract clause stipulating an old national currency as contract currency to mean the currency of the specified country that is legal tender at the time of performance or if the court concludes that the parties have failed to address the issue of currency substitution, it would fill the gap with the same result by way of implication. There is no room for non-performance on the basis of impossibility, impracticability, or frustration because it cannot be said that the non-introduction of the Euro was a basic assumption on which the contract was made. The introduction of the Euro does not make performance of a contract denominated in an old national currency impracticable, nor does it frustrate the principal purpose of that contract. This conclusion accords with the principle that contracts should be interpreted so as to be valid and conformable to law.¹⁴⁸

III. CONSEQUENCES FOR ECU OBLIGATIONS

The ECU is the official unit of account of the European Community ("EC").¹⁴⁹ The ECU is not a currency, but rather a basket of currencies, comprised of distinct sums of all EC currencies, except for the currencies of Austria, Sweden, and Finland, whose membership in the EC first became effective on January 1, 1995.¹⁵⁰ Parallel to the official ECU, a "private" ECU has developed in the currency and capital markets¹⁵¹ which serves as a unit of account in private contracts.¹⁵²

According to Article 2 of the Art. 235 Council Regulation,¹⁵³ all contractual references¹⁵⁴ to the ECU will, effective January 1,

the money market."); FARNSWORTH, *supra* note 103, § 9.7, at 562 (citing further authority); see also Sternberg v. West Coast Life Insurance Co., 16 Cal. Rptr. 546 (Cal. Ct. App. 1961).

148. See 3 CORBIN, CORBIN ON CONTRACTS § 546 (1960).

149. See EC Treaty, *supra* note 2, arts. 207, 209, [1992] 1 C.M.L.R. at 707-08.

150. The basket was finally determined by EC Regulation No. 3320/94, O.J. L 350/27 (1994). See EC Treaty, *supra* note 2, Art. 109g, [1992] 1 C.M.L.R. at 650.

151. The creation of the "private" ECU may, of course, be subject to the national currency laws. The authorization required by Währungsgesetz Section 3 (Currency Act) in Germany was granted by a release of the Deutsche Bundesbank, Mitteilung Nr. 1002/90 of January 5, 1990, Bundesanzeiger no. 3 of January 5, 1990.

152. This development is described in detail in Siebelt & Häde, *Die ECU im deutschen Recht*, 45 NEUE JURISTISCHE WOCHENSCHRIFT 10 (1992).

153. See Art. 235 Council Regulation, *supra* note 7.

154. "Contracts" are covered by the term "legal instruments." Art. 235 Council

1999, be replaced by a reference to the Euro at an exchange rate of one Euro to one ECU, provided that the contract defines the ECU within the meaning of Article 109 of the EC Treaty and the definition of EC Regulation No. 3320/94.¹⁵⁵ Even if the parties have not clearly defined the ECU, the art. 235 Council Regulation establishes a presumption that the parties intended to refer to the ECU within the meaning of the EC law.¹⁵⁶ This presumption was recommended by the European Commission in 1994.¹⁵⁷

The official conversion of the ECU into the Euro at a rate of one to one applies to private agreements denominated in ECU in the manner discussed in Parts I and II above. The conclusions reached with respect to contracts denominated in old national currencies should be applicable with respect to contracts denominated in ECU.¹⁵⁸

Whether federal or state courts in the United States will apply the presumption set forth in the Art. 235 Council Regulation, that all contractual references to the ECU should be presumed references to the ECU within the meaning of EC law, even when parties have not clearly defined the ECU, depends upon what law the parties have chosen. If the parties have chosen the law of an EU Member State,¹⁵⁹ the courts in the United States will apply this presumption as part of the chosen foreign

Regulation, *supra* note 7, Art. 1. The term is broadly defined to include all writings with legal effect.

155. EC Regulation No. 3320/94, O.J. L 350/27 (1994).

156. This presumption may be overcome by the parties to the contract if they provide for a different contractual definition of the ECU. *See* Art. 235 Council Regulation, *supra* note 7, art. 2, and cmts. to art. 2 of the art. 235 Council Regulation, *in* Council Document COM (96) 499, *supra* note 7.

157. Commission Recommendation No. 94/284/EC O.J. L 121/43 (1994) [hereinafter Recommendation of the Commission] (concerning legal treatment of ECU and of contracts denominated in ECU in view of introduction of single European currency).

158. Even if the federal and state courts in the United States should apply the *lex monetae* to questions involving currency law, the European statutes concerning the Euro would come into play only under the circumstances described in Part II hereof. The 1:1 exchange rate of ECU into Euro, in contrast with the conversion of old national currencies of countries participating in the EMU, is not an act of currency law because the ECU does not constitute a real currency. Rather, the conversion of ECU into Euro simply involves modification of the monetary standard agreed to by the parties.

159. The proposed Article 109j(4) Council Regulation, *supra* note 7, will be effective only in participating Member States, while the Article 235 Council Regulation, *supra* note 7, is effective in all Member States of the EU. *See* lit. 5 of the Protocol on certain provisions relating to the United Kingdom of Great Britain and Northern Ireland, according to which Article 109i(4) of the EC Treaty does not apply to Great Britain and Northern Ireland.

law.¹⁶⁰ If the parties have chosen the law of a state of the United States, however, the courts will normally not observe this rule of presumption because the courts would not be applying foreign law.¹⁶¹ Moreover, a statutory rule of interpretation hardly constitutes a non-U.S. act of state within the meaning of the act of state doctrine, or a fundamental public policy of the relevant EU Member State, which could be offended by the application of the stipulated law. Neither of those doctrines, therefore, could be relied upon to support the application of the rule of presumption. Courts in the United States would apply the general common law rules of contractual interpretation to determine whether the parties to a contract denominated in ECU intended to use ECU in the sense of EC law or in the sense of a contractual unit of account.¹⁶²

The question thus becomes whether a New York court, in applying general substantive law principles of interpretation, would reach the same conclusion as the Proposed EC Regulation on some provisions relating to the introduction of the Euro, and employ a rebuttable presumption that in case of doubt the "official" ECU was intended. This question cannot be answered with certainty. In favor of the foregoing presumption, it could be argued that, at least after the Maastricht Treaty, entered into on February 7, 1992, became effective on January 1, 1993,¹⁶³ it was incumbent upon the parties explicitly to define the ECU¹⁶⁴ if they wished to divorce themselves from the definition of the ECU formulated in EC law, and thus from the mandatory conversion of the ECU into an independent currency. On the other hand, one could argue, the issuer of an ECU-bond or lender of an ECU denominated loan chose precisely to denominate the obligation in a portfolio of more or less stable currencies and, moreover, negotiated the terms of the bond or loan on that basis.¹⁶⁵ In sum, however, the arguments appear to weigh in favor

160. See *supra* notes 30-55 and accompanying text (discussing obligations governed by laws of country of foreign currency).

161. See *supra* notes 56-102 and accompanying text (addressing obligations governed by New York law).

162. See *supra* notes 103-148 and accompanying text (regarding contract interpretation).

163. See *supra* note 2 (discussing EMU provisions of EC Treaty).

164. The Commission stated this position as early as April 1994. See Recommendation of the Commission, *supra* note 157, at no. 5.

165. See Fischer & Klanten, *supra* note 5, at 8 (setting forth that Euro, compiled

of the presumption suggested by the Art. 235 Council Regulation. In light of the Maastricht Treaty, a federal or state court in the United States would be more likely than not to construe a contractual reference to the ECU as a reference to ECU in the meaning of EC law, provided that the contract was concluded after the Maastricht Treaty became effective and that the parties had not agreed otherwise. With respect to contracts concluded before the Maastricht Treaty went into effect, the parties' intention cannot be interpreted in the same way.

IV. CLAUSES IN NEW CONTRACTS

The question arises whether parties now entering into a contract governed by New York law and having as a contract currency a currency of an EU Member State likely to participate in the third stage of the EMU should address in the contract the issue of currency substitution. Any attempt to address in the contract the introduction of the Euro and the substitution of the Euro for the old national currencies faces the potential conflict between the contractual provisions on one hand and the Council Regulations¹⁶⁶ and the relevant national law of the Member State on the other. The contractual provisions may violate mandatory law, or if they do not, there may be confusion caused by discrepancies between the contractual provisions on the one hand, and European or national laws, rules, or even market practices regarding the introduction of the Euro on the other. Even a clause providing that the contract currency should be replaced by the Euro if the country of the contract currency participates in the third stage of the EMU creates an ambiguity because the meaning of such a clause during the transitional period is not clear. It could be read as requiring that all payments during the transitional period must be made in the Euro only.

The introduction of the Euro raises two particular issues for debt obligations denominated in the currency of an EU Member State likely to participate in the third stage of the EMU and governed by New York law. The first issue is *redenomination*. At a certain date the obligations will be deemed to be denominated in Euro converted as provided by the above Council Regulations

from hard currencies, could, in contrast to ECU basket, quickly develop stronger market value in relation to other currencies).

166. See *supra* note 7 (discussing EC Council Regulations).

and payment on the obligations will have to be made as provided by such Council Regulations. The second issue is the issue of *renominalization*, that is, the change of the nominal amount of the obligations expressed in amounts of the old national currency into amounts of Euros, or cents (the subdivision of the Euro). If the nominal amount of the obligations is changed into full Euros, fractional amounts will have to be paid to the holders. The issuer would wish that neither redenomination nor renominalization requires consent of the holders of the debt obligations. Whereas the redenomination is covered by the proposed Council Regulation on the introduction of the Euro,¹⁶⁷ the renominalization will be covered by the national law of the EU Member States.¹⁶⁸

Parties to a contract governed by New York law would be well advised, with respect to the introduction of the Euro, to rely on the relevant EU regulations and the law of the Member State of the contract currency. In doing so, they would be subject to the same legal regime as most other obligors who owe performance in the contract currency. To accomplish this result, the parties would have to agree on a dual or split governing law clause, with New York law governing the contract in general, and the European Council Regulations and the law of the country of the contract currency governing the issues relating to the introduction of the Euro and the replacement of the contract currency by the Euro. New York conflict-of-laws rules permit contract parties to agree that different laws apply to different issues or parts of their contract ("*dépeçage*").¹⁶⁹ New York General Obl-

167. Art. 109j(4) Council Regulation, *supra* note 7, Art. 6(2).

168. See proposed German law regarding the conversion of debt obligations to the euro (*Gesetz zur Umstellung von Schuldverschreibungen auf Euro*), Draft of Sept. 24, 1997. The national law is authorized by Article 8(4) of the Article 109j(4) Council Regulation, *supra* note 7. See also Bartels, *Umstellung verbrieftester Atschuldner auf Euro*, 51 *Zeitschrift für Wirtschafts- und Bankrecht*, WERTPAPIER-MITTEILUNGEN 1313 (1997).

169. GRISON, *Contractual Choice of Law and Choice of Forum: Unresolved Issues*, in JUDICIAL ENFORCEMENT OF INTERNATIONAL DEBT OBLIGATIONS 13-18 (Sassoon & Bradlow, eds., 1987). See, e.g., *Chinchilla v. Foreign Tankship Corp.*, 91 N.Y.S.2d 213, 217-18 (Sup. Ct. 1949), *modified on other grounds*, 97 N.Y.S.2d 835 (Sup. Ct. 1950), *aff'd*, 102 N.Y.S.2d 438 (App. Div. 1951); *Zion v. Kurtz*, 405 N.E.2d 681, 684 (N.Y. 1980) (noting that agreement provided that it should be "governed by and construed and enforced in accordance with the laws of the State of Delaware as to matters governed by the General Corporation Law of that State."); *Shannon v. Irving Trust Co.*, 285 N.Y.S. 478 (App. Div. 1936), *aff'd*, 9 N.E.2d 792 (N.Y. 1937). See also *Corporación Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 794 (2d Cir. 1980), *cert. denied sub. nom. Corporación Venezolana de Fomento v. Merban Corp.*, 449 U.S. 1080 (1981).

gations Law Section 5-1401 expressly provides for contractual dépeçage by permitting the parties to an agreement to agree on New York law to "govern their rights and duties in whole or in part".¹⁷⁰ A split governing-law clause could read as follows:

The Notes shall be governed by, and construed in accordance with, the law of the State of New York, except that if the Republic of France participates in the third stage of the European Economic and Monetary Union, payment under, and redenomination and renominalization of the Notes shall be subject to the applicable regulations of the European Council, French law and regulations, and monetary authority and stock exchange and international clearing system regulations and requirements.

If the notes are issued under an indenture which provides for amendments with the consent of a certain majority of the noteholders, the requirement for such consent should be excluded to the extent that such amendments serve to facilitate the exchange, redenomination and renominalization of the French Franc-denominated notes for Euro-denominated notes. More generally, the notes may provide that the issuer (and the trustees) may take any action in connection with the introduction of the Euro that is in compliance with the laws, regulations, and requirements referred to in the governing law clause without the consent of any holder of the notes.

V. NEW YORK STATUTE ON THE EURO

As pointed out in this Article, although the introduction of the Euro will not frustrate contracts denominated in old national currencies which have been replaced by the Euro, or make the performance of such contracts impossible,¹⁷¹ New York's legislative assembly has adopted a statutory amendment to the General Obligations Law ("Title 16") dealing with the introduction of the Euro.¹⁷²

The principal purpose of Title 16 is to deal with the issue of continuity of contracts. Section 5-1602 (1)(a) provides:

170. N.Y. GEN. OBLIG. LAW § 5-1401 (McKinney 1989).

171. See *supra* notes 103-148 and accompanying text (discussing contract interpretation).

172. N.Y. GEN. OBLIG. LAW §§ 5-1601 to 5-1604 (McKinney Supp. 1997). The New York Legislature added a new title 16 to the New York General Obligations Law. Similar legislative initiatives are being made in Illinois and California.

If a subject or medium of payment of a contract, security or instrument is a currency that has been substituted or replaced by the euro, the euro will be a commercially reasonable substitute and substantial equivalent that may be either: (i) used in determining the value of such currency; or (ii) tendered, in each case at the conversion rate specified in, and otherwise calculated in accordance with, the regulations adopted by the council of the European Union.

Section 5-1602 (1)(a), clause (i) of Title 16 provides that if the Deutsche Mark is contract currency, its value can only be determined by reference to the Euro. This clause deals with the case where an action is brought in U.S. dollars, raising the question of how the old national currency, the contract currency, should be valued against the U.S. dollars.¹⁷³ According to Title 16, the Euro conversion rate set by the European Council is the only basis for such valuation even if a different market rate for the old national currency develops outside of Europe.¹⁷⁴ Thus, Title 16 overrules case law that prefers the true market rate over the fixed exchange rate.¹⁷⁵ The rationale for this change of established case law is unclear. The case law on the valuation of foreign currency obligations for the purpose of awarding dollar judgment does not interfere with the continuity of contracts or the orderly introduction of the Euro. It is questionable whether this change in the law serves the aim of making the creditor whole and to avoid rewarding the debtor.¹⁷⁶ The proposed adoption of the fixed exchange rate for judgments makes it unnecessary for the courts to select a date for the conversion.

It appears curious that Title 16 declares the Euro to be a "commercially reasonable substitute and substantial equivalent" of the replaced old national currency. This language was presumably used to paraphrase U.C.C. Section 2-614. However, the Euro *is* the substitute of the replaced old national currencies,

173. See *supra* notes 10-25 and accompanying text (addressing suits for payment in U.S. dollars).

174. See *supra* notes 22-24 and accompanying text (discussing the possibility of market rate for old national currencies that is not linked to fixed Euro exchange rate).

175. See *supra* notes 23-24 (citing specific examples of such cases).

176. See RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 10, § 823(2) ("If, in a case arising out of a foreign currency obligation, the court gives judgement in dollars, the conversion from foreign currency to dollars is to be made at such rate as to make the creditor whole and to avoid rewarding a debtor who has delayed in carrying out the obligation.").

even during the transitional period.¹⁷⁷ As such, it would have been preferable, and would have sounded less condescending for European ears, if Title 16 had read “[i]f a subject or medium of payment of a contract, security or instrument is a currency that has been substituted or replaced by the euro, the euro may be either: . . .” This language would not have negatively affected the application of Section 2-614 of the U.C.C.

Section 5-1602 (1)(a), clause (ii) of Title 16 presumably applies to the transitional period and the period thereafter, because even during the transitional period the Euro has already replaced the old national currencies.¹⁷⁸ This Section provides that the borrower may tender Euros in performance of his or her obligations. Thus, this Section makes it necessary for New York banks to be ready to accept Euros during the transitional period. European banks have the option to credit an amount received in an old national currency or in Euro “to the account of the creditor in the denomination of his account”¹⁷⁹ without having to ask for the consent of the creditor. Under Title 16, New York banks do not have this right of crediting flexibility. Title 16 does not clearly express the principle of “no compulsion,” meaning that during the transitional period the currency unit that is stipulated in the relevant instrument shall be respected and can be used in performance.¹⁸⁰ Arguably, the no-compulsion principle follows from the statutory words that the Euro “may be” used and from Section 5-1602(1)(c) of Title 16, discussed below. Section 5-1602 (1)(a), clause (ii), if applied after the transitional period, does not seem to give the creditor of an obligation denominated in an old national currency the right to request performance in Euros in lieu of the old national currency.¹⁸¹ It only speaks about the right of performance by the debtor.

Title 16 adopts the rules on the conversion of the ECU from the Council Regulation on certain provisions relating to the in-

177. See *supra* note 18 (stating that old national currencies will no longer be currencies but will be another form of expressing Euro currency).

178. *Id.*

179. Art. 109j(4) Council Regulation, *supra* note 7, art. 8(3).

180. *Id.* art. 8(1).

181. The right of the creditor to demand payment in Euro follows for the time after the transitional period from Article 14 of the Article 109j(4) Council Regulation, *supra* note 7. During the transitional period the debtor has the right to choose between performance in the Euro or in the old national currency. *Id.* Art. 8(3).

roduction of the Euro.¹⁸² Section 5-1602 (1)(b) of Title 16 provides:

If a subject or medium of payment of a contract, security or instrument is the ECU, the euro will be a commercially reasonable substitute and substantial equivalent that may be either: (i) used in determining the value of the ECU; or (ii) tendered, in each case at the conversion rate specified in, and otherwise calculated in accordance with, the regulations adopted by the Council of the European Union.

Section 5-1601(3) of Title 16 establishes the one to one ECU-Euro conversion and the presumption that references to the ECU which are not defined in terms of Council Regulation 3320/94 are nevertheless references to the official ECU and are subject to the one to one conversion unless the parties prove a contrary intention.¹⁸³ It is unfortunate that the New York legislature will adopt the politically motivated, but not economically justifiable, presumption in favor of a one to one conversion in the context of private contracts which do not specifically refer to the official ECU.

Section 5-1602(1)(c) of Title 16 provides:

Performance of any of the obligations described in paragraph (a) or (b) of this subdivision may be made in the currency or currencies originally designated in such contract, security or instrument (so long as such currency or currencies remain legal tender) or in euro, but not in any other currency, whether or not such other currency (i) has been substituted or replaced by the euro or (ii) is a currency that is considered

182. Art. 235 Council Regulation, *supra* note 7, Art. 2. *See supra* notes 149-165 and accompanying text (examining consequences for ECU obligations).

183. Section 5-1601(3) of Title 16 provides:

"ECU" or "European Currency Unit" shall mean the currency basket that is from time to time used as the unit of account of the European Community as defined in European Council Regulation No. 3320/94. When the euro first becomes the monetary unit of participating member states of the European Union, references to the ECU in a contract, security or instrument that also refers to such definition of the ECU shall be replaced by references to the euro at a rate of one euro to one ECU. References to the ECU in a contract, security or instrument without such a definition of the ECU shall be presumed, unless either demonstrated or proven to the contrary by the intention of the parties, to be references to the currency basket that is from time to time used as the unit of account of the European Community.

N.Y. GEN. OBLIG. LAW § 5-1601(3) (McKinney Supp. 1997).

a denomination of the euro and has a fixed conversion rate with respect to the euro.

The first half of this Section sets forth the “no compulsion” and the “no prohibition” rule.¹⁸⁴ However, Section 1602(1)(c) is correctly limited to the transitional period. This follows from the qualification of the right to pay in the old national currency “so long as such currency or currencies remain legal tender.” The second half of Section 5-1602(1)(c) seems to say that a Deutsche Mark debt cannot be paid in French Franc. It is not obvious why such provision is necessary or desirable, because both the Deutsch Mark and the French Franc have a fixed exchange rate against the Euro. However, the provision mirrors a similar provision in the Council Regulation on the introduction of the Euro.¹⁸⁵

Section 5-1602(2) of Title 16¹⁸⁶ provides that the introduction of the Euro does not trigger the application of doctrines such as frustration and impossibility, which have the effect of discharging or excusing performance. The continuity clause, however, contains in clause (d) a condition that may turn it into a discontinuity clause: A calculation or determination with reference to an interest rate formula after the introduction of the Euro does not have the effect of discharging or excusing per-

184. 84 See Art. 109j(4) Council Regulation, *supra* note 7, art. 8. Article 8(1) of the Article 109j(4) Council Regulation ensures that during the transitional period a party to a contract will only have to use the unit, either euro or old national currency, to which the parties have agreed, and Article 8(3) gives the debtor the choice of paying his or her debt in the euro unit or the old national currency unit.

185. Article 8(3) of the Article 109j(4) Council Regulation, *supra* note 7, provides that any amount denominated either in the Euro unit or in the national currency unit of a given participating Member State, “and payable within that Member State by crediting an account of the creditor,” can be paid by the debtor either in the euro unit or in that national currency unit.

186. Section 5-1602(2) of Title 16 provides:

None of: (a) the introduction of the euro; (b) the tendering of euros in connection with any obligation in compliance with paragraph (a) or (b) of subdivision one of this section; (c) the determining of the value of any obligation in compliance with paragraph (a) or (b) of subdivision one of this section; or (d) the calculating or determining of the subject or medium of payment of a contract, security or instrument with reference to interest rate or other basis [that?] has been substituted or replaced due to the introduction of the euro and that is a commercially reasonable substitute and substantial equivalent, shall either have the effect of discharging or excusing performance under any contract, security or instrument, or give a party the right to unilaterally alter or terminate any contract, security or instrument.

N.Y. GEN. OBLIG. LAW § 5-1602(2) (McKinney Supp. 1997).

formance only if such calculation or determination is a "commercially reasonable substitute and substantial equivalent." Section 5-1602(2)(d) of Title 16 differs substantially from the Council Regulation¹⁸⁷ on certain provisions relating to the introduction of the Euro which does not contain such condition for continuity of contracts. In the case of each floating rate loan denominated in the currency of a Member State of the EU participating in the third stage of the EMU, this provision requires proof that the substituted Euro interest rate formula is a reasonable substitute and substantial equivalent of the old formula.

In the same manner as the Council Regulation on certain provisions relating to the introduction of the Euro,¹⁸⁸ Section 5-1603 of Title 16 confirms the generally accepted principle of freedom of contract.¹⁸⁹

In light of New York's substantive law on contracts, the adoption of Title 16 is not necessary. In addition, Title 16 raises three general issues. At times of political and social upheaval, countries tend to replace their currencies frequently. Some of the cases discussed in this Article¹⁹⁰ give a good picture of daisy chains of currency substitutions. If the introduction of the Euro requires a statute in order to preserve the continuity of contracts, a similar statute would be required every time a country's currency is replaced by another. Title 16 attempts to address this concern with a most curious provision which tries to instruct future legislators not to follow the example of Title 16, and courts not to pay attention to Title 16 when faced with other currency substitutions. Section 5-1604(2) of Title 16 provides:

In circumstances of currency alteration, other than the introduction of the euro, the provisions of this title shall not be interpreted as creating a negative inference or negative pre-

187. See Art. 235 Council Regulation, *supra* note 7, art. 3.

188. *Id.*

189. Section 5-1603 of Title 16 provides: "The provisions of this title shall not alter or impair and shall be subject to any agreement between the parties with specific reference to or agreement regarding the introduction of the euro." N.Y. GEN. OBLIG. LAW § 5-1603 (McKinney Supp. 1997).

190. See, e.g., *Dougherty v. Equitable Life Assurance Soc'y of the United States*, 193 N.E. 897, 904-06 (N.Y. 1934) (addressing Russian currency); *Johansen v. Confederation Life Ass'n*, 447 F.2d 175, 177-78 (2d Cir. 1971) (regarding Cuban currency); *Sternberg v. West Coast Life Insurance Co.*, 16 Cal. Rptr. 546, 547-50 (1961) (discussing Chinese currency); *Trinh v. Citibank, N.A.*, 623 F. Supp. 1526, 1538 (E.D. Mich. 1985) (concerning Vietnamese currency), *aff'd*, 850 F.2d 1164 (6th Cir. 1988).

sumption regarding the validity or enforceability of contracts, securities or instruments denominated in whole or in part in a currency affected by such alteration.

In other words, Title 16 states that it is really not necessary to enact that statute. It is an open question whether this unusual instruction will influence the courts. Section 5-1604(2) is contradictory to the act of adopting Title 16 and must be characterized by the old Roman legal maxim of "*venire contra factum proprium*."¹⁹¹

New York's legislative initiative creates a second problem by raising serious doubts about the enforcement of obligations denominated in old national currencies and governed by the law of a state which has not adopted a similar statute.

Lastly, the differences between Title 16 and the Council Regulations¹⁹² will raise troublesome questions. The drafters of Title 16 will claim that they did not attempt to duplicate the Council Regulations but that they only intended to regulate the issue of continuity of contracts. Because Title 16 adopts many but not all provisions of the Council Regulations, however, it will be difficult later to maintain this argument. A party before a New York court will find it difficult to persuade the court that Title 16 did not attempt to regulate all issues relating to the introduction of the Euro. Furthermore, there are significant differences between Title 16 and the Council Regulations, including Title 16's requirements that interest rate calculations must be a "commercially reasonable substitute and substantial equivalent."¹⁹³

Predictability and certainty would have been better served if New York had simply adopted those provisions of the Council Regulations, which deal with issues of contract law and expressly recognized those provisions that deal with issues of monetary law. New York could also have passed a law recognizing the con-

191. *Venire contra factum proprium nemini licet*. A party may not claim a legal interpretation which is contradicted by its own acts. See DIG. 1, 7, 25 (Ulpian); AZO, *BROCARDICA SIVE GENERALIA JURIS* (ed. Basel 1567); LIEBS, *LATEINISCHE RECHTSREGELN UND RECHTSSPRICHWÖRTER* 217 (5th ed. 1991); DETTE, *VENIRE CONTRA FACTUM PROPRIUM NULLI CONCEDITUR* (1985).

192. See Art. 235 Council Regulation and Art. 109j(4) Council Regulation, *supra* note 7.

193. N.Y. GEN. OBLIG. LAW § 5-1602(2)(d). (McKinney Supp. 1997).

flict-of-laws rule referred to as *lex monetae*.¹⁹⁴ Neither approach may have been politically feasible. The next best course of action would have been to rely on the quality and ability of the judges of the State of New York and the Second Circuit. New York's and the Second Circuit's decisions demonstrate that such reliance is not unreasonable. In particular, New York's judges have frequently emphasized awareness of their responsibility to New York's role as an international financial and commercial center.¹⁹⁵

CONCLUSION

A New York court will, in all likelihood, interpret an agreement to make payment in an old national currency of a EU Member State participating in the third stage of the European Economic Monetary Union as an agreement to make payment in the currency that constitutes legal tender at the time of performance. With respect to bonds or loans denominated in ECU, one should assume that parties who entered into a contract after the EC Maastricht Treaty had taken effect intended, in referring to the ECU, to call upon the meaning thereof in EC law, unless they explicitly defined the ECU in different terms. In all events, a creditor can minimize the existing uncertainties by presenting his or her claim to the U.S. court as a suit for payment in U.S. dollars or by suing the debtor before the courts of an EU Member State, provided the chosen tribunal has the requisite jurisdiction to hear his or her claim.

194. See *supra* notes 62-73 and accompanying text (examining *lex monetae*).

195. See, e.g., *Marine Midland Bank, N.A. v. United Missouri Bank, N.A.*, 643 N.Y.S.2d 528, 531 (App. Div. 1996); *Ehrlich-Bober & Co. v. University of Houston*, 404 N.E.2d 726, 730 (N.Y. 1980); *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 333 N.E.2d 168, 172-73 (N.Y.), *cert. denied*, 423 U.S. 866 (1975); *Pallavicini v. Int'l Tel. and Tel. Corp.*, 341 N.Y.S.2d 281 (App. Div. 1973), *aff'd*, 316 N.E.2d 722 (N.Y. 1974); *Intercontinental Planning, Ltd. v. Daystrom, Inc.*, 248 N.E.2d 576, 582-83 (N.Y. 1969).