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Continuity for Transatlantic Commercial Contracts After the Introduction of the Euro

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Cover Page Footnote

The author would like to thank Professor Chantal Thomas, Professor Joel Reidenberg, and Professor Carl Felsenfeld for insightful and helpful comments after reading drafts; David Detjen and Heidi Doerbeck of Walter, Conston, Alexander & Green, for their expertise and aid; and A. James Hoskins for support and encouragement.

CONTINUITY FOR TRANSATLANTIC COMMERCIAL CONTRACTS AFTER THE INTRODUCTION OF THE EURO

*Rebecca H. Marek**

TABLE OF CONTENTS

INTRODUCTION	1986
I. THE MECHANISMS AND POLICIES BEHIND THE SINGLE CURRENCY	1988
A. <i>Achieving the European Monetary Union</i>	1988
1. Stage One: Preparing for Financial Integration.	1991
2. Stage Two: The Path to Economic Convergence	1992
3. Stage Three: Centralization and the Euro	1994
B. <i>Repercussions of the EMU and a Single Currency</i> ..	1996
II. POTENTIAL IMPACT OF AND DISCONTENTMENT WITH THE EURO	2002
A. <i>Affected Transatlantic Commercial Contracts</i>	2003
B. <i>Scenarios for Arguing for Excuse and Discharge</i>	2004
C. <i>Legislative Acts to Ensure the Continuity of Contract</i>	2006
D. <i>Survey of Applicable Contract Law</i>	2008
1. The Duty to Perform	2011
2. Uniform Commercial Code	2012
3. Convention on the International Sale of Goods	2015
4. The UNIDROIT Principles	2018
III. KEEPING THE DEAL TOGETHER: RATIONALES FOR CONTINUITY	2020
A. <i>The Economic Need for Stability and Certainty of Contract</i>	2020
B. <i>The First Range: Severity of the Loss</i>	2022
C. <i>The Second Range: Allocation of Risk and Foreseeability</i>	2024
1. Allocation of Risk	2024
2. Foreseeability	2026
D. <i>The Third Range: Judicial Reformation of the Contract</i>	2028
CONCLUSION	2031

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"In essence the impracticability doctrine says that contracts will be enforced . . . unless it really hurts."¹

INTRODUCTION

Between 1999 and 2002, the Euro,² the European Union's future single currency, will replace qualified³ European Member States' currencies.⁴ Both commentators and practitioners see the continuity of contracts as a key legal problem that Europe⁵ and the countries with which it trades will soon face.⁶ For American companies and their European trading partners, the issue of continuity of transatlantic commercial contracts is likely to arise because they will be parties to contracts denominated in currencies that no longer exist.⁷

1. Paul J. Joskow, *Commercial Impossibility, The Uranium Market and the Westinghouse Case*, 6 J. Legal Stud. 119, 160 (1977).

2. The Euro will become the European Union's single currency as qualified European Union Member States form a monetary union. Geoffrey Yeoward, *Commission Publishes Blueprint for Euro Legal Framework*, 16 Int'l Fin. L. Rev. 37 (1997).

3. To qualify, European Member States must meet economic criteria that demonstrate economic health and convergence (low inflation, low government budget deficits, low interest rates, and exchange rate stability). See *infra* note 57 and accompanying text.

4. Treaty Establishing the European Community, Feb. 7, 1992, O.J. (C 224) 1, [1992] 1 C.M.L.R. 573 (1992) [hereinafter EC Treaty]; see also *Calendar: What Will Happen and When* (visited Jan. 26, 1998) <<http://europa.eu.int/euro/en/calendar.asp>> [hereinafter *Calendar*] (outlining the most probable timeline for the introduction of the single currency); *The 1998 Countdown to EMU* (visited Jan. 26, 1998) <http://amue.lf.net/news/newslet.28/nl28_1.htm> (same). There is a slight possibility that no Member State will qualify and the Economic and Monetary Union process will not go forward. A convincing discussion of the probability of the implementation of the Euro is beyond the scope of this Note. Therefore, this discussion will assume that the Euro will be introduced in at least some Member States. For an article arguing for an eventual large membership base, see Wolfgang Münchau, *The First Wave: Probables and Possibles*, Fin. Times, May 28, 1998, (EMU: An FT Guide) at 3.

5. "With a gross domestic product of over \$8 trillion, Europe is set to become the largest trading group in the world . . . EMU countries will comprise the world's largest trading bloc, doing 21 percent of the world's trading, compared with 18 percent for the United States." Becky Yerak, *Counting Down to the Euro: It May Be a New European Currency, But Its Havoc Will Reach into Cleveland*, The Plain Dealer, Oct. 26, 1997, at 1-H, 5-H (quoting Sawar Kashmeri, President of Niche Systems, a consulting firm that offers seminars to prepare U.S. businesses for the introduction of the Euro).

6. See Dorothy Livingston & Bill Hutchings, *Legal Issues Arising from the Introduction of the Euro*, 12 J. Int'l Banking L. 63, 63 (1997); Gordon Platt, *Euro Launch Could Keep Lawyers in Money for Years*, J. Com., June 23, 1997, at 1A, 5A ("One concern voiced on both sides of the Atlantic is continuity of contract. Most jurisdictions, such as the United States and Britain, have doctrines such as 'impossibility' and 'frustration of purpose,' which may be used to discharge performance under binding contracts due to unexpected or extraordinary events."); *infra* Part II.A (giving examples of affected transatlantic commercial contracts).

7. See Wendy Fowler, *Practical Arrangements for the Introduction of the Single Currency—the English Legal Issues*, 10 Butterworths J. Int'l Banking & Fin. L. 534, 537 (1995) (outlining the legal issues that arise when a contract expressing its payment obligation in a European currency is governed by the law of a state outside the European Union); Michael Gruson, *The Introduction of the Euro and Its Implications for*

The question facing these contracting parties is a simple one: Will U.S. courts enforce contracts in which the parties denominated the payment obligation in an obsolete European currency?⁸ This Note argues that U.S. courts should enforce these transatlantic commercial contracts after the introduction of the Euro.

Part I presents the various stages that constitute the process of achieving the European Monetary Union. This section also discusses the timeline and requirements for introducing the Euro. In addition, it surveys the expected benefits and likely consequences of a successful implementation of the Euro.

Part II gives examples of potentially affected transatlantic commercial contracts. This part then introduces the two domestic state statutes and the applicable European legislation that provide for continuity of contracts. Finally, this part discusses the grounds for arguing against continuity of contract based on current impracticability doctrines under the Uniform Commercial Code ("U.C.C."), the Convention on the International Sale of Goods ("CISG"), and the International Institute for the Unification of Private Law's Principles of International Commercial Contracts ("UNIDROIT Principles").

Part III argues in favor of continuity for the contracts at issue. First, it discusses the importance of stability for contracts in the international marketplace. It then argues that impracticability doctrines should not apply to disrupt contractual relations when a government decides to replace its currency. The value or cost of performance is not likely to change radically. In a case where the value does shift, the parties are likely to have allocated the risk, could have foreseen the introduction of the Euro and its reasonable consequences, or implicitly agreed to renegotiate the contract. Furthermore, in the case of an extreme change in the value or cost of performance due to the Euro, the courts should first compel renegotiation or reform the contract rather than discharge its obligations.

Obligations Denominated in Currencies Replaced by the Euro, 21 *Fordham Int'l L.J.* 65, 66 (1998) ("Some authors have expressed concern that long-term payment obligations, . . . denominated in the national currency of a Member State of the European Union ('EU') participating in the third stage of the Economic and Monetary Union ('EMU'), will no longer be enforceable in U.S. courts after the introduction of the Euro.").

8. Yeowart, *supra* note 2, at 39 (discussing what might happen if a contract is governed by the law of a state outside the EU). The analysis in this Note primarily covers commercial contracts for the sale of goods. It will not discuss financial services contracts or commercial paper.

I. THE MECHANISMS AND POLICIES BEHIND THE SINGLE CURRENCY

The Economic and Monetary Union ("EMU")⁹ was designed to progress in three stages. In the third stage, the EMU will phase in the Euro as the single European currency. After outlining the three stages, this part will describe the expected benefits and costs of the EMU and the introduction of the single European currency.

A. *Achieving the European Monetary Union*

The concept of a monetary union is a product of the larger effort to economically integrate the economies of the European states.¹⁰ The original Member States¹¹ came together after World War II and agreed by treaty¹² to form a community to prevent further savage conflicts.¹³ Through some expansions in membership¹⁴ and several treaty amendments,¹⁵ the European Union emerged in 1993, when the Member States ratified the Maastricht Treaty.¹⁶ "[T]he European Union as an organization . . . started out hoping to prevent war, and became an

9. See *infra* notes 33-37 and accompanying text. The monetary union centralizes the monetary policy of the participating Member States to maximize the benefit of a unified market. See *infra* notes 66, 83 and accompanying text.

10. For more background on the evolution of monetary policy cooperation in Europe, see Tommaso Padoa-Schioppa, *The Road to Monetary Union in Europe* (1994) and David Currie & John Whitley, *European Monetary Integration and Prospects for Monetary Union, in Trade Blocs? The Future of Regional Integration* 160 (Vincent Cable & David Henderson eds., 1994) [hereinafter *Trade Blocs*].

11. France, Germany, Italy, Belgium, Netherlands, and Luxembourg were the six original Member States in the early 1950s. See George A. Bermann et al., *Cases and Materials on European Community Law* 5 (1993).

12. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140, as amended, Treaty Establishing the European Community (EC Official Pub. Off. 1987); Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, as amended, *Treaties Establishing the European Communities* (EC Official Pub. Off. 1987); Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 167, as amended, *Treaties Establishing the European Communities* (EC Official Pub. Off. 1987).

13. Bermann, *supra* note 11, at 3-11 (discussing the postwar movement towards community and describing the first three treaties); Richard I. Fine & Francois Alland, *Current Political and Economic Developments in the European Union*, 18 *Whittier L. Rev.* 281, 282 (1997) ("Europe, having been laid waste by World War II, tried to prevent the savagery of the European Conflicts in the future. Thus, three types of organizations came forth: the European Coal and Steel Community . . . ; the European Economic Community . . . ; and finally the Euratom."). These three organizations merged into the European Union. *Id.*

14. Currently, the European Union has fifteen members. They are: Belgium, Germany, France, Italy, Luxembourg, The Netherlands, Denmark, Ireland, United Kingdom, Greece, Portugal, Spain, Austria, Finland, and Sweden. *Member States of the European Union* (visited Feb. 17, 1998) <http://ananse.irv.uit.no/trade_law/status/eu/eu_status.html> (giving the most current status of membership).

15. An example of an EC Treaty amendment is the Maastricht Treaty. Treaty of the European Union and Final Act, 1992 O.J. (C 224), 31 *I.L.M.* 247 [hereinafter *Maastricht Treaty*].

16. *Id.*

integrated union . . . somewhere along the line."¹⁷ A monetary union with a single currency will be the ultimate manifestation of the European Member States' economic integration.¹⁸

The concept of the EMU approaches the model of the American economy.¹⁹ Although the United States has fifty states, it has a single currency²⁰ and can boast considerable mobility of both people and capital across state lines.²¹ The main motivation of the EMU is the "general awareness over the decades of the perceived necessity of bringing European nations and economies far more closely together."²² Success in achieving such a monetary union would stimulate economic growth and employment as a result of a reduction in business costs and, therefore, lead to a rise in the standard of living for the citizens of the European Union.²³

The first plan for a monetary union in Europe, the Werner plan,²⁴ was conceived as early as 1970.²⁵ The Werner plan proposed the achievement of a monetary union with a single currency by 1980.²⁶ This plan failed when the collapse of the Bretton Woods system,²⁷ the

17. Fine & Alland, *supra* note 13, at 282.

18. David Currie, *The Pros and Cons of EMU 17-21* (1997); Padoa-Schioppa, *supra* note 10, at 65.

19. See *The State of the U.S. Economy: Hearing Before the Senate Budget Comm.*, 105th Cong. (Jan. 29, 1998), available in 1998 WL 32040, at *41 (statement of Alan Greenspan, Chairman of the Federal Reserve) [hereinafter *Greenspan Testimony*] (asserting that the EMU is modeled after the American economy). Mobility of people and capital refers to the ease with which people and their assets cross state borders within the United States.

20. Peter Gwin, *A Brief History of the Dollar*, *Eur. Mag.*, Sept. 1997, (Special Report) at 16.

21. *Greenspan Testimony*, *supra* note 19, at *41.

22. *Id.*

23. See *id.*; Fine & Alland, *supra* note 13, at 284 ("The EMU is the logical complement to the single market . . . as it brings greater visibility and predictability to markets and investment.").

24. The Werner plan, also known as the Werner Report, envisioned a monetary union for Europe with a single currency and its own institutions. Kenneth Dyson, *Elusive Union: The Process of Economic and Monetary Union in Europe 80-81* (1994) (citing Council-Commission of the European Communities, Report to the Council and the Commission on the Realization by Stages of Economic and Monetary Union in the Community — "Werner Report," Supplement to Bulletin 11-1970 (1970)).

25. Currie, *supra* note 18, at 19.

26. *Id.* at 19.

27. Dyson, *supra* note 24, at 40-46 (describing the rise and fall of the Bretton Woods system). The Bretton Woods system was an international fixed exchange-rate system which relied on the U.S. dollar as its anchor currency. *Id.* at 40-41.

oil crisis,²⁸ and rapid inflation²⁹ made unification of currencies impossible.³⁰

In 1979, the European Economic Community launched the European Monetary System ("EMS") to create intra-European exchange rate stability.³¹ After a decade of EMS operation, the system proved successful in stabilizing exchange rates.³² In 1987, the framers of the Single European Act decided to include the goal of a monetary union, now known as the EMU,³³ in the European Community Treaty.³⁴ They added a chapter entitled "Cooperation in Economic and Monetary Policy" to the Treaty.³⁵ The Delors Report of 1989 proposed concrete plans for another attempt at forming a monetary union.³⁶ In 1992, the Maastricht Treaty, also known as the Treaty on European Union, built upon the Delors plan's outline of three stages toward the achievement of EMU.³⁷

28. The international oil crisis was the result of an oil embargo, and its impact is discussed in more detail below. See *infra* Part III.C.2.

29. Dyson, *supra* note 24, at 89.

[T]he Werner report . . . [assumed] that global coordination of a fixed exchange rate system would continue to operate and to do so effectively. This assumption was soon revealed to be mistaken. Another assumption was that economic development would enable continuing progress towards convergence of economic performance, thus facilitating improved economic policy coordination and monetary integration. Again, the external shocks administered by the collapse of the Bretton Woods system and then the first oil crisis were to show the inadequacy of this assumption.

Id.

30. Currie, *supra* note 18, at 19-20; Dyson, *supra* note 24, at 82-83 (discussing declining political commitment to the Werner plan and exchange rate problems in 1972 and 1973).

31. Currie, *supra* note 18, at 19-20; see *infra* notes 42-46 and accompanying text. Exchange-rate stability means that the relative values of the Member States' currencies vary only minimally from day to day. For a detailed discussion of the lessons about institutional problems of the EMS, see Padoa-Schioppa, *supra* note 10, at 68-85.

32. Currie, *supra* note 18, at 20.

33. See Bermann, *supra* note 11, at 16-17, 1193-1204; Lionel Barber, *Setting the Stage for the Single Currency*, Eur. Mag., Sept. 1997, (Special Report) at 3.

34. EC Treaty, *supra* note 4. The EC Treaty is the treaty that sets forth the new legal order and the framework of the European Community. It binds all of the Member States to the treaty and the institutions created by the treaty. One author described the result of the EC Treaty as "a union of fifteen members active in economic, political, social, and cultural spheres." Jonathan A.C. Wise, Note, *Variable Geometry and the European Central Bank: How the ECB Can Assert Itself Against Attacks From Member States With Derogations*, 20 B.C. Int'l & Comp. L. Rev. 407, 407 (1997).

35. EC Treaty, *supra* note 4, tit. VI, chs. 1-4.

36. Jacques Delors was then President of the European Commission. The report was published in April of 1989. Padoa-Schioppa, *supra* note 10, at 246. Padoa-Schioppa offers a detailed discussion of this report and a comparison with the previous Werner report. *Id.*, at 137-49.

37. Maastricht Treaty, *supra* note 15; see also Joshua M. Wepman, Note, *Article 104(c) of the Maastricht Treaty and European Monetary Union: Does Ireland Hold the Key to Success?*, 19 B.C. Int'l & Comp. L. Rev. 247, 249-52 (1996) (examining the three steps towards convergence outlined in the Maastricht Treaty); Wise, *supra* note 34, at 409-411 (same).

1. Stage One: Preparing for Financial Integration

From 1989 to 1993, Stage One³⁸ of the process toward the EMU focused on eliminating the obstacles to economic integration and cooperation.³⁹ The Member States dismantled restrictions on capital movements across borders, which consisted mostly of currency controls,⁴⁰ thereby coming closer to attaining free movement of capital.⁴¹ Additionally, all Member States adhered to the EMS⁴² and increased the level of monetary policy coordination.⁴³ The main feature of the EMS is an exchange rate mechanism that establishes a fixed band within which each Member State's currency may fluctuate 2.25% higher or lower than a central rate.⁴⁴ The exchange rate mechanism aims to maintain exchange rate stability for the European Member

38. Christos Hadjiemmanuil, *European Monetary Union, The European System of Central Banks, and Banking Supervision: A Neglected Aspect of the Maastricht Treaty*, 5 Tul. J. Int'l & Comp. L. 105, 107 (1997) (explaining that "[t]he first stage of the process of monetary unification began prior to the Maastricht Treaty, on July 1, 1989, and comprised increased coordination of the monetary and economic policies of Member States").

39. Currie, *supra* note 18, at 26-27.

40. See Council Directive 88/361 to Implement Article 67, 1988 O.J. (L 178) 5 (directing the Member States to abolish all restrictions on capital movement by July 1, 1990, with some exceptions); Bermann, *supra* note 11, at 615-23, 1201. The removal of controls on capital movement allows "access to efficient financial services within the context of an integrated financial market; . . . [is] a part of the effort to achieve monetary stability, . . . [and] promote[s] the optimum allocation of European savings." *Id.* at 615 (internal quotation and citations omitted).

41. Benn Steil, *Competition, Integration and Regulation in EC Capital Markets, in Trade Blocs, supra* note 10, at 127 (examining the European capital markets and their regulatory structure). "[A] tremendous increase in inter-market competition has accompanied major national deregulatory initiatives [and] the removal of capital controls . . ." *Id.* at 127. Furthermore, Mr. Steil asserts that "major political initiatives such as the establishment of a single European currency would undoubtedly provide an enormous spur to European capital market integration . . ." *Id.* at 128.

Freedom of capital is among the four freedoms preeminent in the EC Treaty. The others are free movement of goods, persons, and services. Bermann, *supra* note 11, at 315.

Free movement of capital is a vital accessory to the other three basic freedoms. Free movement of goods is impeded if payment for the goods is restricted. Free movement of workers is limited if workers cannot bring funds from the home State or if their income and savings cannot be freely transferred back to the home State. The right of establishment for commercial and financial enterprises and the right to provide cross-border services are substantially frustrated by significant restrictions on capital movements. An integrated financial market is impossible without free movement of capital.

Id. at 606.

42. The EMS was created in 1979. David P. Valenti, Note, *Currency Unification on the European Economic Communities: The Mechanics, Politics, and Probability for Success*, 28 Int'l Law. 1039 (1994). "The EEC did not design the EMS to be an end in itself, but adopted the EMS as a step on the road toward accomplishment of complete monetary union." *Id.* at 1046 (footnote omitted).

43. See *id.* at 1046.

44. See Currie, *supra* note 18, at 21.

States.⁴⁵ The EMS also provides a forum for economic policy cooperation through meetings of a committee comprised of European central bank governors.⁴⁶

Thus, Stage One set the tone for the rest of the integration process. Already, the Member States had eliminated structural obstacles to the free movement of capital to ensure a prosperous single market. Moreover, they had started to coordinate their economic policies and currencies through the EMS.

Between 1992 and 1993, currency speculation pressures and economic circumstances forced the United Kingdom and Italy to withdraw from the EMS.⁴⁷ The EMS did recover, but had to expand the permissible fluctuation band from 2.25% to 15% in 1993, which no longer ensured the previously achieved level of stability.⁴⁸ Although the EMS crisis of the early 1990s was a setback, it did not doom the EMU.⁴⁹ The structure of the EMU would not allow foreign exchange speculation to upset the monetary union as it had in the EMS.⁵⁰ Therefore, the movement toward a monetary union continued.

2. Stage Two: The Path to Economic Convergence

Stage Two focuses on monetary convergence, the process by which "the [fifteen] Member States of the European Union are supposed to move progressively toward the economic virtue required for membership in the EMU."⁵¹ It commenced on January 1, 1994, as specified by Article 109e of the EC Treaty.⁵² The European Monetary Institute ("EMI")⁵³ began operating at the beginning of this stage.⁵⁴ The EMI

45. *See id.*

46. *See id.* at 26.

47. *See Barber, supra* note 33, at 5.

48. *See id.*

49. Currie, *supra* note 18, at 26.

50. *Id.*

[A] monetary union requires the pooling of monetary sovereignty, not monetary cooperation, the limits of which were the root problem of the EMS. Given pooled monetary policy [and a single currency] the EMU could not be subject to foreign exchange speculation of the kind that brought down the EMS, any more than could the sterling value of the Scottish pound.

Id.

51. *See Wepman, supra* note 37, at 251 n.33 (citing Lionel Barber, *Not a Bible, But a Primer for Single Currency*, *Fin. Times*, May 31, 1995, at 2).

52. EC Treaty, *supra* note 4, art. 109e ("The second stage for achieving economic and monetary union shall begin on 1 January 1994.").

53. Hadjiemmanuil, *supra* note 38, at 107 ("[The] most important feature [of the second stage] was the establishment in Frankfurt of a transitional monetary institution, the European Monetary Institution (EMI), the predecessor to a permanent institution, the European Central Bank . . .").

54. EC Treaty, *supra* note 4, art. 109f ("At the start of the second stage, a European Monetary Institute . . . shall be established and take up its duties . . .").

The Treaty provides that:

The EMI shall:

-strengthen co-operation between the national central banks;

replaces the committee of the central bank governors as the formal cooperation mechanism for EU monetary policy.⁵⁵ The EMI is also responsible for the general oversight of the preparations made for the EMU.⁵⁶

Stage Two requires Member States to meet certain requirements concerning the size of government deficits, interest rates, and price and currency stability.⁵⁷ The criteria are vital to attaining a "sustainable financial position" to progress to Stage Three.⁵⁸ These criteria were designed to create a credible, solid economic foundation for the

- strengthen the co-ordination of the monetary policies of the member-States, with the aim of ensuring price stability;
- monitor the functioning of the European Monetary System;
- hold consultations concerning issues falling within the competence of the national central banks and affecting the stability of financial institutions and markets;
- take over the tasks of the European Monetary Co-operation Fund . . . ;
- facilitate the use of the ECU and oversee its development, including the smooth functioning of the ECU clearing system.

Id. art. 109f(2).

55. *See* Currie, *supra* note 18, at 26-27.

56. EC Treaty, *supra* note 4, art. 109f(3):

For the preparation of the third stage, the EMI shall:

- prepare the instruments and the procedures necessary for carrying out a single monetary policy in the third stage;
- promote the harmonisation [sic], where necessary, of the rules and practices governing the collection, compilation and distribution of statistics in the areas within its field of competence;
- prepare the rules for operations to be undertaken by the national central banks within the framework of the ESCB [European System of Central Banks];
- promote the efficiency of cross-border payments;
- supervise the technical preparation of ECU bank notes.

Id.

57. *Id.* arts. 104c (requiring budgetary discipline), 109j (setting forth the four criteria for the achievement of economic and monetary union); Wepman, *supra* note 37, at 251.

- [1.] Each Member State's annual inflation and long-term interest rates must be no more than 1.5 percent to two percent higher than the three best performing Member States;
- [2.] Each Member State's fiscal deficit must be no more than three percent of its gross domestic product (GDP);
- [3.] Each Member State's debt-to-income ratio must not exceed sixty percent of its annual budget; and
- [4.] Each Member State must not have devalued its currency under the Exchange Rate Mechanism within the intervening two years.

Id. The convergence criteria bring the various Member State economies closer and prepare them for the full integration of their respective economies. *See id.* (summarizing the Treaty of the European Union and Final Act, 7 Feb. 1992, Protocol on the Excessive Deficit Procedure, Protocol on the Convergence Criteria referred to in Article 109j of the Treaty Establishing the European Community *reprinted in* Padoa-Schioppa, *supra* note 10, at 270-72).

58. *See* Wepman, *supra* note 37, at 252.

Euro, so that it would not be easily buffeted by inflation.⁵⁹ The value of this new currency would decline quickly if the Member States do not comply fully with these criteria.⁶⁰ Furthermore, after the introduction of the Euro, the Member States will not be able to execute independent monetary policy,⁶¹ so it is in their interest to enter into the EMU with healthy economies.⁶² Yves-Thibault de Silguy, the European Commissioner with special responsibility for economic, monetary, and financial affairs, has recently asserted that the Member States have rapidly progressed towards economic convergence.⁶³ He concluded that the majority of the Member States should be ready to participate in Stage Three on schedule.⁶⁴

3. Stage Three: Centralization and the Euro

For eligible Member States, Stage Three will begin on January 1, 1999.⁶⁵ The main thrust of this stage will be the centralization of all economic and monetary power in the European Council and the European Central Bank ("ECB").⁶⁶ At this time, the Council will irrevocably

59. Association for the Monetary Union of Europe, *EURO—Europe United Through A Single Currency* (visited Jan. 26, 1998) <http://amue.lf.net/q_a/qa_engl.htm> [hereinafter *Europe United*].

60. See *infra* note 153 and accompanying text.

61. Currie, *supra* note 18, at 40-41.

62. *Id.*

63. Yves-Thibault de Silguy, *Yves-Thibault de Silguy – A. Rapid Progress Has Been Made Towards Economic Convergence* (visited Jan. 26, 1998) <<http://europa.eu.int/euro/en/silguy5/silguy502.asp?nav=en>>.

Almost all the European Union countries already meet the criterion [for inflation] laid down by the Treaty Government deficits have been substantially reduced in all Member States The other two criteria — namely interest rates and exchange-rate stability — pose no particular problem Economic convergence is no longer a wish; it has become a reality A majority of Member States should therefore be able to meet the conditions laid down by the Treaty for participation in the euro when the Commission and the EMI present their convergence reports next March.

Id.

64. See *id.* Mr. Ravasio, Director General for Economic and Financial Affairs of the European Commission, testified to the United States Senate Budget Committee to the same effect and asserted that the financial markets reflect the same. *Europe's Monetary Union and its Potential Impact on the United States Economy: Meeting Before the Senate Budget Comm.*, S. Prt. 105-38, at 21, 24 (Com. Print 1997), available in 1997 WL 654395, at *5-7 (F.D.C.H.) (statement by Giovanni Ravasio) [hereinafter *Ravasio Testimony*].

65. EC Treaty, *supra* note 4, art. 109j(3)-(4) (setting forth the procedures for entering into the third stage).

66. Hadjiemmanuil, *supra* note 38, at 120-29 (giving arguments for the centralization of supervisory powers in the Monetary Union); see EC Treaty, *supra* note 4, arts. 105-09 (comprising the chapter on monetary policy); Wise, *supra* note 34, at 410 ("The third stage . . . will be marked by the transferral [sic] of all economic and monetary policy to EU institutions [T]he EU Council will be given power to decide economic questions and impose constraints on national budgets. The ECB also will decide all monetary issues").

cably fix the exchange rates of the old currencies against the Euro,⁶⁷ and financial institutions will use the Euro instead of the participating Member States' currencies.⁶⁸ Additionally, the future ECB⁶⁹ will take over the functions of the EMI⁷⁰ and the eligible Member States will phase in the Euro.⁷¹

There are four significant dates for the process of implementing the Euro.⁷² On July 1, 1998, the Council of Ministers⁷³ will select eligible Member States—on the basis of the financial situation of each Member State—to progress into the third stage of the EMU.⁷⁴ On January 1, 1999, the conversion rates between the eligible currencies and the Euro will be irrevocably fixed.⁷⁵ At this time, the banking and finance industry will begin using the Euro as a substitute for the eligible currencies.⁷⁶ January 1, 2002 will mark the beginning of a six-month period during which Euro-coins and Euro-notes will be in concurrent

67. EC Treaty, *supra* note 4, art. 109l(4). A unanimous vote of the European Council will fix the irrevocable conversion rates for the qualified currencies. *Id.* The fixed conversion rates will establish how many Euros an obligation denominated in an obsolete national European currency is worth. *Id.*

There is a risk of false exchange rates if the Council allows speculation to distort the market value of qualified currencies. Currie, *supra* note 18, at 34-35; Wolfgang Münchau, *Foreign Exchange: Risks Aplenty When Converting 15 Into 1*, *Fin. Times*, Nov. 21, 1997, (EMU Survey) at 4 (describing exchange rate conversion as one of the most risky aspects of the EMU and reporting that EU finance ministers decided on a pre-announcement strategy to combat risks); *Europe United*, *supra* note 59. This danger can be averted, however, by using a rate close to the market rate or using the average rate of a certain time period. *Id.*

68. Currie, *supra* note 18, at 28-29.

69. The European Central Bank's primary function will be to guarantee monetary stability and combat inflation throughout Europe. See Bruce Barnard, *European Central Bank to Play Leading Role*, *Eur. Mag.*, Sept. 1997, (Special Report) at 6 (discussing the characteristics and role of the future European Central Bank); Hadjiemmanuil, *supra* note 38, at 133-38 (same); Wise, *supra* note 34, at 413-21 (same). The European Central Bank was modeled after Germany's Central Bank to inspire market confidence. See *The Interview - José María Gil-Robles: What Will be the Main Advantages of the Euro?* (visited Jan. 26, 1998) <<http://europa.eu.int/euro/en/stabilite/stab02.asp?nav=en>> [hereinafter *Main Advantages of the Euro*].

70. EC Treaty, *supra* note 4, art. 109l(1)-(2) (providing for the establishment of the ESCB and the ECB, as well as for the liquidation of the EMI).

71. Currie, *supra* note 18, at 28-29.

72. The Madrid Council decided on these dates in December 1995. Wulf H. Döser, *EMU/Single Currency: What Does It Mean for Business*, 11 *J. Int'l Banking L.* 503, 503-04 (1996).

73. The Council of Ministers is a European Union Institution composed of one minister (cabinet member) from each Member State who has the authority to commit his or her national government. EC Treaty, *supra* note 4, art. 146. The Council shares in the legislative and budgetary process. *Id.* art. 145. It has the final say in passing legislation and ensures coordination of the general economic and monetary policy of the Member States. *Id.*

74. See *id.* art. 109j(4).

75. See *id.* art. 109g.

76. *Calendar*, *supra* note 4, at 1.

circulation with national currencies.⁷⁷ The Euro will replace the national currencies by July 1, 2002.⁷⁸

Although only eligible Member States will enter Stage Three in 1999,⁷⁹ other Member States will still be able to join at a later date once they qualify.⁸⁰ The EC Treaty specifies the process through which Member States may qualify for the single currency and monetary union at a later date.⁸¹

In conclusion, the Member States must all meet the same economic requirements to enter the third and final stage of EMU. During the third stage, Member States will phase in the single currency. The following section will survey the benefits, costs, and risks of the single European currency and EMU.

B. *Repercussions of the EMU and a Single Currency*

Commentators have identified many different types of benefits and consequences that may result from the monetary union and the introduction of the Euro.⁸² Many have justified their enthusiasm by citing various types of economic benefits such as decreased transaction costs and increased competition.⁸³ Others have expressed concerns about short-term transition costs and the lack of fiscal policy freedom for the

77. *Id.*

78. See EC Treaty, *supra* note 4, arts. 14, 105a.

79. See *id.* art. 109j(4). For a discussion of the eligibility criteria, see Bruce Bernard, *Countdown to the Euro*, Eur. Mag., Sept. 1997, (Special Report) at 8.

80. See EC Treaty, *supra* note 4, art. 109k(2). The criteria for qualification will remain the same:

At least once every two years, or at the request of a Member-State [wanting to join the EMU] . . . , the Commission and the ECB shall report to the Council in accordance with the procedure laid down in Article 109j(1). After consulting the European Parliament and after discussion in the Council, meeting in the composition of the Heads of State or of Government, the Council shall, acting by a qualified majority on a proposal from the Commission, decide which Member-States . . . fulfil [sic] the necessary conditions on the basis of the criteria set out in Article 109j(1).

Id.

81. See *id.*

82. For a thorough and detailed discussion of the impact of the Euro, the Association for the Monetary Union of Europe has published an informational brochure, entitled *EURO—Europe United Through a Single Currency*. It is available on the Internet at <http://amue.lf.net/q_a/qa_engl.htm> (visited Jan. 26, 1998). For another insightful article on the subject, see Wolfgang Münchau, *Life Will not be the Same Under EMU*, Fin. Times, Nov. 21, 1997, at 1.

83. See Robert P. Inman & Daniel L. Rubinfeld, *The EMU and Fiscal Policy in the New European Community: An Issue for Economic Federalism*, 14 Int'l Rev. L. & Econ. 147, 148-49 (1994) (arguing that the benefits will be fourfold: lower transaction costs, greater overall price stability, further market integration, and increased capital formation); Niels Thygesen, *Why is Economic and Monetary Union an Important Objective for Europe?*, 14 Int'l Rev. L. & Econ. 133, 134-35 (1994) (stating that in the 1990s the Europeans have come to perceive that the benefits of a single currency outweigh its costs, with many benefits being microeconomic in nature).

individual Member States.⁸⁴ On the whole, however, the expected advantages outweigh the concomitant risks and inconveniences.⁸⁵

One of the most immediate benefits of a single currency will be a decrease in transaction costs.⁸⁶ With a single currency, costs associated with exchanging currency, such as currency exchange commissions⁸⁷ and currency fluctuation risks,⁸⁸ will disappear.⁸⁹ Thus, not only will transactions between Member States be simplified, they will be cheaper.⁹⁰ As transactions become more efficient, businesses may

84. See *infra* text accompanying notes 119 and 131; Paul Krugman, *Second Thoughts on the EMU, in Japan, Europe, and International Financial Markets: Analytical and Empirical Perspectives* 34 (Ryuzo Sato et al. eds., 1994) (arguing that the economic benefits of the EMU will not be significant enough to warrant enthusiasm); Valenti, *supra* note 42, at 1061 (stating that “[w]hile currency unification may potentially have many benefits, ‘[t]here is no categorical or unconditional reason to conclude that a monetary union is preferable to a flexible exchange regime’” (footnote omitted)).

[M]ovement toward a single currency limits the fiscal policy options of the EEC [sic] Member States and essentially handcuffs them in their attempts to react to supply and demand shocks in their own economies. Currency unification will also result in the loss to the EMS Member States of an important policy instrument, namely the ability to control national currency in order to exert influence over the national economy Losing control over monetary policy can have harsh effects on a country's economy.

Id. at 1062 (footnotes omitted).

85. See *Europe United, supra* note 59 (“[T]he expected advantages clearly outweigh the inconveniences EMU involves. Otherwise, the creation of the EMU would not have gained the far reaching support of politicians as well as economic and financial decision makers.”).

86. Currie, *supra* note 18, at 55.

87. These are commissions paid by the exchanger to institutions who exchange currencies for their customers. See Valenti, *supra* note 42, at 1049 (“[A] tourist could traverse the entire region of the EEC [sic], passing through country after country, without ever having to exchange currency.”).

88. A currency fluctuation risk arises when someone must exchange his or her domestic currency at a future date for a fixed amount of foreign currency (e.g., to pay a debt). Currie, *supra* note 18, at 55-56. Where the value of the foreign currency increases, more domestic currency must be exchanged to obtain the fixed amount of foreign currency, thereby increasing the cost of exchanging the currency. See Valenti, *supra* note 42, at 1049 (“[B]ankers could lend and borrow throughout the region with concern only for credit risk and not exchange-rate risk.” (footnote omitted)).

89. Currie, *supra* note 18, at 55-57.

90. See Döser, *supra* note 72, at 506 (explaining that “[f]irst and foremost, there will be no issue of ‘permitted’ contract currencies or the mandatory use of national currencies, as is presently the case in Germany with respect to domestic transactions. Numerous statistical and even exchange control requirements will disappear, representing a substantial savings in manpower”); *Main Advantages of the Euro, supra* note 69 (“[T]he costs of foreign exchange and currency risk hedging will instantaneously disappear. Such costs are far from negligible.”).

transact more profitably.⁹¹ This will lead to an eventual reduction in prices and a proportional increase in consumer purchasing power.⁹²

European trade unions support the EMU and the single currency because of its projected impact on employment.⁹³ After conducting economic research, the trade unions have concluded that a timely implementation of the third stage of the EMU "can only have a positive effect on employment in the long term."⁹⁴ They attribute the long-term benefits, such as the reduction of unemployment, to the dynamics of an economic and monetary union and the convergence of the Member States' economies.⁹⁵

The Euro and the EMU will likely increase competition among the businesses of the Member States,⁹⁶ provide price stability,⁹⁷ and stimulate economic growth.⁹⁸ José María Gil-Robles, President of the European Parliament,⁹⁹ confirmed that the Euro will maximize the benefits of the single market for EU citizens by increasing overall competition among the participating Member States because the prices of goods and services in different countries will, for the first time, be more easily compared.¹⁰⁰ This is especially important in the

91. See Yves-Thibault de Silguy, *Yves-Thibault de Silguy - 2. The Euro will Provide a Permanent Basis for a Culture of Stability in Europe* (visited Jan. 26, 1998) <<http://europa.eu.int/euro/en/silguy7/sil704.asp?nav=en>> [hereinafter *Culture of Stability*] (predicting that "the euro will cut business costs, simplify business management and facilitate exports").

92. See *Europe United*, *supra* note 59 ("The elimination of . . . costs [linked to the multiplicity of currencies] will help reduce prices and raise the purchasing power of the consumer proportionately The market becomes more transparent [with a single currency] Due to increased competition, this also means lower prices." (emphasis omitted)).

93. Peter Coldrick, *European Trade Unions Say "Yes" to the Euro* (visited Jan. 26, 1998) <<http://europa.eu.int/euro/en/coldrick/coldrick.asp>>. Mr. Coldrick is an economist at the European Trade Union Confederation. *Id.*

94. *Id.* Job creation will increase as the EMU encourages economic growth. *Id.*

95. "It is not the single currency -- the euro -- which is going to resolve the problems of European economic deficits or unemployment but the economic and monetary union dynamics which underpin it, and the broad movement towards the convergence of national economies, stability and growth." *Id.*

96. See *Europe United*, *supra* note 59.

97. See *Culture of Stability*, *supra* note 91.

98. See *Main Advantages of the Euro*, *supra* note 69.

99. The European Parliament is the democratic institution of the European Union. See Bermann, *supra* note 11, at 63-68.

100. See *Main Advantages of the Euro*, *supra* note 69; Yves-Thibault de Silguy, *Yves-Thibault de Silguy - 1. More Efficiency on the Single Market* (visited Jan. 26, 1998) <<http://europa.eu.int/euro/en/silguy7/sil703.asp?nav=en>>.

Free competition is essential for the smooth operation of the large internal market. Yet obstacles to competition arise where consumers have difficulties in comparing prices.

The Euro will make it quick and easy to compare prices. This will step up competition With more transparent competition, it will be easier for businesses to maximise [sic] the benefits resulting from their efforts to increase competitiveness and thereby to increase their share of the market.

Id.

market for durable goods, such as automobiles or machinery.¹⁰¹ Currently, prices stated in currencies unfamiliar to potential buyers mask a price differential.¹⁰² The new price transparency will make the market more efficient by eliminating geographic price differentials through competition.¹⁰³

Furthermore, enthusiasts have touted the Euro's ability to increase the stability of the international monetary system.¹⁰⁴ The Euro will flow into international reserve holdings¹⁰⁵ gradually as it gains credibility.¹⁰⁶ As more central banks hold the Euro instead of the Deutsche Mark ("DM") as a reserve currency, the Euro will play a role similar to that of the U.S. dollar.¹⁰⁷ The Euro may help to balance the international monetary system.¹⁰⁸ Indeed, Alan Greenspan, Chairman of the U.S. Federal Reserve, recently explained to the Sen-

101. *Id.*

102. *Id.* Consumers have difficulty comparing prices if they are quoted in two different currencies. See Valenti, *supra* note 42, at 1049 ("[After currency unification,] consumers could directly compare prices for goods in two separate countries.").

103. This will also affect American-based multinationals doing business in Europe. One article describes the effect of the new transparency:

[EMU] has major competitive issues Suddenly, for the first time, [European] customers are going to be able to see at what prices [the multinationals] are selling [their] product in every country in Europe. They've always been able to do that, but they've been looking at different currencies and probably different discount structures. Now, for the first time, they'll be able to shop around in a common currency and therefore, by doing much less work, be able to see whether they should buy a particular part in the U.K. rather than Germany. That will drive the customer toward the source where [the multinationals] are probably making the least profit.

Yerak, *supra* note 5, at 1H (quoting Mark J.D. Jarrad, International Vice-President for Finance and Administration for Parker Hannifin Corp.).

104. See Robert J. Guttman, *An Interview with Yves-Thibault de Silguy*, Eur. Mag., Sept. 1997, (Special Report) at 9; *International Impact of the Euro – An Increasingly International Euro* (visited Jan. 26, 1998) <<http://europa.eu.int/euro/en/impact/impact03.asp?nav=en>> [hereinafter *International Impact of the Euro*].

105. See Lawrence S. Ritter et al., *Principles of Money, Banking, and Financial Markets* 174 (9th ed. 1997) (explaining the function of international reserves). "In general, countries use their international reserves . . . to bridge temporary gaps between the receipt and expenditure of funds, to tide them over periods when inflows of funds are slack, and to meet unexpected or emergency needs." *Id.*

106. See *International Impact of the Euro*, *supra* note 104.

107. See *Europe United*, *supra* note 59; *International Impact of the Euro*, *supra* note 104 (noting percentage of holdings relative to the dollar will increase).

In recent years volatility between the major anchor currencies (Dollar – DM – Yen) has escalated, causing problems not only for the European Market. One of the reasons for this instability is the fact that the D-Mark [sic] has gained importance as an international anchor currency. Yet the economic weight of the DM is insufficient to support currency shifts on the financial markets. The Euro currency area, with an economic weight which equals the dollar would correspond to the importance of the euro in world trade.

Europe United, *supra* note 59.

108. See *International Impact of the Euro*, *supra* note 104; *Europe United*, *supra* note 59 ("A deeper and [more] unified financial market would help stabilise [sic] exchange rates between the main international currencies, which is also an advantage for the United States and Japan.").

ate Budget Committee that "it is conceivable that the Euro will rise as a significant currency in the world, and that's good, not bad [T]o have numbers of strong major currencies in the world [is to have] very important anchors to international prosperity."¹⁰⁹

The introduction of the Euro also represents a step toward Europe becoming a more effective political actor in the international realm.¹¹⁰ Increased economic integration requires Member States to work together in the long term.¹¹¹ Through the process of increased economic convergence, Member States will learn how to cooperate even more closely.¹¹² This has the potential of creating consensus in other important policy areas.¹¹³ As a result, Member States will be able to make decisions and take actions more effectively in the international arena.¹¹⁴

As the above quote from the Chairman of the U.S. Federal Reserve indicates, the United States has responded favorably to the prospect of the European Union's single currency.¹¹⁵ As long as the EMU and the single currency strengthen the European economy, the United States will also benefit.¹¹⁶ Europe is an important trading partner and the United States economy would profit from an increased European demand for United States exports, which would result from European

In the initial transitional period, however, one commentator did identify a risk of exchange rate instability. Currie, *supra* note 18, at 52-53 (explaining two scenarios which may induce international currency instability temporarily: (1) a dollar overhang caused by countries adjusting their international reserve portfolios; and (2) bad monetary policy decisions by an inexperienced and politically independent ECB).

109. *Greenspan Testimony*, *supra* note 19, at *41.

110. *See Europe United*, *supra* note 59.

111. *Id.*

112. *Id.*

113. *Id.*

114. *See id.*

115. *See* Martin Walker, *The Euro: The View from America*, *Eur. Mag.*, Sept. 1997, (Special Report) at 13-14 (reporting President Clinton's "relaxed and supportive approach" towards the EMU and the Euro); *Europe's Monetary Union and its Potential Impact on the United States Economy: Meeting Before the Senate Budget Comm.*, S. Prt. 105-38, at 6-9 (Com. Print 1997) (statement by Lawrence H. Summers), available in 1997 WL 14153282, at *8 [hereinafter *Summers Testimony*]. This testimony can also be obtained on the Internet. *See* Larry Summers, *U.S. Attitude Towards EMU* (visited Jan. 26, 1998) <http://amue.lf.net/news/newslet.27/nl27_9.htm>.

116. *See Summers Testimony*, *supra* note 115, at 13 ("[I]f EMU works for Europe, it will work for the United States. The more the single currency helps Europe develop a robust and healthy economy that is open to world markets, the more welcome the project will be.").

economic growth and increased employment.¹¹⁷ Furthermore, United States consumers benefit from competitive European imports.¹¹⁸

Although both Member States and other countries will likely benefit from the Euro, there are also costs and risks that should be recognized. First and foremost are the costs of the EMU. European trade unions are concerned that the restructuring necessary to accommodate the single currency will have short-term repercussions for employment in some sectors.¹¹⁹ For governments, the restructuring costs include the cost of producing the Euro-notes and coins, which will cost over 0.25% of the combined gross domestic product ("GDP") of the Member States in the first year.¹²⁰ This is equal to the projected savings in transaction costs.¹²¹ The currency production costs, however, will decline in the following years, whereas the savings in transaction costs will continue on a long-term basis.¹²² Other governmental restructuring costs include national government-sponsored information campaigns¹²³ and changes in accounting systems.¹²⁴ The costs of adjusting to the Euro for businesses and banks include changing accounting systems,¹²⁵ software,¹²⁶ stock control,¹²⁷ price labeling,¹²⁸

117. This idea was expressed by the Chairman of the Federal Reserve in his testimony to the Senate in January 1998. "As far as [the United States is] concerned, to the extent that [the European Union is] successful [with the EMU], it's helpful to [the United States]. To the extent that Europe grows faster, becomes a more effective economy, they become an important trading partner of the United States." *Greenspan Testimony*, *supra* note 19, at *41.

118. *Summers Testimony*, *supra* note 115, at 10.

119. *See* Coldrick, *supra* note 93.

120. *See* *Europe United*, *supra* note 59.

121. *Id.*

122. *See id.*

123. Coldrick, *supra* note 93. "It is the task of politicians to keep the general public better informed The general public must be persuaded that EMU will represent a zone of stability, growth and employment. The euro is also, perhaps above all, a matter of confidence." *Id.*

124. *See* *Europe United*, *supra* note 59.

125. *Id.*

126. *See* *Money Changers: Firms Adjust to New Euro Currency*, Crain's N.Y. Bus., Mar. 2, 1998, at 37 (noting that "[t]o accommodate the new monetary unit, virtually every firm doing business in Europe will have to make systems changes, the complexity of which could dwarf even those for the year 2000"); Yerak, *supra* note 5, at 1H ("The launch of the common currency - the euro - by the European Monetary Union (EMU) could begin on Jan. 1, 1999. And it could make the much-dreaded computer upgrades for the year 2000 look like child's play, some say. 'This is potentially much bigger, and it will happen much earlier than the 2000 time bomb.'" (quoting Mark J.D. Jarrad, International Vice-President for Finance and Administration for Parker Hannifin Corp.); Ben Pring, *EMU Compliance Dwarfs Importance of the Year 2000 Problem* (visited Feb. 16, 1998) <<http://advisor.gartner.com/inbox/articles/article-2-3a.html>> ("The cost of EMU compliance is predicted to be three times that of adapting systems for the year 2000 transition.").

127. *See* *Europe United*, *supra* note 59.

128. *Id.*

and the currency distribution system.¹²⁹ Additionally, some jobs in the banking sector will be eliminated.¹³⁰

Second are the problems associated with the delegation of sovereignty in the monetary and fiscal policy fields. The individual Member States will no longer be able to employ independent monetary policy in response to economic problems.¹³¹ Furthermore, the stability pact greatly diminishes the available flexibility of the fiscal policy changes a Member State may make.¹³² Government borrowing, often utilized in times of economic recession, is restricted by the stability pact to three percent of the Member States' GDP.¹³³ Member States are subject to penalties if they run higher deficits.¹³⁴ Consequently, Member States will have to cut government spending and/or increase taxes to stay within the defined deficit limits during a recession,¹³⁵ which may exacerbate unemployment and economic stability.¹³⁶ Therefore, the EMU makes structural reforms in Europe even more necessary.¹³⁷

II. POTENTIAL IMPACT OF AND DISCONTENTMENT WITH THE EURO

The introduction of the Euro potentially affects all transatlantic supply contracts that have payment terms denominated in a European currency,¹³⁸ which will be replaced by the Euro,¹³⁹ and do not provide

129. *Id.*

130. *Id.*

131. *Id.*

132. See Currie, *supra* note 18, at 51 (reporting that "the stability pact sets out fines for deficits in excess of 3% of GDP, unless corrective action is put in place to bring the deficit back down below 3%").

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Summers Testimony, supra* note 115, at 7. Structural reforms include reforming national tax and income transfer systems, as well as regulations and legislation concerning entitlements. See Currie, *supra* note 18, at 86.

In order to reap the full benefits of monetary union, and thus spread growth rather than stagnation abroad, the European Union must further liberalize its economy. The labor market in particular must be liberalized in order to instill greater wage flexibility and worker mobility, thereby reducing the overall rate of unemployment. Deregulation, privatization and fiscal reform would also add flexibility to the economy. Without progress on this front, European growth would be sluggish and unemployment would remain high.

Europe's Monetary Union and its Potential Impact on the United States Economy: Meeting Before the Senate Budget Comm., S. Prt. 105-38, at 36 (Com. Print 1997), available in 1997 WL 654402, at *5-6 (F.D.H.C.) (statement by C. Randall Henning, American University & Institute for International Economics).

138. The magnitude of this problem is unknown because actual contract terms are not public, as such information would compromise the future bargaining positions of the contracting parties. Most likely, the party with the most bargaining power will try to avoid carrying the currency risk. Telephone Interview with David W. Detjen, Esq., Partner at Walter, Conston, Alexander & Green, P.C., New York, N.Y. (Feb. 20, 1998) [hereinafter Detjen Telephone Interview]. Bargaining power is usually a func-

for a currency alteration.¹⁴⁰ Long-term contracts in particular will be affected because they may not have anticipated a currency alteration.

This part discusses examples of contracts that may be affected by the introduction of the Euro. Then, this part presents two hypothetical situations in which parties could use the fixed exchange rate of the obsolete currency to the Euro to assert that changed circumstances justify an excuse of contractual obligations. A survey of legislative acts that have responded to the introduction of the Euro then follows. Finally, this part discusses potentially available doctrines of excuse that could apply.

A. *Affected Transatlantic Commercial Contracts*

A survey of corporate contracting practices indicates that most companies have used long-term contracts in the course of business at least once.¹⁴¹ As more and more companies have entered the international realm in their business transactions,¹⁴² the use of long-term contracts with European suppliers or buyers has become more likely.

The issue of continuity of contracts could arise in a contract where, for example, a U.S. company agrees with a French firm to provide

tion of the party's size and purchasing power. *Id.* Thus, a large European buyer may be able to bargain with a small American supplier to pay in a European currency. *Id.* Usually, European suppliers invoice in their currency and expect the buyers to carry the exchange-rate fluctuation risk, precisely the type of obsolete currency provision discussed by this Note. *Id.*

As a default rule for currency payment provisions, the UNIDROIT Principles propose that the currency of the place of payment will be used. International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts arts. 6.1.9, 6.1.10 (1994) (setting forth rules for currency of payment) [hereinafter UNIDROIT Principles]. Article 6.1.10 states that "[w]here a monetary obligation is not expressed in a particular currency, payment must be made in the currency of the place where payment is to be made." *Id.* Thus, when the place of payment is in a EMU Member State, the payment currency will most likely be in a European currency.

139. *Calendar*, *supra* note 4. As noted above, states that do not initially qualify may still join at a later date when they do qualify. Therefore, the issue of continuity of contracts may still arise many years from now as Member States, which did not originally qualify, do join and phase in the Euro. *See supra* note 80; *Yerak*, *supra* note 5, at 1H ("Some countries might come in in 2003, and there could be a transition for those countries. That means the process will continue for many years." (quoting Les Vinney, Treasurer for B.F. Goodrich)).

140. David Southern, *Alteration of the Currency*, 4 *Eur. Fin. Serv. L.* 27, 27 (1997) ("An alteration of the currency exists if its basis is altered due to the legislator's consciously building a new monetary system on a new unit of account.").

141. *See* Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 *Wis. L. Rev.* 1, 16 (reporting that 89.2% of the companies surveyed, which were large companies, responded that they entered into long-term contracts to buy or sell products or services). The survey defined "long-term" as more than one year. *Id.*

142. In 1995, worldwide trade amounted to six trillion dollars. Alex Y. Seit, *Globalization and the Convergence of Values*, 30 *Cornell Int'l L.J.* 429, 440 (1997). For an explanation of the mechanisms producing such large international economic flows of goods and capital, see *id.* at 439-47.

long-term metal reclamation and mill services.¹⁴³ Additional examples of long-term transatlantic contracts are found in the manufacturing industry. Airbus, a European airplane manufacturer, agreed to build and deliver 50 to 150 airplanes to Northwest Airlines in the United States by 2003.¹⁴⁴ Fuji's American plant contracted to provide four major European manufacturers with lawnmower engines on a long term basis.¹⁴⁵ In another recent example, Galaxy Tire Co., Inc., entered into long-term arrangements with four European tire makers to ensure its supply of tires for the next five years.¹⁴⁶

In all of the above examples, if the buyers agreed to pay in a European currency, then the long-term contract could be subject to potential uncertainty when the Euro comes into circulation. Thus, the introduction of the Euro may impact American parties to contracts with European counterparties in two situations: (1) where the American seller bears the risk of exchange rate fluctuation, and (2) where the American buyer bears the risk of exchange rate fluctuation. The crucial issue is the currency, which was agreed upon for payment. Whenever the mode of payment has been specified as a European currency, which later is replaced by the Euro, and no provision dealing with the conversion to the Euro has been included in the contract, the continuity of the contract may be challenged.¹⁴⁷

B. *Scenarios for Arguing for Excuse and Discharge*

There are numerous reasons why a party to a sales contract denominated in an obsolete currency would not want to accept Euros.¹⁴⁸ This would most likely occur if the 1999 fixed exchange rate did not adequately reflect the value of the currency as assessed at the time of contract formation. This could cut against either the buyer or the seller. In one scenario, the seller realizes a loss. In the second scenario, the buyer is disadvantaged. Both are discussed more fully below.

143. *For the Record: Contracts*, Pittsburgh Post-Gazette, Feb. 5, 1997, at C14 (reporting a long-term French-American contract for metal reclamation and mill services).

144. See *Airbus Wins Aircraft Contracts, Rebounds From Boeing's Sole Source Deals*, Airline Fin. News, June 23, 1997 ("Airbus announced a memorandum of understanding June 19 [1997] with Northwest for 50 firm orders, plus options for 100 others.").

145. *Fuji Heavy to Build More Engines in US*, Comline Daily News Trans., Mar. 10, 1997 (reporting that the U.S. plant will fill a long-term supply contract providing lawnmower engines to four major European lawnmower makers).

146. Jean Sisson, *Galaxy Acts to Secure Supply*, Tire Bus., Aug. 18, 1997, at 1, 22 (reporting that the U.S. company signed a five-year supply contract worth more than \$100 million with European tire manufacturers).

147. See Platt, *supra* note 6, at 5A.

148. The same problem will not exist when the contract is denominated in a currency that is not obsolete. The conversion of Euros, instead of an obsolete currency, into dollars, for instance, would not involve the operation of the fixed Euro-obsolete currency exchange rate.

In the first case, the fixed exchange rate over-values the Euro as compared to the valuation of the now obsolete currency specified in the contract.¹⁴⁹ The Euro value at the time of payment would not provide an adequate compensation to the seller. Thus, the seller will likely not want to perform (supplying goods), because the value of the buyer's performance (payment) has decreased.

In the example of a long-term contract to supply tires,¹⁵⁰ for instance, the European seller may not want to accept overvalued Euros. The Euro value of the contract would be too low to reasonably compensate the seller for the tires. The original contract could have determined that each tire would cost 100 DMs. When a relatively stable DM / U.S. Dollar exchange rate is 1.00 DM for \$0.75, the buyer and seller assume that the equivalent dollar price will be \$75.00. Assuming the 1999 irrevocable fixed rate for 1.00 DM would be 0.50 Euros, the tires will cost 50 Euros. If the exchange rate in the free market for \$1.00 is 2.00 Euros, one tire will cost the buyer \$25.00, instead of the expected \$75.00. Thus, the value decreased by almost seventy percent. The contract would be practically worthless, especially if the seller expected to convert the Euros to Dollars at some later time. The seller would want more Euros than the fixed exchange rate would grant.

Such a case may arise from the very beginning of the circulation of the Euro if the fixed rate is distorted by currency speculation¹⁵¹ preceding the date of the rate setting.¹⁵² Currency speculation after the EMU could also cause the value of the Euro to decline over time, if the EMU is not as successful in promoting economic growth, low inflation, and employment as the supporters of the EMU have predicted.¹⁵³ For example, currency traders may sell their Euro holdings

149. This Note assumes that the parties will apply the legally fixed exchange-rate to determine how many Euros to pay.

150. See *supra* note 146.

151. Currency speculation is the practice of buying and selling currency based on its expected future value to realize a profit by a rise or fall in exchange-rates. Black's Law Dictionary 1399 (6th ed. 1990) (defining "speculation").

152. See *supra* note 67. Currency speculation can also cause an under-valuation. See *infra* text accompanying note 156.

153. Testifying before the Senate Budget Committee, James A. Baker, former Secretary of State and Treasury, speculated that creative accounting to squeeze marginal countries in as original EMU Member States would weaken the Euro and increase the value of the U.S. dollar.

The question in my mind is how much [the European Union] will have to slide the objective standards that [the European union has] set for Monetary Union in order to get there I really believe . . . that [the European Union] will do some creative accounting, which means that the Euro conceivably could be a weaker currency than the Deutsche Mark, which could give some impetus to the value of the dollar.

NATO Enlargement, European Union Expansion and EMU: Policy Implications and Debate: Hearing Before the Senate Budget Comm., S. Hrg. 105-333, at 87-88 (Com. Print 1998), available in 1997 WL 676597, at *15 (F.D.C.H.).

and instead buy Japanese Yen or U.S. Dollars. This would increase the available supply of Euros and thus drive its relative value down.

Conversely, in the second case, a buyer under a contract denominated in an obsolete currency may wish to be excused from performance if the Euro is undervalued in comparison with the fixed exchange rate set by law at the time of transition.¹⁵⁴ The cost of performance would have increased for the buyer, making the contract much more expensive than expected.

To illustrate this scenario using the example of a long-term contract for tires, the tires would be more expensive when the obsolete currency-Euro exchange rate undervalues the Euro. To review: the contract for tires called for a price of 100 DMs per tire, which was expected to be worth about \$75.00 per tire (1.00 DM = \$0.75). Let us assume that the irrevocably fixed DM / Euro exchange rate is 1.00 DM for 5.00 Euros. When payment is due, the contract would be worth 500 Euros. Where \$1.00 is worth only 2.00 Euros on the open market, the contract would actually cost \$250.00, instead of the expected \$75.00. Here, an undervaluation of the Euro increased the cost of the tires by over 150%.

Such an undervaluation can occur if the Euro appreciates in value over time in response to the outstanding success of the EMU.¹⁵⁵ Currency speculation could also cause Euro undervaluation by distorting the fixed rate of exchange between the obsolete currency and the Euro.¹⁵⁶ For example, a currency speculator who anticipates that the EMU will be successful in stimulating growth and employment may try to buy European currency, anticipating an increase in value due to the EMU. The currency speculator would sell his Japanese Yen or U.S. Dollars to buy DMs. If many currency speculators act in this way, the supply of European currency available for trade will decrease, in turn increasing the relative value of the European currency.

C. *Legislative Acts to Ensure the Continuity of Contract*

Jurisdictions which perceive themselves as most affected by the introduction of the Euro have provided for contract continuity through legislation.¹⁵⁷ All relevant legislation to date is in favor of preserving

154. See *supra* notes 67 and 75 and accompanying text.

155. See Currie, *supra* note 18, at 52-53 (discussing the possibility of a fall in the value of the dollar against the Euro).

156. See *supra* note 67.

157. Dennis Keeling, *The EMU Time Bomb*, Mgmt. Acct., Sept. 1, 1997, at 34.

Legislation is being passed throughout Europe that will ensure that contracts cannot be (broken) frustrated by the move from local currencies to the euro. Already in the United States, states such as New York and California are preparing legislation to accept the same principle of avoidance of frustration of contracts in terms of contracts entered into in previous European local currencies.

Id. at 37.

the continuity of contracts in connection with the introduction of the single currency.¹⁵⁸ The European Union's Council has issued a binding regulation which provides for the continuity of contracts to assuage any fears of "walk-aways" in its jurisdiction.¹⁵⁹ New York¹⁶⁰ and Illinois¹⁶¹ have passed substantially similar legislation. Furthermore, the California legislature is also considering passing such a

"EMU has the potential to create vexatious litigation. Such litigation and any resulting uncertainty could threaten New York's stature in the world's financial markets and cause such transactions to be entered into elsewhere – most obviously in Europe." . . . In an effort to avoid this, legislation has been proposed in New York to ensure that all relevant contracts get the appropriate level of legal certainty.

Platt, *supra* note 6, at 5A (quoting from a memorandum for the Financial Markets Lawyers Group written by Cravath, Swaine & Moore, a New York law firm).

158. *See infra* notes 159-61.

159. Council Regulation 1103/97, art. 3., 1997 O.J. (L 162) 1, 3.

Article 3

The introduction of the Euro shall not have the effect of altering any term of a legal instrument or of discharging or excusing performance under any legal instrument, nor give a party the right unilaterally to alter or terminate such an instrument. This provision is subject to anything which parties may have agreed.

Id.; *see* Yeowart, *supra* note 2, at 37-38 (reporting on the European legal framework for the introduction of the Euro); Geoffrey Yeowart, *Building a Solid Euro Framework*, *Fin. Times*, May 28, 1997, (EMU: An FT Guide) at 7 ("Article 3 will establish that the introduction of the euro will not have the effect of altering any term of a contract or discharging or excusing performance under a contract. Equally, it will not give a party the right unilaterally to alter or terminate a contract.").

160. Continuity of Contract Act, N.Y. Gen. Oblig. L. §§ 5-1601 to 5-1604 (McKinney Supp. 1997). This new title provides that:

None of: (a) the introduction of the Euro; (b) the tendering of Euros in connection with any obligation . . . ; or (d) the calculating or determining of the subject or medium of payment of a contract . . . with reference to interest rate or other basis 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 . . . or give a party the right to unilaterally alter or terminate any contract

Id.; *see also* Gruson, *supra* note 7, at 100-07 (examining the New York Statute on the Euro).

161. Euro Conversion Act, Pub. Act 90-268, 1997 Ill. Legs. Serv. 268 (West 1997). In relevant section, it reads:

Section 10. Continuity of Contract. (a) 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 shall be a commercially reasonable substitute and substantial equivalent that may be . . . tendered . . . at the conversion rate specified in, and otherwise calculated in accordance with, the regulations adopted by the Council of the European Union.

Id. § 5-1602.

law.¹⁶² This legislation reflects the view that the changeover to the Euro should not disrupt commercial contracts.¹⁶³

D. Survey of Applicable Contract Law

In the United States, contract law is a matter of individual state law.¹⁶⁴ Thus, state law will determine whether the Euro is a reasonable substitute as a medium of payment. Although New York and Illinois currently provide for continuity of contract through legislation, not all affected contracts will be governed by these laws. Contracts litigated under the law of states that have not passed continuity of contract statutes may be vulnerable to judicial intervention and discharge.¹⁶⁵

In a state which has not adopted a continuity of contract statute, there are various bodies of law which parties can elect to govern their contract. These include the U.C.C.,¹⁶⁶ the CISG,¹⁶⁷ and the

162. A.B. 185, Cal. Legis. 1997-98, Reg. Sess. (1997) (proposing to add Section 1663 to the Civil Code to assure continuity of contract) (passed by the California Assembly on Sept. 3, 1997, and now being considered by the California Senate).

163. Platt, *supra* note 6, at 5A (discussing the New York legislation implemented to protect contracts); Letter from Daniel P. Cunningham, Cravath, Swaine & Moore to Alan H. Kaufman, Jones, Day, Reavis & Pogue 1 (Oct. 24, 1997) (on file with the *Fordham Law Review*) (“When the legislation was submitted to the New York Legislature in March 1997 it was accompanied by an Executive Summary which stated that New York should adopt legislation concerning legal certainty and the introduction of the Euro ‘to ensure that all relevant contracts receive the appropriate level of legal certainty.’”); Memorandum for International Swaps and Derivatives Association from Daniel P. Cunningham & Patricia L. Hogan, Cravath, Swaine & Moore 3 (Oct. 24, 1997) (on file with the *Fordham Law Review*) (“[T]he EMU Statute was intended to address the legal uncertainty with respect to all relevant contracts . . .”).

164. John D. Calamari & Joseph M. Perillo, *The Law of Contracts* 13 (3d ed. 1987) (describing sources of contract law).

165. *See* Gruson, *supra* note 7, at 90-91 (explaining that there is a possibility that “the substitution of the Euro for the old national currencies will make performance of the contract denominated in an old national currency impossible or, in today’s usage, impracticable”); Gordon Platt, *Euro Opens Door to Contract Confusion*, *J. Com.*, June 23, 1997, at 5A. Mr. Gruson notes that the enactment of the New York continuity of contract legislation raised “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.” Gruson, *supra* note 7, at 106.

Discharge occurs when parties are released from their contractual duties due to the occurrence of an excusing event or by operation of law. *See* Black’s Law Dictionary, *supra* note 151, at 463 (defining “discharge”). “[A] party to a contract will be relieved of his or her duty to perform when the objective purpose for performance no longer exists . . .” *Id.* at 670-71 (defining the “frustration of purpose doctrine”).

166. Uniform Commercial Code (1977); *see also infra* notes 175-79 and accompanying text (describing the applicability of the U.C.C.).

167. United Nations Convention on Contracts for the International Sale of Goods, Apr. 10, 1980, S. Treaty Doc. No. 98-9, 98th Cong., 1st Sess. (1983), 19 I.L.M. 668 (1980), *microformed on* Sup. Docs. No. Y 1.1/4:98-9 (U.S. Gov’t Printing Office) [hereinafter CISG]. There is a United States, a German, and a French on-line database, each giving the full text of the treaty and reporting different cases and commentary interpreting the treaty. *Convention on the International Sale of Goods* (visited Mar. 12, 1998) <<http://cisgw3.law.pace.edu/>> (in English); *CISG Online* (visited

UNIDROIT Principles.¹⁶⁸ Article Two of the U.C.C. governs contracts for the sale of goods.¹⁶⁹ The CISG is a federal treaty which governs contracts for the international sale of goods.¹⁷⁰ As a treaty, the CISG preempts conflicting state contract law.¹⁷¹ The UNIDROIT Principles, while not a body of law,¹⁷² are important because judges often use them as a gap-filler when interpreting the CISG.¹⁷³ The UNIDROIT Principles are also available as a set of default rules for contracting parties to elect.¹⁷⁴

The relevant U.C.C. sections are applicable to transactions in goods¹⁷⁵ as long as they have a reasonable relationship¹⁷⁶ to the forum state.¹⁷⁷ Thus, a transatlantic long-term supply contract for goods may be covered by the U.C.C.¹⁷⁸ A contract for industrial services, however, is not covered, because the contract lacks the “goods” element.

Mar. 12, 1998) <<http://www.jura.uni-freiburg.de/ipr1/cisg/title.htm>> (in German); *Cis-ginh* (visited Mar. 12, 1998) <<http://www.jura.uni-sb.de/FB/LS/Witz/cisg.htm>> (in French).

168. International Institute for the Unification of Private Law (UNIDROIT), *Principles of International Commercial Contracts* (1994) [hereinafter UNIDROIT Principles].

169. See *infra* notes 175-77 and accompanying text.

170. See *infra* notes 180-81 and accompanying text.

171. See Henry Gabriel, *Practitioner's Guide to The Convention on Contracts for the International Sale of Goods (CISG) and The Uniform Commercial Code (UCC) 11* (1994) (explaining that “[b]ecause the CISG is the law of the land under the supremacy clause, the state law is preempted” (footnote omitted)); Amy A. Kirby, Note and Comment, *Punitive Damages in Contract Actions: The Tension Between the United Nations Convention on Contracts of the International Sale of Goods and U.S. Law*, 16 J.L. & Com. 215, 216, 223-227 (1997) (discussing how courts should not apply developments of U.S. common law concerning punitive damages in international sales contract contexts which would be contrary to the CISG).

172. For a description of the history, nature, and success of the UNIDROIT Principles, see Michael Joachim Bonell, *The UNIDROIT Principles in Practice – The Experience of the First Two Years* (visited Feb. 16, 1998) <<http://cisgw3.law.pace.edu/cisg/biblio/pr-exper.html>>.

173. See Alejandro M. Garro, *The Gap-Filling Role of the Unidroit Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG*, 69 Tul. L. Rev. 1149 (1995); *infra* note 336.

174. See *infra* note 187 and accompanying text.

175. U.C.C. § 2-102 (1977). “Goods” are defined by the U.C.C. as “all things . . . which are movable at the time of identification to the contract for sale . . .” *Id.* § 2-105.

176. *Id.* § 1-105 (providing that when a transaction also bears a reasonable relation to another state or nation, the parties are free to elect the law of the other state or nation to govern the transaction). To avoid going outside of the scope of this Note, I will avoid conflicts of laws issues and assume that the parties have not exercised this option.

177. Some states have adopted slightly altered versions of the U.C.C. and, consequently, some outcomes may vary.

178. This is of course contingent upon a court’s rulings on conflict of laws issues. In a case where the parties opt out of the CISG and elect a state’s version of the U.C.C. as the governing law, this Note assumes that the court will apply the U.C.C.

The U.C.C. allows parties to designate a different governing law in their contract.¹⁷⁹

The scope of applicability of the CISG¹⁸⁰ is limited to the sale of goods between parties located in participating signatory countries.¹⁸¹ The CISG is valid, applicable law for international commercial contracts for goods in the jurisdiction of United States, provided the other contracting party is from another signatory state.¹⁸² The nature of the CISG is like that of the U.C.C. in that it applies unless the parties opt for another set of rules or laws to govern their contract.¹⁸³

Unlike the U.C.C. and the CISG, which cover contracts for the sale of goods unless the parties designate another governing law, the UNIDROIT Principles only govern when the parties have selected them as the governing law.¹⁸⁴ The UNIDROIT Principles have a broader coverage than either the U.C.C. or the CISG.¹⁸⁵ The latter two cover only contracts for the sale of goods, whereas the former can also govern contracts for the sale of services.¹⁸⁶ Parties may choose the UNIDROIT Principles as the governing law in their international

179. U.C.C. § 1-102(3) (1977) (providing that “[t]he effect of provisions of this Act may be varied by agreement”).

180. See CISG, *supra* note 167, arts. 1-6; Albert H. Kritzer, Guide to Practical Applications of the United Nations Convention On Contracts for the International Sale of Goods 11-13 (1989) (discussing the scope and the applicability of the CISG). For example, the CISG was applied as the governing law in *Delchi Carrier, S.p.A. v. Rotorex Corp.*, 71 F.3d 1024 (2d Cir. 1995) (applying the CISG when a foreign buyer brought an action to recover lost profits as damages resulting from delivery of non-conforming goods).

181. “The CISG is the uniform international sales law of countries that account for over two-thirds of all world trade.” *Participating Countries: Current Status, Trends* (visited Feb. 16, 1998) <<http://cisgw3.law.pace.edu/cisg/cisgintro.html>>. Contracting (signatory) European Member States are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, Netherlands, Spain, and Sweden. *CISG: Participating Countries* (visited Mar. 12, 1998) <<http://cisgw3.law.pace.edu/cisg/countries/cntries.html>>; [untitled] (visited Feb. 16, 1998) <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/x_boo/x_10.html> (listing participants, dates, declarations, and reservations). Potentially all of these countries could introduce the Euro in the near future.

182. Reed Kathrein & Daniel Magraw, *Introduction, in The Convention for the International Sale of Goods: A Handbook of Basic Materials 1* (Daniel Barstow Macgraw & Reed R. Kathrein eds., 2d ed. 1990). This self-executing treaty came into force on January 1, 1988. *Id.*

183. CISG, *supra* note 167, art. 6 sets forth: “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.”

184. See Garro, *supra* note 173, at 1163; Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 Fordham L. Rev. 281, 283 (1994) [hereinafter Perillo, *UNIDROIT Principles of International Commercial Contracts*] (noting that the UNIDROIT Principles are “not intended for adoption as a treaty or uniform law; rather, the document is in the nature of a restatement of the commercial contract law of the world”).

185. See Garro, *supra* note 173, at 1152.

186. See *id.* at 1163 (“[T]he UNIDROIT Principles . . . are not limited to contracts for the . . . sale of goods. Instead [they] cover all other kinds of transactions.”).

contracts.¹⁸⁷ The UNIDROIT Principles are especially helpful when they cannot agree on a governing national law.¹⁸⁸

Hence, the U.C.C., the CISG, and the UNIDROIT Principles may control or influence the outcome of litigation concerning transatlantic commercial contracts. The following four sections will survey these three bodies of law, specifically the provisions they afford for performance and excuse due to changed circumstances causing commercial impracticability.

1. The Duty to Perform

The parties contract to assure that they will either receive performance as promised or have a remedy, regardless of which body of law governs. The U.C.C. embodies a duty to perform¹⁸⁹ by supplying damages for non-performance and making the remedy of specific performance available if appropriate.¹⁹⁰ The CISG also creates a duty to perform, the breach of which entitles the other party to various remedies.¹⁹¹ Similarly, the UNIDROIT Principles also contain a duty to perform¹⁹² and set out remedies for the breach of this duty.¹⁹³ The discharge of a contract and the concomitant excuse from paying damages for non-performance is an exception to the general duty to perform as promised.¹⁹⁴ Thus, a contract will generally be enforceable unless it is discharged under some applicable legal doctrine.

187. See Perillo, *UNIDROIT Principles of International Commercial Contracts*, *supra* note 184, at 283.

188. *Id.*

189. U.C.C. § 2-301 (1977) (“General Obligations of the Parties[:] The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.”).

190. *Id.* §§ 2-701 to 725 (setting forth the available remedies).

191. CISG, *supra* note 167, arts. 28, 46, 62, 74–77 (sections on entitlements and remedies); see also Amy H. Kastely, *The Right to Require Performance in International Sales: Towards an International Interpretation of the Vienna Convention*, 63 Wash. L. Rev. 607, 613 (1988) (“[T]he remedial provisions of the Convention establish a clear right to performance for both buyers and sellers. Under these provisions, an aggrieved party may choose either to require the breaching party fully to perform the contract or to seek substitutional damages.”).

192. UNIDROIT Principles, *supra* note 168, art. 6.2.1. It provides that “[w]here the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.” *Id.* Articles 6.2.2, 7.2.1-2.5 set forth the right to performance. *Id.*

193. *Id.* arts. 7.4.1–4.13 (providing for damages).

194. See Gerhard Wagner, Essay, *In Defense of the Impossibility Defense*, 27 Loy. U. Chi. L.J. 55, 58 (1995).

Under current law, a party who fails to perform a contractual duty is in breach of contract and must reimburse the other party for its expectation damages. Common law generally equates non-performance of a contract with breach, regardless of the promisor's reason for failing to perform his contractual duty. Despite the strictness of this common law principle, the doctrine of impossibility is well established in both English and American common law. Under this doctrine, the promisor's failure to perform is excused if a supervening event renders performance impossible.

Doctrines that relieve the parties from their duty to perform are available under the U.C.C., the CISG, and the UNIDROIT Principles.¹⁹⁵ The U.C.C. provides for excuse from contractual obligations under its section on impracticability.¹⁹⁶ The CISG has a provision which excuses parties from liability for non-performance caused by an impediment beyond a party's control.¹⁹⁷ The UNIDROIT Principles allow for recourse when hardship alters the equilibrium of the contract.¹⁹⁸

2. Uniform Commercial Code

The U.C.C. section which provides for excuse is U.C.C. Section 2-615,¹⁹⁹ under which a party alleges an excuse by invoking commercial impracticability.²⁰⁰ Although U.C.C. Section 2-615 only mentions sellers in its text, U.C.C. Official Comment 9 expresses an intent to entitle buyers to assert excuse under this section as well.²⁰¹ Thus, contracting parties can plead commercial impracticability under U.C.C. Section 2-615 when presupposed conditions fail to occur.²⁰² The four-part test²⁰³ for this section requires:

- 1) The occurrence of a supervening contingency;
- 2) the non-occurrence of the resulting contingency was a basic assumption upon formation of the contract;
- 3) the occurrence of the contingency rendered the agreed performance impracticable; and
- 4) the occurrence of the contingency was not a risk assumed by the performing party.²⁰⁴

Id.

195. *See infra* notes 200-57.

196. *See infra* Part II.D.1.

197. *See infra* Part II.D.2.

198. *See infra* Part II.D.3.

199. U.C.C. § 2-615 (1977).

200. Jane Massey Draper, *Impracticability of Performance of Sales Contract as a Defense Under U.C.C. § 2-615*, 93 A.L.R.3d 584, § 2 (1980). "Excuse" in this context is "[a] matter alleged as a reason for relief or exemption from some duty or obligation." Black's Law Dictionary, *supra* note 151, at 566-67. "Commercial impracticability" in this context is defined as "[a] broadened interpretation of the doctrine of impossibility which holds that a party to a contract for the sale of goods will be relieved of his or her duty to perform when the premise . . . on which the contract was based no longer exists due to unforeseeable events." *Id.* at 756.

201. U.C.C. § 2-615 cmt. 9 (1977); Draper, *supra* note 200, § 2.

202. For a precise explanation of the impossibility doctrine, see Calamari & Perillo, *supra* note 164, at 536-540.

203. This test is supplemented by the code requirement of notice to the other party. U.C.C. § 2-615(c) (1977).

204. *See* Steven Walt, *Expectations, Loss Distribution and Commercial Impracticability*, 24 Ind. L. Rev. 65, 66 (1991); *see also* Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265 (7th Cir. 1986) (not excusing utility from long-term, fixed-price coal contract because the utility had assumed the risk); Iowa Elec. Light and Power Co. v. Atlas Corp., 467 F. Supp. 129 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979) (finding the energy crisis foreseeable and, thus, refusing to consider whether performance had become impracticable); Eastern Air

A judicial reformulation has developed which treats the second and the fourth requirement set forth in the U.C.C. as essentially the same.²⁰⁵ Thus, there are three inquiries by which a court evaluates any event to determine whether it meets the requirements of U.C.C. Section 2-615. First, there must be an actual occurrence of an event or contingency which renders performance impracticable.²⁰⁶ Second, the party seeking an excuse must establish that the event or contingency was unforeseeable and not allocated by the parties.²⁰⁷ A determination of foreseeability does not require absolute foreseeability, rather, it is a question of degree.²⁰⁸ An absolute approach would rule out any event that was even remotely foreseeable by anyone.²⁰⁹ Courts have held that an absolute interpretation of foreseeability would be too narrow.²¹⁰ In *Opera Co. of Boston v. Wolf Trap Foundation for the Performing Arts*,²¹¹ the court enunciated the following test for foreseeability: "whether the non-occurrence of the event was sufficiently unlikely or unreasonable to constitute a reason for refusing to apply the doctrine."²¹² Foreseeability is an essential element of the inquiry because it is an objective means of ascertaining whether the parties intended to allocate the risk.²¹³ What sorts of events have been foreseeable? A drought that caused crop failures has been found not to be foreseeable.²¹⁴ The international oil crisis of the early 1970s, on the other hand, was found to be foreseeable.²¹⁵

Third, the event or contingency must actually have rendered performance impracticable.²¹⁶ A mere increase in the cost of perform-

Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975) (not excusing performance where the United States government interfered with oil prices during an oil crisis); *Nora Springs Coop. Co. v. Brandau*, 247 N.W.2d 744, 748 (Iowa 1976) (finding that a failure to attempt to find a substitute method of performance undermined the plaintiff's claim of impracticability).

205. See *Walt*, *supra* note 204, at 66.

206. *Draper*, *supra* note 200, § 2. This is a question of evidentiary proof and is outside of the scope of this Note.

207. *Id.*

208. *Opera Co. of Boston v. Wolf Trap Found. for the Performing Arts*, 817 F.2d 1094, 1100-02 (4th Cir. 1987); *L.N. Jackson & Co. v. Royal Norwegian Gov't*, 177 F.2d 694, 699-700 (2d Cir. 1949).

209. *Wolf Trap*, 817 F.2d at 1100-02.

210. *Id.*

211. *Id.* at 1094.

212. *Id.* at 1102.

213. *Waldinger Corp. v. CRS Group Eng'rs, Inc.*, 775 F.2d 781, 786 (7th Cir. 1985) (explaining that "[b]ecause the purpose of a contract is to place the reasonable risk of performance upon the promisor, . . . [the promisor] is presumed to have agreed to bear any loss occasioned by an event that was foreseeable at the time of contracting").

214. *Alimenta (U.S.A.), Inc. v. Cargill, Inc.*, 861 F.2d 650, 653-54 (11th Cir. 1988) (stating that drought which caused peanut crop to fail was unforeseeable); *Alimenta (U.S.A.), Inc. v. Gibbs Nathaniel (Canada) Ltd.*, 802 F.2d 1362, 1366 (11th Cir. 1986) (same).

215. See *infra* notes 311-12 and accompanying text.

216. *Draper*, *supra* note 200, § 2.

ance will usually not be severe enough to merit excuse.²¹⁷ The increase in costs must be unreasonable and unexpected and, thus, outside a realm of cost increase possibly anticipated in the contract.²¹⁸ It is an objective, not a subjective determination.²¹⁹

To fall under U.C.C. Section 2-615, performance must be impracticable.²²⁰ The U.C.C. does not give any guidance on the definition of "impracticable."²²¹ This leaves the issue open for judicial interpretation and requires litigants to resort to common law arguments.²²² The Restatement (Second) of Contracts is persuasive in defining "impracticable."²²³ Section 261 of the Restatement (Second) of Contracts, entitled "Discharge by Supervening Impracticability,"²²⁴ delineates one formulation of commercial impracticability. Section 261 requires the parties to have assumed in their contract the non-occurrence of an unforeseeable event causing the alleged impracticability.²²⁵

U.C.C. Section 2-615 will not excuse a contracting party for impracticability when substitute performance is possible under U.C.C. Section 2-614.²²⁶ Thus, section 2-614 limits the application of section 2-615.²²⁷ Under section 2-614, the parties are bound to tender and accept reasonable substitutes.²²⁸ The duties and rights embodied in sec-

217. *D.H. Blattner & Sons, Inc. v. Firemen's Ins. Co.*, 535 N.W.2d 671 (Minn. Ct. App. 1995); *infra* note 276.

218. *See Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721 (Mo. Ct. App. 1979).

219. *Cargill*, 861 F.2d at 652.

220. *See Waldinger Corp. v. CRS Group Eng'rs, Inc.*, 775 F.2d 781 (7th Cir. 1985) (excusing a contractor which could not possibly comply with company specific mechanical characteristics); *International Minerals & Chem. Corp. v. Llano, Inc.*, 770 F.2d 879 (10th Cir. 1985) (excusing buyer when it no longer had any use for gas because of environmental regulations).

221. *Walt*, *supra* note 204, at 65-66 (noting that "[i]n fact the official comment states that section 2-615 'deliberately refrains from any effort at an exhaustive expression of contingencies and is to be interpreted in all cases sought to be brought within its scope in terms of its underlying reason and purpose'").

222. *See Draper*, *supra* note 200, § 2.

223. *See* Restatement (Second) of Contracts § 261.

224. *Id.* It states that:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Id.

225. *Id.*

226. U.C.C. § 2-615 (1977); *Draper*, *supra* note 200, § 5 (discussing the tender of substitute performance).

227. *Nora Springs Coop. Co. v. Brandau*, 247 N.W.2d 744, 748 (Iowa 1976) (finding that a failure to attempt to find a substitute method of performance undermined the plaintiff's claim of impracticability).

228. U.C.C. § 2-614(1) (1977) (obligating seller to use, and buyer to accept, substitute performance by commercially reasonable means when the method of performance specified in the contract becomes impracticable); *Draper*, *supra* note 200, § 5.

tion 2-614 apply to both sellers and buyers.²²⁹ Section 2-614(2) gives sellers a right to withhold or stop delivery when the manner of payment fails due to government regulations.²³⁰

The following example shows how a party to a transatlantic contract might try to employ the U.C.C. to argue for a discharge of their contractual obligation to perform. Under the U.C.C., when a seller does not want to accept Euros as payment because the Euros are weaker than the expected former European currency, he or she can try to plead commercial impracticability. The seller would argue that the value of such a payment would not cover the seller's costs. If delivery has already been taken, the disadvantaged seller could argue that payment in Euros will not discharge the obligation because the 1999 fixed rate is a "discriminatory, oppressive, or predatory" governmental regulation.²³¹

Likewise, a disadvantaged buyer who does not want to make a payment in Euros could argue impracticability of performance. Under U.C.C. Section 2-615, the buyer would argue that the cost of the contract is overly burdensome because the Euro price of the contract is dramatically higher than originally expected, making payment commercially impracticable.

Hence, both buyers and sellers may try to be excused from their contractual obligations under the U.C.C. when unexpected circumstances cause commercial impracticability. The party asserting excuse must show impracticability, non-assumption of the risk, and that the event causing impracticability was not foreseeable.²³² The following section examines what a party must show when arguing for an exemption under the functional equivalent of U.C.C. Section 2-615 found in the CISG.

3. Convention on the International Sale of Goods

Article 79 of the CISG excuses parties from liability due to commercial impracticability.²³³ The Article exempts a party from liability

229. Thus, if a court accepts the Euro as a reasonable substitute for an obsolete Member State currency, it would not excuse either the seller or the buyer from their contractual obligations. See U.C.C. §§ 2-614, 2-615 (1977).

230. *Id.* § 2-614(2) (1977).

231. *Id.*

232. See *supra* note 204.

233. CISG, *supra* note 167, art. 79 ¶1 states that:

A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or . . . overcome it or its consequences.

See also C.M. Bianca & M.J. Bonell, *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* 572-95 (1987) (analyzing CISG Article 79); John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* 426-43 (1982) (same); Kritzer, *supra* 180, at 501-22 (same).

for damages caused by non-performance where the party is not responsible.²³⁴ The party asserting excuse must prove three elements:

- (a) The failure was “due to an impediment beyond [the party’s] control”;
- (b) At the time of the contract [the party] “could not reasonably be expected to have taken the impediment into account”; and
- (c) Subsequent to the contract he could not reasonably be expected “to have avoided or overcome [the obstacle] or its consequences.”²³⁵

Commentators argue that the wording is broad enough for judges to be influenced by the excuse doctrines already existing in their respective jurisdictions.²³⁶ Thus, it is likely that the American common law principle of impracticability might be applied to litigation in the United States, but would not be applied by a German court interpreting exactly the same section.²³⁷ Merely applying domestic principles would, however, disregard the international intent of the treaty.²³⁸ Rather, “[j]udicial construction should be guided by the necessity of finding a balance between the two fundamental principles which govern the issue of exemption in international commercial law – security of transactions and contractual justice.”²³⁹

234. CISG, *supra* note 167, art. 79(1); Peter Schlechtriem, *Uniform Sales Law: The UN-Convention on Contracts for the International Sale of Goods* 101 (1986).

235. Honnold, *supra* note 233, at 427 (quoting from the CISG).

236. *See* Bianca & Bonell, *supra* note 233, at 594:

[T]he general wording of Article 79 leaves much room for judicial interpretation. The judge will have a natural tendency to refer to similar concepts in his own law. Thus, the judge of a socialist country will have a restrictive approach to *force majeure*. Judges in socialist countries will also have a peculiar attitude with regard to strikes. On the contrary a common lawyer will feel inclined to refer to the more flexible notions of frustration and impracticability. In the Roman-German system, the judge will reason in terms of *force majeure*. The risk of divergence thus exists and must not be underestimated.

Id. (footnote omitted); *see also* Kritzer, *supra* note 180, at 501-02 (making the same assertion as Bianca-Bonell).

237. *See* Bianca & Bonell, *supra* note 233, at 594; Kritzer, *supra* note 180, at 501-02.

After comparing the CISG and the UCC, one commentator finds that the CISG is more permissive than the common law, because it is much like the civil law approach to frustration of purpose. Gabriel, *supra* note 171, at 241-42. He contends that, in essence, the operation of the two codes are much the same, as the Restatement (Second) of Contracts adopts a broad view concerning frustration of purpose. *Id.*

Incidentally, about half of all CISG cases, and most of the hardship cases have been argued in German courts. Institute of Commercial Law, *CISG Database: Country Case Schedule* (visited Feb. 16, 1998) <<http://cisgw3.law.pace.edu/cisg/text/casecit.html#us>>.

238. *See* Bianca & Bonell, *supra* note 233, at 594-95; Honnold, *supra* note 233, at 429 n.3 (citing Barry Nicholas, *Force Majeure and Frustration*, 27 *Am. J. Comp. L.* 231 (1979)).

239. Bianca & Bonell, *supra* note 233, at 595 (rejecting national law and comparative law approaches in favor of a harmonized, uniform approach).

Clear guidance in the form of judicial precedent on the application of Article 79 has not yet been established, because very few contracts governed by the CISG have been the subject of litigation.²⁴⁰ According to the Second Circuit, U.C.C. case law can be used to interpret a CISG provision with identical language.²⁴¹ Foreign courts and arbitrators have already established decisions based on Article 79.²⁴² An arbitration case between an Austrian seller and a Bulgarian buyer interpreted Article 79 as not excusing an impediment caused by government action which suspended the payment of foreign debts.²⁴³ An Italian court had occasion to interpret various CISG articles, including Article 79, although the CISG did not directly govern the contract.²⁴⁴ This Italian court found that a claim of hardship based on a thirty percent price increase of the market price of steel would not justify a party avoiding the contract.²⁴⁵ In another case of price increase in the

240. See Michael R. Will, *International Sales Law under the CISG: The First 222 or So Decisions, in Review of the Convention on Contracts for the International Sale of Goods (CISG) 211, 218* (Cornell Int'l L.J. ed., 1995) [hereinafter *Review of the CISG*] (reporting that CISG cases are only litigated one to three times a year in the United States). So far, only six cases involving the CISG in the United States have been decided. See *Delchi Carrier S.p.A. v. Rotorex Corp.*, 71 F.3d 1024, 1027-28 (2d Cir. 1995) (explaining that "[b]ecause there is virtually no case law under the Convention, we look to its language and to 'the general principles' upon which it is based"); *Beijing Metals & Minerals Import/Export Corp. v. Am. Bus. Ctr., Inc.*, 993 F.2d 1178, 1182-83 n.9 (5th Cir. 1993) (noting the choice of law issue concerning the CISG, though not resolving the issue on this appeal); *Graves Import Co., Ltd. v. Chilewich Int'l Corp.*, No. 92-Civ. 3655 (JFK), 1994 WL 519996, *4 n.2 (S.D.N.Y. Sept. 22, 1994); *Delchi Carrier S.p.A. v. Rotorex Corp.*, No. 88-CV-1078, 1994 WL 495787 (N.D.N.Y. Sept. 9, 1994) (applying Article 29 of the CISG); *Filanto S.p.A. v. Chilewich Int'l Corp.*, 789 F. Supp. 1229, 1237 (S.D.N.Y. 1992) (stating that "[a]lthough there is as yet virtually no U.S. case law interpreting the Sale of Goods Convention it may safely be predicted that this will change" (citation omitted)); *Orbisphere Corp. v. United States*, 726 F. Supp. 1344, 1355 n.7 (Ct. Int'l Trade 1989) (holding that "for international contracts for the sale of goods between U.S. parties and foreign parties . . . the applicable commercial law is not the U.C.C., but rather the [CISG] . . ."). None of these cases have interpreted CISG Article 79.

241. *Delchi Carrier*, 71 F.3d at 1028 (warning, however, that the U.C.C. case law is not applicable per se (citing *Orbisphere*, 726 F. Supp. at 1355)).

242. See 2 *Guide to the International Sale of Goods Convention* 201.177 (William A. Hancock ed., 1996); *UNILEX International Case Law and Bibliography on the UN Convention on Contracts for the International Sale of Goods* 164 (Michael Joachim Bonell et al. eds., 1997).

243. *ICC Arbitration Case No. 7197 of 1992* (visited Feb. 16, 1998) <<http://cisgw3.law.pace.edu/cgi-bin/SFgate/cisg/wais/db/cases2/927197il.html;7=%00;#cs>>.

244. *Nuova Fucinati S.p.A. v. Fondmetall Int'l A.B.*, Tribunale Civile di Monza, Italy (Mar. 29, 1993) (visited Feb. 16, 1998) <<http://cisgw3.law.pace.edu/cgi-bin/SFgate/cisg/wais/db/cases2/930329i3.html;7=%00>>. An English translation of the case was published in Alessandra Michelini, *Interpretive Decision Applying CISG: Tribunale di Monza, Sentenza 14 Gennaio 1993, Laudisio Presidente, Lapertosa Estensore, Nuova Fucinati S.p.A. (Aw. Bassi, Santamaria) C. Fondmetall International (Aw. Bianchi, Ginelli, Rossi)*, 15 J.L. & Com. 153 (1995).

245. Michelini, *supra* note 244, at 155 (explaining that the CISG "does not seem to contemplate the remedy of dissolution of contract for supervening excessive onerousness").

steel market, an arbitrator decided that fluctuations in the market price of steel were foreseeable.²⁴⁶ In this decision, the arbitrator intimated, however, that hardship caused by a sudden, substantial, and unforeseeable price increase could qualify for exemption from liability under Article 79.²⁴⁷ Thus, it is arguable whether commercial impracticability could be a ground for exemption under the CISG.

4. The UNIDROIT Principles

In the UNIDROIT Principles, the relevant excuse section is found in Article 6.2 and is entitled “Hardship.”²⁴⁸ Unlike the mainstream U.C.C. and Restatement versions of impracticability, hardship under the UNIDROIT Principles usually does not excuse performance.²⁴⁹ Rather, this subchapter compels the parties to renegotiate²⁵⁰ and authorizes the court to reform the contract²⁵¹ to take the hardship into account. Both the buyer and the seller have redress under this provision when the value or cost of performance changes such that the “equilibrium of the contract” is fundamentally altered.²⁵² To invoke this doctrine, a party must show that the events altering the equilibrium of the contract became known after contracting, and “could not reasonably be taken into account, . . . are not within the party’s control and the risk was not assumed.”²⁵³ Hence, the party asserting the

246. *ICC Arbitration Case No. 6281 of 1989* (abstract) (visited Feb. 16, 1998) <<http://cisgw3.law.pace.edu/cgi-bin/SFgate/cisg/wais/db/cases2/896281il.html;7=%00>>.

247. *See id.*

248. UNIDROIT Principles, *supra* note 168, art. 6.2.1.

249. *See* UNIDROIT Principles, *supra* note 168, art. 6.2.1. (providing that “[w]here the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship”); *id.* art. 6.2.3(2) (“The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.”).

Professor Perillo has asserted that the hardship subchapter “appears to introduce radical deviations from the common law.” Perillo, *UNIDROIT Principles of International Commercial Contracts*, *supra* note 184, at 297.

250. *See id.* art. 6.2.3(1) (“In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.”).

251. *See id.* art. 6.2.3(3)-(4) (“Upon failure to reach agreement within a reasonable time either party may resort to the court. If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed; or (b) adapt the contract with a view to restoring its equilibrium.”).

Court reformation of a contract is an “[e]quitable remedy used to reframe written contracts to . . . bring about a better result, correction or rectification.” Black’s Law Dictionary, *supra* note 151, at 1281 (defining “reformation”).

252. *See* Perillo, *UNIDROIT Principles of International Commercial Contracts*, *supra* note 184, at 300.

253. *Id.* The relevant definition is found in UNIDROIT Principles, *supra* note 168, art. 6.2.2, which defines hardship as a situation

where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished, and

excuse must prove unforeseeability, non-allocation of the risk, and severity of the hardship of at least a fifty percent price increase.²⁵⁴

Article 7.1.7 is another potentially relevant subchapter.²⁵⁵ This article excuses performance when a party can prove complete impossibility.²⁵⁶ Arguably, this article does not cover altered exchange rate situations because it only excuses non-performance on the ground of total impossibility.²⁵⁷

In summary, the introduction of the Euro has the potential of affecting a wide variety of transatlantic commercial contracts. A buyer obligated to pay in an obsolete European currency will likely argue commercial impracticability where the Euro is undervalued in comparison to the old currency. A seller obligated to accept payment in a European currency will likely argue commercial impracticability where the Euro is overvalued. The U.C.C., the Restatement (Second) of Contracts, the CISG, and the UNIDROIT Principles all provide for some form of excuse from contractual obligation for impracticability due to unforeseeable circumstances. The next part of this Note argues that, in the vast majority of cases involving the introduction of the Euro, an assertion of commercial impracticability or hardship should not succeed in discharging the contractual obligations.

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- (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
 - (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
 - (c) the events are beyond the control of the disadvantaged party; and
 - (d) the risk of the events was not assumed by the disadvantaged party.

Id.

254. UNIDROIT Principles, *supra* note 168, art. 6.2.2 cmt. 2 & illus. 1. For a description of the factual requirements for a finding of hardship, see Joseph M. Perillo, *Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts*, 5 Tul. J. Int'l & Comp. L. 5, 22-25 (1997) [hereinafter Perillo, *Force Majeure*].

255. See Perillo, *Force Majeure*, *supra* note 254, at 22 nn. 103-04, 107.

256. UNIDROIT Principles, *supra* note 168, art. 7.1.1.

257. See Perillo, *UNIDROIT Principles of International Commercial Contracts*, *supra* note 184, at 300 ("The rule of *force majeure* is draconian and unforgiving. Under the rule, nothing short of total impossibility will excuse non-performance or partial non-performance."). The relevant UNIDROIT Principles section states that:

Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

UNIDROIT Principles, *supra* note 168, art. 7.1.7(1). An altered currency would never constitute total impossibility in commercial contracts because a substitute currency would still be available and the actual goods can still be delivered. See Southern, *supra* note 140, at 27 (stating that, in a contract for the supply of goods for payment at a fixed price, a replacement of the currency does not change the substance of the contract).

III. KEEPING THE DEAL TOGETHER: RATIONALES FOR CONTINUITY

Although the consequences of a currency unification in the European Union may cause unexpected increases or decreases in the cost of performance, the parties should continue to honor their contracts. Such continuity promotes security in international trade and fosters future trade relations. The aforementioned doctrines of commercial impracticability or excuse should not succeed in this circumstance.

This part discusses the impact that contract continuity has on international trade. Part III uses three hypothetical value or cost change ranges²⁵⁸ to evaluate scenarios with the tests set forth in the previous section: severity, foreseeability, and allocation of risk.²⁵⁹ The first range represents a loss in the value of performance or an increase in the cost of performance of up to fifty percent. In this range, the issue of insufficient severity is addressed. The second range presents a loss in value or an increase in cost of between fifty and eighty percent. In this range, issues of foreseeability and allocation of the risk are most likely to arise. Lastly, the third range embodies a loss in value or increase in cost of above eighty percent. In this case, a United States court would be more willing to grant a discharge than for losses falling into the other two ranges. This Note argues, however, that, rather than discharging the obligations in this range, a court should first attempt to compel renegotiation or reform the contract where this is appropriate.

A. *The Economic Need for Stability and Certainty of Contract*

The United States and other nations benefit from healthy international trade.²⁶⁰ International trade and, thus, commercial contracts, have become increasingly important to the health of the U.S. economy.²⁶¹ Furthermore, our economy needs certainty in those interna-

258. I have chosen these three ranges to organize my discussion. These ranges are not intended to be strictly applied. Because impracticability is an equitable doctrine, the threshold severity is subject to judicial discretion and, thus, a bright line rule is inappropriate.

259. See *supra* notes 202-56 and accompanying text.

260. See *Greenspan Testimony*, *supra* note 19, at *41 (testifying that "the evidence . . . very clearly demonstrates that the more crossborder trade that one can engage in, the greater the degree of specialization, the higher the standards of living").

261. Seita, *supra* note 142, at 429-30, 443.

Globalization . . . is foremost an economic process. Economic globalization refers to the world-wide integration of markets. In economic globalization, markets for goods, services, financial capital, and intellectual property take on transnational or global proportions. A paramount consequence of market integration has been increased economic interdependence among nations For virtually all countries, transnational trade is important, if not vital, to their economic prosperity.

Id. at 429-30, 443.

tional contracts to encourage and facilitate international trade.²⁶² This need for certainty was recognized by all parties to the CISG.²⁶³ The CISG incorporates policies promoting international trade by encouraging the preservation of deals and fostering cooperation in cases of difficulties.²⁶⁴

When courts excuse parties from contracts merely because of a replacement of currency, they create a sense of uncertainty and distrust in the business world.²⁶⁵ In response, parties would shift from long-term to short-term contracts to have more control over pricing.²⁶⁶ This would exacerbate the cycle of economic booms and recessions (also known as the business cycle) and decrease the standard of living.²⁶⁷

Alternatively, when courts ensure the continuity of transatlantic commercial contracts, they contribute to the stability of the interna-

262. See President Ronald Reagan's Letter of Transmittal, U.S. S. Treaty Doc. No. 98-9, 98th Cong. (1983), reprinted in *The Convention for the International Sale of Goods: A Handbook of Basic Materials* 75 (Daniel Barstow Magraw & Reed R. Kathrein eds., 2d ed. 1990). The letter states in part:

International trade now is subject to serious legal uncertainties. Questions often arise as to whether our law or foreign law governs the transaction The Convention's uniform rules offer effective answers to these problems. Enhancing legal certainty for international sales contracts will serve the interests of all parties engaged in commerce by facilitating international trade.

Id. The opening provisions of the CISG state:

CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States, BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade, [the parties have agreed to the CISG].

CISG, *supra* note 167, Preamble.

263. CISG, *supra* note 167, Preamble.

264. See Robert A. Hillman, *Applying the United Nations Convention on Contracts for the International Sale of Goods: The Elusive Goal of Uniformity*, in *Review of the CISG*, *supra* note 240, at 21, 30-32.

The Convention's goal of saving deals promotes important international values pertinent to the contracting process. It supports important non-economic motives for performing, encourages planning, and reduces costs. By encouraging performance, the Convention fosters the parties' trust and cooperation, thereby encouraging future exchanges and helping to unite the international trading community.

Id. at 31.

265. "Because allocating risks through long-term contracts is essential to accurate planning and, thus, to the viability of a business in a free market economy, courts rarely excuse sophisticated commercial parties from their contractual obligations." H. Ward Classen, *Judicial Intervention in Contractual Relationships under the Uniform Commercial Code and Common Law*, 42 S.C. L. Rev. 379, 383 (1991). "If the sanctity of long-term contracts is disturbed, the accompanying uncertainty could create instability in the economic markets." *Id.*

266. *Id.* at 405.

267. *Id.* at 383.

tional contracting environment.²⁶⁸ Just as a stable domestic contracting environment is economically beneficial and allows parties to allocate risks,²⁶⁹ a sound international contracting environment also better accommodates risks.²⁷⁰ Hence, it is very important not to unnecessarily jeopardize the continuity of contracts.

B. *The First Range: Severity of the Loss*

In the first range—where currency values interfere with the cost or value of performance up to fifty percent—the hardship thresholds will most likely not be met.²⁷¹ The UNIDROIT Principles' comments establish a threshold of fifty percent of value lost or cost increased of performance for the hardship provisions to become applicable.²⁷² Although the U.C.C. does not set forth a specific percentage, the following discussion shows that the threshold is as severe as the CISG requirement, if not more so.²⁷³

268. See Perillo, *Force Majeure*, *supra* note 254, at 17-18.

It is difficult to believe that judges in reviewing the "factual" question of foreseeability can refrain from taking into account the larger consequences of a finding of foreseeability. If, in one case, American entry into the second [sic] World War had been declared to be unforeseeable, how many thousands, or tens of thousands of contracts would have to be dissolved because of impossibility or frustration? How many shipping and sales contracts would have been thwarted by the Suez closings? How broadly would international trade be disrupted and how much uncertainty would be injected into domestic and international trade? I suggest that it is no accident . . . that the courts are more willing to find an excuse where the supervening event has drastic consequences only for one contract or a small number of contracts than where the supervening event affects an enormous number of transactions.

Id. (footnote omitted).

269. See Classen, *supra* note 265, at 383.

270. Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions* (Lex Mercatoria), 19 Har. Int'l L.J. 221, 221-29 (1978) (discussing the development of international commercial law based on equity and commercial practices to guard against risks inherent in the transactions).

271. See Southern, *supra* note 257, at 27 (stating that in a contract for the supply of goods for payment at a fixed price a replacement of the currency does not change the substance of the contract). For an analogous situation, see *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975). In that case, the court did not excuse performance where the United States government interfered with oil prices during an oil crisis.

272. See UNIDROIT Principles, *supra* note 168, art. 6.2.2 cmt. 2 (commenting that "an alteration amounting to 50% or more of the cost or the value of the performance is likely to involve a 'fundamental' alteration"). According to one commentator, the UNIDROIT Principles may be used as a gap filler to a CISG contract and, thus, a court could import the fifty percent threshold into a contract dispute governed by the CISG. Garro, *supra* note 173, at 1151-52.

273. See *Haas v. Pittsburgh Nat'l Bank*, 495 F. Supp. 815 (W.D. Pa. 1980) (denying plaintiffs an adjustment of an interest rate after the prime rate rose).

Variations in the value of a promised performance, caused by the constantly varying factors that effect [sic] the bargaining appetites of men, are the rule rather than the exception. Bargainers know this and swallow their losses and disappointments, meantime keeping their promises . . . Relief from

In cases of disadvantage to the buyer or seller, he or she would be arguing for commercial impracticability. Neither the U.C.C. nor the CISG define a threshold severity.²⁷⁴ Thus, the courts may turn to the Restatement (Second) of Contracts to interpret the U.C.C.²⁷⁵ The threshold lies beyond merely sustaining a loss.²⁷⁶ According to the Restatement, “[t]he frustration must be so severe that it is not fairly to be regarded as within the risks that [the disadvantaged party] assumed under the contract.”²⁷⁷

The high threshold level of severity a party must establish is reflected in a heavy evidentiary burden.²⁷⁸ In *Nora Springs Cooperative Co. v. Brandau*,²⁷⁹ the party claiming impracticability (plaintiff) asserted that it did not perform because transportation costs became too expensive.²⁸⁰ The plaintiff elevator company claimed excuse for not accepting corn which it had contracted to purchase.²⁸¹ It asserted that it could not buy the corn because it could not pick it up due to a shortage of railroad cars which made the cost of transportation too expensive.²⁸² The court did not grant an excuse because the plaintiff had failed to show that the increased costs would be so prohibitive as to alter “the essential nature of the performance.”²⁸³ Similarly, in *Northern Illinois Gas Co. v. Energy Cooperative, Inc.*,²⁸⁴ the buyer asserted excuse, based on increased manufacturing costs which caused operating losses.²⁸⁵ The court found a breach of contract because the buyer failed to show that the increased cost of performance would constitute a “grave injustice” if the contract was not excused.²⁸⁶ In

duty . . . can safely be granted on the ground of frustration of purpose by the rise or fall of values, *only when the variation in value is very great*

Id. at 819 (emphasis added) (quoting Corbin, 6 Contracts, § 1355 (1962)).

274. Peter Winship, *Domesticating International Commercial Law: Revising U.C.C. Article 2 in Light of the United Nations Sales Convention*, 37 Loy. L. Rev. 43, 80 (1991) (explaining that CISG art. 79 and U.C.C. § 2-615 “cover much the same ground”). For the purpose of this Note, I assumed that a judge will probably apply common law definitions of severity or impracticability regardless of whether the contract is governed by the U.C.C. or the CISG.

275. Draper, *supra* note 200, § 2.

276. See *Roth Steel Prods. v. Sharon Steel Corp.*, 705 F.2d 134, 149 n.34 (6th Cir. 1983) (citing *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 319 (D.C. Cir. 1966)) (holding that an increase in cost of fifteen percent is not sufficient grounds for excuse); Draper, *supra* note 200, § 2(b) (warning that “claims of commercial impracticability based on increased costs, expenses, and the like, entail a heavy burden of proving facts sufficient to justify such a claim”).

277. Restatement (Second) of Contracts § 265 cmt. a.

278. Draper, *supra* note 200, § 2(b).

279. 247 N.W. 744 (Iowa 1976).

280. *Id.* at 746-47.

281. *Id.* at 747.

282. *Id.* at 746.

283. *Id.* at 748.

284. 461 N.E.2d 1049 (Ill. App. Ct. 1984).

285. *Id.* at 1053. The increased manufacturing costs were caused by a rise in the market demand for natural gas. *Id.*

286. *Id.* at 1061.

United States v. Wegematic Corp.,²⁸⁷ the court came to a similar result where engineering difficulties required an additional development expense of one million dollars or more, even when the contract itself was worth only \$231,800.²⁸⁸ The court held that the alleged additional expenses were not “clearly prohibitive.”²⁸⁹ Therefore, the threshold of severity lies beyond a mere increase in costs. Parties alleging impracticability based on increased costs must prove that the increased cost altered the essential nature of the contract, were clearly prohibitive, or that the obligation of performance, given the changed circumstance, would be gravely unjust.²⁹⁰

C. *The Second Range: Allocation of Risk and Foreseeability*

In the second range, the assumed change in the value or cost of performance is between fifty and eighty percent. In this range, the threshold level of severity is likely to be met under the U.C.C., the CISG, and the UNIDROIT Principles. This does not end the inquiry, however, as a finding of either foreseeability or of an allocation of the risk will keep the court from excusing a party's duty to perform under any of the potentially applicable bodies of law.²⁹¹ As seen below, neither requirement will usually be met in the context of the change-over to the Euro.

1. Allocation of Risk

A party that has assumed the risk of a certain contingency is not entitled to assert that event as an excuse.²⁹² The risk associated with the implementation of the Euro is analogous to any other government-imposed change in a currency's value. In other cases, where the person who is entitled to payment under the contract loses the value of the bargain due to a currency devaluation, courts have held that the risk of devaluation was allocated to him or her under the terms of the contract and, thus, it did not excuse the obligation.²⁹³ By agreeing to

287. 360 F.2d 674 (2d Cir. 1966).

288. *Id.* at 675.

289. *Id.* at 676-77.

290. See Draper, *supra* note 200, §§ 7, 10.

291. Draper, *supra* note 200, §§ 2(a), 3 (discussing requirements of the U.C.C. for excuse); Honnold, *supra* note 233, at 426-27 (outlining the elements required by the CISG to qualify for exemption from liability for non-performance); UNIDROIT Principles, *supra* note 168, art. 6.2.2 (setting forth the elements of hardship).

292. Restatement (Second) of Contracts § 261. In that case, either the language of the contract or the context would indicate that the party may not argue impracticability. Susan E. Wuorinen, Case Comment, Northern Indiana Public Service Company v. Carbon County Coal Company: *Risk Assumption in Claims of Impossibility, Impracticability, and Frustration of Purpose*, 50 Ohio St. L.J. 163, 165 (1989).

293. See, e.g., *Tillman v. Russo Asiatic Bank*, 51 F.2d 1023, 1025 (2d Cir. 1931) (affirming that “an obligation payable ‘in terms of the currency of a country takes the risk of currency fluctuations and whether the creditor or the debtor profits by the change the law takes no account of it’”) (quoting *Deutsche Bank v. Humphrey*, 272

denominate the mode of payment in a certain currency, the obligee is aware of any risks associated with traditional governmental control of that currency.²⁹⁴ In the cases of Cuban²⁹⁵ and Chinese²⁹⁶ currency replacement and concomitant devaluation, the obligee carried the risk of the currency changes.²⁹⁷ Thus, the obligee, in this case the seller, assumed the risk of a change in the value of the medium specified for payment. It follows that in the case of a weak Euro, because a seller carries the risk of disadvantageous exchange rates, he or she should not be excused from a contract.

Where the buyer wants an excuse due to an increased price, most courts have held that U.C.C. Section 2-615 applies.²⁹⁸ Most claims by buyers asserting the U.C.C. Section 2-615 impracticability defense, however, have been rebuffed by the courts.²⁹⁹ Excuse is not granted when the buyer carried the risk of a disadvantageous exchange rate by agreeing to the currency.³⁰⁰ An American buyer who agreed to pay in

U.S. 517, at 519 (1926)). In an analogous situation, concerning government controls of oil prices, the seller was not excused from a disadvantageous oil supply contract. *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429 (S.D. Fla. 1975).

294. See *Tillman*, 51 F.2d at 1025.

295. See *Johansen v. Confederation Life Ass'n*, 447 F.2d 175 (2d Cir. 1971) (holding that a Cuban life insurance policy to be paid in Cuban pesos, made at a time when it was freely convertible on a one to one basis with the U.S. Dollar, was not to be paid, to the plaintiff, in U.S. Dollars once the Cuban Peso lost such convertibility); *Gonzalez y Camejo v. Sun Life Assurance Co. of Canada*, 313 F. Supp. 1011 (D.P.R. 1970) (same).

296. See *Shanghai Power Co. v. Del. Trust Co.*, 316 A.2d 589 (Del. Ch. 1974) (declaring lack of value of stock denominated in severely depreciated Chinese currency); *Sternberg v. West Coast Life Ins. Co.*, 16 Cal. Rptr. 546 (Cal. Dist. Ct. App. 1961) (declaring a life insurance policy denominated in severely devaluated Chinese Currency as valueless).

297. The Cuban and Chinese cases cited merely ruled on risk allocation, not continuity of contract.

298. See, e.g., *Nora Springs Coop. Co. v. Brandau*, 247 N.W.2d 744, 748 (Iowa 1976) ("While the section expressly mentions *sellers*, the explanations in Comment 9 make it evident the provisions should also be equally applicable to buyers." (emphasis in original)). The same result was reached in *Lawrance v. Elmore Bean Warehouse, Inc.*, 702 P.2d 930, 932 (Idaho Ct. App. 1985), *Northern Illinois Gas Co. v. Energy Coop., Inc.*, 461 N.E.2d 1049, 1060 (Ill. App. Ct. 1984), and *Meuse-Rhine-Ijssel Cattle Breeders of Canada, Ltd. v. Y-TEX Corp.*, 590 P.2d 1306, 1308 (Wyo. 1979).

299. See *Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265 (7th Cir. 1986) (not excusing utility from long-term, fixed-price coal contract because the utility had assumed the risk); *Hancock Paper Co. v. Champion Int'l Corp.*, 424 F. Supp. 285 (E.D. Pa. 1976) (noting that both parties bargained for the risk of changes in cost and, thus, a change in cost did not alter any duties under a fixed price contract); *Northern Ill. Gas Co.*, 461 N.E.2d at 1059 (holding no frustration where event was foreseeable); *Nora Springs Coop.*, 247 N.W.2d at 748 (holding that economic burden or unattractiveness of performance does not excuse non-performance); U.C.C. § 2-615 cmt. 4 (1977) (stating that "[i]ncreased cost alone does not excuse performance"); *Draper, supra* note 200, § 7, at 601 (stating that "[t]he mere fact that performance becomes economically burdensome or unattractive does not excuse nonperformance [under] U.C.C. 2-615").

300. See *supra* note 294 and accompanying text.

a European currency has assumed a certain degree of exchange rate risk in the nature of the payment obligation.³⁰¹

2. Foreseeability

Where the contracting parties could have foreseen the events which impacted the cost or the value of the contract, courts will not apply the excuse provided by U.C.C. Section 2-615 to the affected contract.³⁰² The same applies for contracts governed by the CISG or the UNIDROIT Principles.³⁰³ In the 1970s, for example, the oil crisis distorted the value or costs of many contracts and basically crippled the domestic economy.³⁰⁴ Many suppliers who had entered into fixed price contracts litigated to be excused from their contractual obligations.³⁰⁵ For the most part, they did not succeed. The courts viewed the oil crisis as a foreseeable event and, thus, would not excuse the parties from their contractual obligations.³⁰⁶

To a certain extent, the applicability of excuse will depend on the time at which the parties entered into their contract. For instance, if the contract was drafted during the "Europessimism" era³⁰⁷ of the 1980s, the single currency might have been unforeseeable.³⁰⁸ One could argue, however, that a monetary union with a single European

301. Detjen Telephone Interview, *supra* note 138.

302. Draper, *supra* note 200, § 2, 7.

303. See *supra* note 291 and accompanying text.

304. For a discussion of the events leading up to the "energy crisis" that resulted from the Arab oil embargo and 1973 OPEC sponsored oil price increases, see *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 433-34 (S.D. Fla. 1975).

305. *Iowa Elec. Light and Power Co. v. Atlas Corp.*, 467 F. Supp. 129 (N.D. Iowa 1978), *rev'd on other grounds*, 603 F.2d 1301 (8th Cir. 1979) (finding the energy crisis foreseeable and, thus, refusing to consider whether performance had become impracticable); *Eastern Air Lines*, 415 F. Supp. at 437-42 (overruling a claim of impracticability because of the foreseeability of the events causing the contract to become burdensome, i.e. the energy crisis); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721 (Mo. Ct. App. 1979) (denying that the Arab oil embargo constituted an excuse because it was foreseeable).

306. "[The] possibility [of Arab oil embargo] was common knowledge and had been thoroughly discussed and recognized for many years by our government, media economists and business, and the fact that the embargo was imposed during the term of the contract here involved was foreseeable." *Peabody Coal Co.*, 583 S.W.2d at 728. For a contemporary discussion of the courts' treatment of the oil crisis cases, see Thomas Black, *Sales Contracts and Impracticability in a Changing World*, 13 St. Mary's L.J. 247, 263-67 (1981).

307. "Europessimism" was a general popular sentiment in Europe where people held little hope for the success of any European Community endeavors. Bermann, *supra* note 33, at 13-14, 432.

308. See *Contracts at Risk from Euro Conversion*, Thomson's Int'l Banking Regulator, Nov. 17, 1997, at 1 ("Contracts older than 1992, the year the formation of the EMU was announced, and those contracts not governed by the laws of a state with special statutes to protect these contracts, are particularly at risk of litigation 'Any contract made in the last few years, when the European Monetary Union was a foreseeable option, is probably safe'" (quoting Seth Grosshandler, Attorney at Cleary, Gottlieb, Steen & Hamilton in New York)).

currency was foreseeable beginning in 1992, when the Maastricht Treaty included the chapter on the monetary union.³⁰⁹ Indeed, by 1997, many professional articles exhorted business to review existing contracts and include Euro-terms in their new contracts.³¹⁰ At the very least, by 1997 the introduction of the Euro was foreseeable. Consequently, parties who entered into a contract in the mid-1990s and thereafter will most likely not be excused from their contractual obligations because the potential currency change to the Euro was foreseeable at the time of contracting.

One court's reasoning is persuasive in the instant case.³¹¹ The Missouri Court of Appeals found that the business community and the media recognized the oil crisis as a possible event long before it actually occurred.³¹² Likewise, the EMU and the single currency have long been a possibility.³¹³ Thus, just as the possibility of an oil crisis was foreseen by the media and the business sector, so too is Europe's achievement of the EMU and the introduction of a single European currency. Furthermore, in the Missouri case, the mere fact that the parties were not aware of the exact timing of the oil crisis did not render the crisis unforeseeable.³¹⁴ Similarly, the mere showing that the parties doubted that the EMU would be implemented on time should not hinder a court from finding that the events tending to cause impracticability were foreseeable.

The foreseeability standard under the UNIDROIT Principles is similar to that of the U.C.C. and the CISG: An event is not foresee-

309. See *id.*; *supra* Part I.A. Although the achievement of EMU was foreseeable, there was some uncertainty as to the time it would begin. Wolfgang Münchau, *Life Will Not be the Same Under EMU*, *Fin. Times*, Nov. 21, 1997, at 1 ("Two years ago, not many would have bet that [EMU] would begin on time. Six months ago expectations began to change, and today the 1999 start of [EMU] is as certain as any future event can be.").

310. Journal of Commerce Staff, *How to Avoid Legal Tangles*, *J. Com.*, June 23, 1997, at 5A (advising companies to "[r]eview existing contracts that will continue beyond Jan. 1, 1999 [and to] [r]eview rate fixing, price source, indexation, increased cost, prepayment, force majeure and other contractual provisions that may be affected"); Richard F. Kingham & David L. Harfst, *Winning Legal Strategies: Beating the Odds When You're Betting the Company*, *Corp. L. Times*, Nov. 1997, at 40 (col.1) ("Contracts, loan agreements, bond issues and other documents denominated in existing national currencies of European countries must be reviewed, and agreements being negotiated now must be written to take account of the . . . possibility of a new reserve currency to rival the dollar in international financial transactions."); Yerak, *supra* note 5, at 1H ("You've got to look at all your legal contracts and loan agreements, which may have to be adjusted' to include conversions to the euro 'It's important that every vendor and customer contract and every lease agreement will somehow have to be reviewed and changed [to reflect the change to the euro].'" (quoting William Aamoth, Assistant International Treasurer of TRW Inc., and Mark J.D. Jarrad, International Vice-President for Finance and Administration for Parker Hannifin Corp.)).

311. *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721 (Mo. Ct. App. 1979).

312. *Id.*

313. See *supra* text accompanying notes 308-10.

314. See *supra* text accompanying notes 308-10.

able if it "was so outside the bounds of probability that reasonable parties would not provide for it."³¹⁵ The UNIDROIT Principles give an illustration of foreseeability³¹⁶ which indicates that extraordinary depreciation in a foreign currency value due to a political crisis is an "unforeseen" event.³¹⁷ Thus, if the fixed exchange rates of the old currency supply a grossly inadequate value due to a weak Euro caused by political problems within the European Union, this might constitute an unforeseen event under the UNIDROIT Principles.³¹⁸ Furthermore, even assuming that the disadvantaged party meets all the requirements for hardship, it is unlikely that a court would discharge the contractual obligations. Instead, the provisions first entitle the parties to compelled renegotiation or receive reformation.³¹⁹

D. *The Third Range: Judicial Reformation of the Contract*

In the third range, the contract value or cost has changed eighty percent or more and is so dramatic as to require judicial intervention. Such intervention could come in the form of discharge of the contractual obligation, reformation of the contract, or compelled renegotiation.³²⁰ This section will argue that courts interpreting transatlantic commercial contracts should first consider renegotiation and reformation before deciding to discharge the contractual obligations.

Relational values³²¹ embodied in contracting are most respected by judicial reformation.³²² Judicial reformation results in loss sharing³²³

315. Perillo, *Force Majeure*, *supra* note 254, at 23.

316. See UNIDROIT Principles, *supra* note 168, art. 6.2.2 illus. 3.

317. See Perillo, *Force Majeure*, *supra* note 254, at 23.

318. This illustration is not exclusive. It is possible that a dramatic economic crisis may also constitute an unforeseen event.

319. See *supra* notes 249-53 and accompanying text.

320. See Mark P. Gergen, *A Defense of Judicial Reconstruction of Contracts*, 71 *Ind. L.J.* 45, 45 (1995) (discussing judicial interference in contracts); Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 *Duke L.J.* 1, 1-2 (describing the variety of ways in which a judge can respond to a case where a party claims excuse from contractual obligations).

321. Ian R. Macneil, *The New Social Contract: An Inquiry into Modern Contractual Relations* 64-70, 75-77 (1980) (describing relational norms and comparing developing relational contract law to the neoclassical discrete contract law). In a relational contract, the most important objective is to establish and maintain an economic relationship rather than allocate risks and costs of a transaction. *Id.*

322. See Hillman, *supra* note 320, at 4-6 (describing how relational values are important to parties in a long-term supply contract and arguing for a duty to adjust a contract to reflect changed circumstances).

[P]arties want to continue to deal with each other because they are aware of the costs of finding a market substitute after investing in a relationship and after forming understandings that lower the cost of doing business [In short,] both parties can increase mutual gains from the contract by remaining flexible after signing the contract, thereby saving costs related to planning for risks and bickering after contract breakdown.

Id. at 5-6 (notes omitted).

by avoiding an all or nothing approach.³²⁴ That approach perceives risk allocation as the main function of contracting³²⁵ and ignores the relational value of long-term contract practices.³²⁶ Long-term supply contracts, in particular, have a substantial relational dimension which judges should take into account when fashioning relief.³²⁷ Admittedly, not all situations are suited for judicial adjustment.³²⁸ Adjustment can be appropriate when "risk allocation is unclear, and, if the hardship is severe enough, even when the intention to allocate the risk is manifest."³²⁹ A survey of U.S. companies revealed that a plurality of the surveyed companies preferred judicial reformation of their contracts to complete excuse.³³⁰ The survey may indicate the business community's recognition of the relational and fairness advantages inherent in loss sharing.³³¹

Judicial reformation is authorized in the subchapter on hardship in the UNIDROIT Principles.³³² Although United States courts have not favored this option,³³³ Professor Joseph Perillo argues that American law should treat international commercial contracts differently than domestic commercial contracts to fully respect the intentions of

323. Loss sharing can be an efficient and fair remedy. See Daniel T. Ostas & Frank P. Darr, *Understanding Commercial Impracticability: Tempering Efficiency with Community Fairness Norms*, 27 Rutgers L.J. 343, 364-66 (1996).

324. See Sheldon W. Halpern, *Application of the Doctrine of Commercial Impracticability: Searching for "The Wisdom of Solomon,"* 135 U. Pa. L. Rev. 1123, 1125 (1987). The all or nothing approach means that "[o]ther things being equal, the seller bears all of the risk unless performance is extremely burdensome, in which case the buyer bears all the risk." Joskow, *supra* note 1, at 160.

325. See Classen, *supra* note 265, at 399 ("Improper allocation of the element of risk is a serious concern because risk allocation is the primary reason for entering a contract.").

326. Halpern, *supra* note 324, at 1171-73.

327. *McGinnis v. Cayton*, 312 S.E.2d 765 (W. Va. 1984).

Situations arising from [long-term] contracts like [that at issue] recommend solutions by interparty renegotiation. When that does not work, courts should make themselves available to provide just and equitable resolutions with the primary goal being to maintain the integrity of the long-term contractual relationship. This can be better achieved by remedies such as equitable adjustment than rescission or discharge from performance.

Id. at 779 (Harshbarger, J., concurring) (citations omitted); see also Ostas & Darr, *supra* note 323, at 354-55 ("[T]here may be years of personal or industry customs that set particular norms or expectations of behavior. It should, therefore, be expected that relational issues affect the resolution of excuse cases.").

328. See Halpern, *supra* note 324, at 1175.

329. *Id.* at 1168.

330. See Weintraub, *supra* note 141, at 42 ("[A] plurality [of the companies surveyed favor] price adjustment, contrast[ing] with contract doctrine more than any other survey result.").

331. *Id.*

332. See *supra* text accompanying notes 184-253.

333. Only one court has actually reformed a contract in such circumstances. *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980); Hillman, *supra* note 320, at 2 n.5.

the contracting parties.³³⁴ He asserts that many international long-term contracts contain a renegotiation clause to maintain flexibility.³³⁵ He proposes two situations in which courts should consider the lack of a renegotiation term as a gap which they can fill with the help of the UNIDROIT Principles.³³⁶

In one proposed situation, an unsophisticated party fails to include such a commonly-used clause as a mere oversight.³³⁷ In the second proposed situation, a sophisticated party could have deliberately omitted such a renegotiation clause.³³⁸ If a court finds that a contract governed by the CISG does have such a gap, then the UNIDROIT Principles can be used as a gap-filler to justify and grant authority for judicial reformation of the contract.³³⁹ If the court chooses to reform the contract, the court would most likely re-allocate the loss by adjusting the price of the goods and perhaps also the currency of payment to reestablish the contract's equilibrium.³⁴⁰ This solution recognizes the need for parties to keep their promises and equitably saves the disadvantaged party from financial disaster.³⁴¹

In conclusion, excusing a party from his or her contractual obligations because of the introduction of the Euro is inappropriate in the majority of cases. Foremost, parties are unlikely to meet the threshold

334. See Perillo, *UNIDROIT Principles of International Commercial Contracts*, *supra* note 184, at 301-02.

335. *Id.*

336. *Id.*; see also Michael Joachim Bonell, *The UNIDROIT Principles in Practice – The Experience of the First Two Years* (visited Feb. 16, 1998) <<http://cisgw3.law.pace.edu/cisg/biblio/pr-exper.html>>.

Three awards—two rendered by the International Court of Arbitration of the Federal Chamber of Commerce of Vienna, [*Award No. 4318* and *Award No. 4366* of 15 June 1994] and one by the Court of Arbitration of the International Chamber of Commerce [*ICC Award No. 8128 of 1995*—refer to the UNIDROIT Principles in order to fill a gap in the United Nations Convention on Contracts for the International Sale of Goods (CISG). . . . There is also a State court decision—more precisely, one rendered by the Court of Appeal of Grenoble on 23 October 1996—using the UNIDROIT Principles as a means to supplementing CISG.

Id. (footnotes omitted).

For a discussion of the role of the UNIDROIT Principles as a gap filler for the CISG, see Garro, *supra* note 173, at 1151-52 (arguing that judges and arbitrators would better achieve the goals of drafters of international instruments if they would use the CISG and the UNIDROIT Principles to avoid national solutions for international problems).

337. See Perillo, *UNIDROIT Principles of International Commercial Contracts*, *supra* note 184, at 301-02.

338. See *id.*

339. See *supra* note 336.

340. Judge Teitelbaum's famous loss-sharing decision, *Aluminum Co. of Am. v. Essex Group, Inc.*, presents a good example of judicial reformation. 499 F. Supp. 53, 78-80 (W.D. Pa. 1980).

341. See Hillman, *supra* note 320, at 17-19 (discussing fairness norms); Ostas & Darr, *supra* note 323, at 354-57 (describing when judicial readjustment is appropriate).

of severity to qualify for excuse. Secondly, risk of currency value depreciation is usually allocated to the obligee (seller) when he or she accepts to be paid in a certain currency. The risk of currency value appreciation is carried by a buyer who agrees to pay in such a currency. Therefore, circumstances are rare where the disadvantaged party can show that the currency risk was not allocated. Furthermore, the foreseeability inquiry will contribute to the unavailability of excuse from contractual obligations because excuse can only be granted if the contract had been made before the EMU and the single currency became reasonably foreseeable. Finally, even if judicial intervention becomes appropriate, judges can avoid granting a complete discharge of the contractual obligations by compelling renegotiation or reforming the contract.

CONCLUSION

There are compelling legal rationales and policy reasons to support the continuity of contracts in the face of the replacement of European national currencies with the Euro. The interests of the global economy are best served by not unnecessarily creating uncertainty for long-term commercial contracts. An examination of the requirements for excuse from contractual obligation reveals that, in the context of the Euro introduction, excuse is largely inappropriate. Furthermore, in the rare case where the contract is truly commercially impracticable, a court can still foster continuity of contractual relations by compelling renegotiation or reforming the contract.

Notes & Observations