THE EUROPEAN MONETARY UNION AND ITS IMPACT ON MEDIUM AND LONG-TERM TRADE AGREEMENTS

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I. INTRODUCTION

When business parties enter into binding agreements, it is in their interest not merely to consider the immediate dynamics of the exchange, but to anticipate the ways in which a changing world might affect their obligations. Individual circumstances are only a baseline in contract negotiations. In order to achieve maximum security for the parties, the agreement must be attuned to political and economic realities.

In the area of export trade finance, one of the most significant external influences which parties need to take into account today is the impending European Monetary Union (EMU). The EMU, scheduled to be launched in 1999, is the dramatic culmination of sustained efforts to unify economic and monetary policies in Europe. It signals the death of various national currencies, which are to be succeeded by a single monetary unit. At this time, only a minority of EU member states perform well enough economically to qualify for the EMU.¹ Nevertheless, the EMU is expected to proceed according to schedule, inducting the qualified countries immediately, followed by the other countries as they become eligible.²

The obsolescence of national currencies poses some technical difficulties, because many contracts stipulate a specific currency in which payment is to be made. Part I of this paper explores the currency problems that could arise as a consequence of the single currency, focusing in particular on countertrade and forfaiting transactions. Part II of the paper discusses the identifying features of forfait financing. Part III addresses counterpurchase agreements and bilateral clearing agreements. Part IV then examines the history and technical aspects of the EMU. Part V anticipates currency disputes related to forfaiting transactions and countertrade. Finally, Part VI concludes that business parties should pay close attention to the external influence of the EMU when they coordinate their mutual obligations.

¹. These include France, Germany, Austria, Belgium, Luxembourg, and the Netherlands. See infra note 160.
². See infra notes 153 and 154.
II. FORFAITING AS A METHOD OF EXPORT FINANCE

A. Identifying Features

As with other forms of export finance, forfaiting is a mechanism designed to secure credit for buyers with the least possible risk to sellers. Exporters find forfaiting appealing because cash is received shortly after shipment. Buyers find it helpful because it enables them to purchase goods without having to tender immediate payment. Estimates indicate that approximately two percent of all international trade involves forfaiting. This method of finance is now gaining acceptance in the United States, where many European forfait houses have established representative offices.

In a forfaiting transaction, the exporter sells export receivables at a discount to a forfaire in return for cash. Trade instruments used for this purpose include promissory notes, guaranteed bills of exchange (i.e., "per aval"), and letters of credit. The debt is ordinarily paid in semi-annual installments, each of which is evidenced either by a negotiable instrument, or by a letter of credit. When the exporter sells the negotiable

4. See Uzzelle, supra note 3, at 20.
6. See Uzzelle, supra note 3, at 22.
7. See Id. at 20. Forfaiting was developed in the wake of World War II by Swiss financiers in order to facilitate the sale of West German capital assets to Eastern Europe. Id. Today, the center of the forfaiting market is London. Id.; Edmond Tavernier, Legal Aspects of Forfaiting, 11 INT'L BUS. LAW 25 (Oct. 1983) (describing the role of forfaiting in U.S. grain exports) [hereinafter Tavernier].
9. See Tavernier, supra note 7, at 27-28. A per aval guarantee by a bank is "an unconditional irrevocable and freely assignable obligation of the bank, not only as guarantor, but as co-obligor as well." Uzzelle, supra note 3, at 20. Thus, the bank as guarantor is required to make payment without respect to any nonperformance issues that might afflict the underlying transaction. See Handelsbank AG, 1992 U.S. Dist. LEXIS 15100, at 2 (S.D.N.Y. Sept. 29, 1992). A letter of credit is "an undertaking issued by a bank for the account of the buyer (the Applicant) or for its own account, to pay the [seller] the value of the Draft and/or documents provided that the terms and conditions of the [letter of credit] are complied with." CHARLES DEL BUSTO, ICC GUIDE TO DOCUMENTARY CREDIT OPERATIONS 22 (1994).
10. See Uzzelle, supra note 3, at 20.
instruments, the forfaiter may hold them until they mature, or resell them in a secondary market.¹¹

Since the forfaiter buys the instruments from the exporter on a non-recourse basis, all of the risks related to foreign debt are shifted from the exporter to the forfaiter.¹² Recourse against the exporter is only available in three extraordinary situations.¹³ The first is where the instruments are in some way defective.¹⁴ Recourse may also be had if the guarantee by the bank was not valid when it was made.¹⁵ Finally, the forfaiter has recourse if the transaction was “not as represented.”¹⁶

B. For Example

Suppose Spacely Sprockets, a United States exporter, enters into a sales agreement with Compratore di Milano, an Italian buyer.¹⁷ Compratore agrees to purchase 10,000 sprockets in return for a six-year credit on the sale. As part of the arrangement, Compratore secures a guarantee of payment from its local bank. Next, Spacely ships the

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[The products and the objectives of this market are very different from those of the original forfaiters. The participants in this secondary market view any item generated in the primary cycle (as a means to finance the export) merely as a risk asset to be endorsed and traded as a marketable security. Bankers participating simply buy risk, invariably on a non-recourse basis, and judge that risk by its country of origin, the credit status of the guaranteeing or avalizing party and their portfolio management objectives. Popular risk, such as good quality Chinese paper, could change hands as many as 10 times in the secondary market. Id. at 51.

¹² See Gmur, supra note 3, at 117.


¹⁴ Id.

¹⁵ Id.

¹⁶ Id. See also Eugene A. Ludwig & Michael J. Coursey, The Export Trade Note: A New Instrument for International Trade, 16 GA. J. INT’L & COMP. L. 381 (1986) [hereinafter Ludwig & Coursey]:

[It is unclear under European civil law whether the exporter, despite its endorsement of the note without recourse, implicitly covenants to the note-purchaser that the note it is selling is a valid note, validly executed by the importer and validly [guaranteed] by the importer’s bank. Thus, the exporter in a forfait transaction may ultimately be liable to the note-purchaser if the note proves to be invalid in form or substance.

Id. at 387 (citing Tavernier, Legal Aspects of Forfaiting, 11 INT’L BUS. LAW 25, 28-29 (Oct. 1983)).

¹⁷ This example is based on an illustration which appeared in Elnora Uzzelle’s article. See Uzzelle, supra note 3, at 21.
sprockets to Italy and endorses the guaranteed negotiable instruments on a non-recourse basis in favor of Fred's Forfaiting. Fred then pays to Spacely the discounted proceeds in cash. Spacely is now out of the picture, although it is still responsible for the quality of the goods. Meanwhile, Fred has absorbed all of the risks attending the transaction: the credit risk of Compratore’s bank; the risk of exchange rate fluctuations; and the political risks of doing business with an Italian firm. Fred now has the option of transferring those risks by selling the notes to another bank or to a private investor.

Under a forfaiting agreement, credit terms can range from two months to ten years. However, the normal range is between 180 days and about six years. In general, the amount of time granted for repayment corresponds to the risks involved. Thus, high risk transactions entail short repayment terms and high discount rates, while transactions of low risk imply the reverse.

III. COUNTERTRADE

Countertrade is a term used generically to describe a variety of international trade agreements. The most common forms of countertrade are counterpurchase agreements, buy-back agreements and barter. While barter and buy-back agreements typically do not require cash payment, other countertrade techniques often do. In light of the rapidly approaching changes in Europe’s currency system, this section outlines two

18. Id.
20. See supra note 11.
22. Id.
23. Id.
24. Id. “For sales to Japan, Canada, and France, terms may reach five years and the discount to yield hovers around 6.75%. However, sales to Pakistan may yield a one year term limit with a discount rate of 7.5%, reflecting the perceived risk.” Id.
27. Id. In a barter transaction, the parties exchange goods of equal value. Id. In a buy-back transaction, one trading partner exports technology and equipment in order to construct a plant in another country, and in return receives a predetermined supply of the plant’s ultimate output. Id. at 444.
of these techniques: counterpurchase agreements and bilateral clearing agreements.

A. Counterpurchase

In a counterpurchase agreement, the parties enter into multiple contracts, and the value of the reciprocal deliveries need not be equivalent. The first contract is simply a cash-for-goods transaction. The second contract prescribes the conditions of the counterpurchase, i.e., it covers the original exporter's obligation to purchase goods from the original buyer. The final contract, known as a protocol, links the first two agreements. This protocol is frequently incorporated into the counterpurchase contract.

The two essential purchase agreements are discrete transactions and involve separate payments of currency. The performance of deliveries and payments is ordinarily spread out over a period of one to five years. To illustrate, a German telecommunications company might sell hardware to a buyer in the Republic of Malawi for cash. This initial purchase would then be linked to a reciprocal purchase agreement. The German company would thereby assume an obligation for the subsequent purchase of some commodity, such as limestone or uranium.

B. Bilateral Clearing Agreements

Under a bilateral clearing agreement, two countries agree to extend mutual lines of credit and trade certain quantities of each other's goods during a specified period of time. In other words, one country purchases goods from the other and the price of the goods are debited from its line of credit.

When the clearing period expires, there is often an imbalance between the amounts of credit used by each country. In such a case, the

30. Id.
31. Id.
32. Id.
33. See Guyot, supra note 25, at 930.
34. Id.
35. Id.
36. See Nugent, supra note 28, at 833.
37. Id.
38. Id.
greater-consuming country is obligated to pay any residual difference to the lesser-consuming country. For example, if Austria shares a clearing agreement with Romania, and if at the end of the clearing period Austria has imported more goods from Romania than Romania has imported from Austria, then Austria will be responsible for its outstanding residual debt.

Whether the transaction in question involves a clearing agreement, a counterpurchase, or a forfait financing, parties to agreements with medium and long-term credit terms are advised to consider their possible exposure to risks related to the steady advance of a unified system of currency in Europe. The following section describes the forces propelling the new regime, the concomitant technical details and the arguments for and against its consummation.

IV. THE EUROPEAN MONETARY UNION

In 1957, the concept of a unified economic and monetary structure in Europe was formally posited in Article 3(g) of the Treaty of Rome. From 1957 until 1972, the Bretton-Woods Agreement represented the principal attempt to stabilize European currencies relative to one another. Under this regime, the fluctuations in exchange rates on foreign markets were subject to tight controls in the participating countries. However, recessionary pressures in the late 1960's and early 1970's forced the

39. Id.

40. Id. Romania would also have the option of selling its credit to a third party at a discount. Id. at 833-34.

41. The Treaty of Rome was signed by France, Germany, Italy, and the Benelux countries, and was ratified by each of those states as of 1958. See AURTHUR I. BLOOMFIELD ET AL., EUROPEAN MONETARY UNIFICATION AND ITS MEANING FOR THE UNITED STATES 1 (Lawrence B. Krause & Walter S. Salant eds., 1973) [hereinafter Bloomfield]. This treaty provided for the dissolution of restrictions on the free movement of capital among the participating countries, and for the erection of a single customs union. Id. Article 2 of the Treaty proclaimed that a common market was to be achieved, and that the economic policies of the signatories were to be harmonized. See John P. Flaherty & Maureen E. Lally-Green, The European Union: Where is it Now?, 34 DUQ. L. REV. 923, 937 (Summer 1996) [hereinafter Flaherty & Lally-Green]. Article 3 provided the instrumental details, including: (1) the coordination of a single external commercial and tariff policy; (2) the elimination of barriers to the free movement of labor, capital, goods, and services; (3) the development of common policy in certain areas of the economy such as agriculture and transportation; (4) the unification of economic and monetary policy; (5) the harmonization of the various laws of the signatories in order to nurture the common market; (6) the establishment of a European Social Fund and a European Investment Bank to promote employment and commercial expansion; and (7) the increase of trade with other countries and territories. Id.

42. The participating countries included France, Germany, Italy, and the Benelux countries. See Bloomfield, supra note 41, at 22-23.

43. Id.
original participants to withdraw from the agreement in order to rehabilitate their individual economies.\textsuperscript{44} The abandonment of Bretton-Woods resulted in pronounced instability in exchange rates in Europe on the markets for goods and capital suffered accordingly.\textsuperscript{45}

\textbf{A. The European Monetary System}

Partly inspired by the lessons learned from Bretton-Woods, the current effort to maintain stable markets and exchange rates is known as the European Monetary System (EMS).\textsuperscript{46} The EMS is far more ambitious than Bretton-Woods, and contemplates the coordination of fiscal and monetary policy as well as the stabilization of currency.\textsuperscript{47} Beyond these objectives, the EMS was also conceived as a vehicle for the establishment of a single currency that might eventually become suitable for international trade.\textsuperscript{48}

The push for a single currency can be traced to the Werner Plan of 1970, which set forth in detail the implications of a European Monetary Union.\textsuperscript{49} This plan sought to eliminate restrictions on the movement of capital, and to advance the goal of policy coordination.\textsuperscript{50} In 1979, this philosophy found expression as the European Economic Community adopted the EMS.\textsuperscript{51}

Technically, the EMS is "an agreement among central banks to manage intra-community exchange rates and to finance exchange market interventions."\textsuperscript{52} This system includes three operative components.\textsuperscript{53} First, member states are required to limit fluctuations in exchange rates through

\textsuperscript{44} See Susan B. Shulman, \textit{A Rapid or Evolutionary Approach: The EEC's Adoption of the ECU as a Common Currency}, 12 J. INT'L L. BUS. 392, 407 (1991) [hereinafter Shulman].
\textsuperscript{45} See Bloomfield, supra note 41, at 23.
\textsuperscript{46} See LAWRENCE B. KRAUSE ET AL., \textit{EUROPEAN MONETARY UNIFICATION AND ITS MEANING FOR THE UNITED STATES}, supra note 41, at 114-15 [hereinafter Krause].
\textsuperscript{47} Id. at 115.
\textsuperscript{48} Id.; HORST UNGERER ET AL., \textit{THE EUROPEAN MONETARY SYSTEM: DEVELOPMENTS AND PERSPECTIVES 2-3} (1990) [hereinafter Ungerer].
\textsuperscript{49} The Werner Report documented the need for the total convertibility of currency, as well as the elimination of fluctuations in exchange rates, and the establishment of parity ratios. See Krause, supra note 46, at 114-15.
\textsuperscript{50} Id. at 115-16.
\textsuperscript{51} See MICHELE FRATIANNI & JURGEN VON HAGEN, \textit{THE EUROPEAN MONETARY SYSTEM AND EUROPEAN MONETARY UNION 1} (1992) [hereinafter Fratianni & von Hagen].
\textsuperscript{52} JOHN B. GOODMAN, \textit{MONETARY SOVEREIGNTY: THE POLITICS OF CENTRAL BANKING IN WESTERN EUROPE} 192 (1992) [hereinafter Goodman].
\textsuperscript{53} See STEPHEN ZAMORA ET AL., \textit{BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW} 471 (Stephen Zamora & Ronald A. Brand eds., 1990) [hereinafter Zamora].
an Exchange Rate Mechanism (ERM). Second, member states may obtain short-term credit in order to intervene in cases of serious fluctuation. Finally, the EMS embraces the European Currency Unit (ECU) as the official reserve asset, and as the official accounting unit for the EEC.

Currency stability under the EMS is maintained by a parity grid and a divergence indicator. The parity grid measures the performance of one country's currency versus that of another. Desired bilateral rates are set by agreement and function as reference points for parameters beyond which currencies are not allowed to fluctuate. If a currency strays outside of the pre-set bands, the central bank of that country is required to intervene. Thus, the EMS works as a pegged exchange arrangement.

While the parity grid measures bilateral variations, the divergence indicator measures the performance of individual currencies against the weighted average of all the other currencies. If a member state's currency diverges too far from the ECU, that state is required to adjust by selling or buying its own currency, as the case may be. However, participation among states in both the parity grid and the divergence indicator is voluntary.

In the absence of excessive market pressures, the parity grid and the divergence indicator have helped to stabilize exchange rates.

54. Id.
55. Id.
56. Id. The ECU is a unit of account that represents a weighted average of the individual currencies of the member states. See John H. Works Jr., The European Currency Unit: The Increasing Significance of the European Monetary System's Currency Cocktail 41 BUS. LAW. 483, 494 (1986) [hereinafter Works].
58. Id.
59. Id.
60. If the currency of a central bank approaches the high end of its range versus another currency, the bank must sell its overvalued currency and buy the undervalued currency. Conversely, a central bank whose currency approaches the low end of the band must buy its own currency and sell the other. See Works, supra note 56, at 493-94.
61. See Kurzmann, supra note 57, at 144.
62. Id.
63. See Works, supra note 56, at 495.
64. See Schluter v. Hauptzollamt Lorrach, [1973] E.C.R. 1135, 1161 (holding that member states are not ultimately required to submit to the terms of the Exchange Rate Mechanism).
65. See Kurzmann, supra note 57, at 144.
Nevertheless, these devices have failed when intense market forces have jeopardized individual currencies. For example, Italy and the United Kingdom withdrew their currencies from the EMS in 1992 because of drastic economic conditions.

When the EMS was implemented in 1979, critics argued the wide disparities between the economies of the member states would preclude a workable system. These critics pointed to three possibilities as a result of the economic divergences. First, they argued the system would rapidly fail because it was not flexible enough to accommodate such disparate economies. Second, the critics warned that the system would have a deflationary impact, either by forcing countries with high inflation to tighten their policies or by making it necessary to suppress the competitiveness of all member states in order to sustain the weaker countries. The third possibility was severe inflation might ensue because countries with low inflation would have to import inflation from other member states in the form of price supports and increases in their monetary bases. Despite these risks, however, the EMS has survived and currently serves as the functional precursor to the single currency.

B. The Maastricht Treaty of 1992

In December of 1991, an intergovernmental conference on the EMU made its report to the Maastricht European Council. Input from the conference was then formally incorporated as part of the Treaty on the

66. Id.
68. For example, in 1979 the inflation rate in Germany was 2.7%, compared to 12.2% in Italy. The dramatic disparities in inflation rates among EEC member states were partly compounded by the OPEC crisis of the 1970's. See JACQUES VAN YPERSELE & JEAN-CLAUDE KOEUNE, THE EUROPEAN MONETARY SYSTEM: ORIGINS, OPERATIONS AND OUTLOOK 66 (1984) [hereinafter Van Ypersele & Koeune].
69. Id.
70. Id.
71. Id.
72. Id.
73. See Goodman, supra note 52, at 182-83.
European Union ["TEU"] on February 7, 1992. Under the terms of the TEU, the European Monetary Union is cast with other significant EU institutions as one of three pillars, which together uphold the European Union.

The Treaty specifies three incremental stages for the eventual changeover to a single currency. The first stage (now complete) involved the enhanced coordination of economic policies among the member states within the extant institutional framework. On January 1, 1994, the second stage began. This transitional stage brought a prohibition on all barriers to the free movement of capital, not only among member states but also with respect to third-party states. In addition, restrictions were drawn on government deficits; the European Monetary Institute was formed and the eventual independence of each state's central bank was prescribed. Stage Three is scheduled to commence no later than January 1, 1999, at which time participating countries will adopt a single monetary policy and a single policy on exchange rates.

Under stage two the key institutional change was the establishment of the European Monetary Institute (EMI). The EMI monitors the European Monetary System; promotes the use of the ECU in private transactions; and supervises the development of the ECU clearing system. The EMI will also be consulted by the authorities of the member states on monetary policy and will be authorized to issue pertinent

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75. The TEU became effective on January 1, 1993. Id. (citing 24 BULL. EC 12-1991, at 7-8).

76. These include the European Union itself, as well as two other treaty-based institutions known as Euratom (which coordinates nuclear energy policy) and the European Coal and Steel Community (which coordinates matters relating to coal and steel—scheduled incidentally, to be subsumed by the European Union in 2002). Id. at 1110.

77. See TEU art. G. The second pillar is the Common Foreign and Security Policy. See TEU art. J. Under this article, the European Council is to establish and administer non-binding rules on foreign and security policy. Id. The third pillar is known as Cooperation in Justice and Home Affairs. See TEU art. K. Article K concerns the coordination of affairs of justice. Id.

78. Goodman, supra note 52, at 202-08.

79. Id.

80. Id.

81. Id.

82. Id.

83. Id.

84. See The Maastricht Agreement on Economic and Monetary Union, 32 BANK OF ENG. Q. BULL. 64, 67 (1992) [hereinafter BEQB].

85. Id.
recommendations. If a member state wishes to hold foreign exchange reserves with the EMI, the Institute is competent to manage the reserves as the state’s agent. However, the EMI cannot intervene in foreign markets on its own initiative.

The EMI consists of the central bank governors from all the member states, as well as a full-time President. The governors are fully independent, but independence is not required for the central banks themselves during Stage Two. The central banks are responsible for the EMI’s administrative costs.

Two significant events will usher in the third stage. First, exchange rates between participating currencies will be permanently fixed. Second, the European Central Bank (ECB), with the cooperation of the European System of Central Banks (ESCB), will assume managerial control over the new currency. The ECB will determine monetary policy for the entire EU, and will be “empowered to enforce binding rules on national budgets.”

The chief objective for both the ECB and the ESCB will be to ensure price stability. The ESCB will also be charged with a host of collateral duties. First, it will develop and administer a single monetary policy. Second, it will hold and manage the foreign exchange reserves of participating member states. As a third matter, the ESCB is required to facilitate the operation of payments systems. Finally, it must assist competent authorities in the prudential supervision of credit institutions and the maintenance of a stable financial system. Central bank governors from the various states will serve as members of the Governing Council of the ESCB.

86. Id.
87. Id.
88. Id.
89. Id.
90. The Maastricht Agreements on Economic and Monetary Union, supra note 84, at 67.
91. Id.
92. Because exchange rates will be locked, the ECU will no longer represent a weighted average of the individual currencies. Id. at 64-65.
93. Id. at 65.
94. Goodman, supra note 52, at 203.
95. See BEQB, supra note 84, at 65.
96. Id.
97. Id.
98. Id.
99. Id.
the ECB.\textsuperscript{100} They will be joined on the Council by a full-time executive board appointed by the member states.\textsuperscript{101}

The ECB and the ESCB are to be free from all external influence.\textsuperscript{102} This policy of independence was designed to avoid the administrative complications that would arise if the ECB were to be accountable on an individual basis to fifteen national governments and parliaments.\textsuperscript{103} Instead, accountability is to be maintained through the European Council of Finance Ministers (ECOFIN).\textsuperscript{104} Although the ECOFIN President may not vote in the ECB’s Governing Council meetings, the President may participate and submit motions for consideration.\textsuperscript{105} The ECOFIN Council may also discuss ECB objectives with the ECB President, and may amend the ESCB statute to a limited extent.\textsuperscript{106}

Additional accountability measures include a requirement that the ECB deliver an annual report on monetary policy to the ECOFIN Council, the European Parliament, the Commission, and the European Council.\textsuperscript{107} Furthermore, members of the ECB executive board, including the President, can be requested to appear at the hearings of certain committees of the European Parliament.\textsuperscript{108} Finally, central bank governors may freely

\textsuperscript{100} Id.
\textsuperscript{101} See BEQB, \textit{supra} note 84, at 65.
\textsuperscript{102} Id.
\textsuperscript{103} Id.
\textsuperscript{104} Id.
\textsuperscript{105} Id.
\textsuperscript{106} The ECOFIN Council may not amend provisions which govern the ESCB’s principal tasks and objectives, nor may it alter the ESCB’s ultimate independence. Id.
\textsuperscript{107} See BEQB, \textit{supra} note 84, at 65. The European Parliament serves as a forum for debating issues of concern to the peoples of the EU member states. See BERMANN ET AL., \textit{EUROPEAN COMMUNITY LAW} 66 (1993). The Parliament is considered the most democratic arm of the EU, because its members are directly elected by the people. Id. at 68. However, “although its role in the legislative and budgetary processes has grown, Parliament still lacks the power it ordinarily would enjoy in a modern democracy.” Id. For example, legislation is proposed not by Parliament, but by the Commission. Id. at 66.

The Commission performs tasks commonly associated with an executive organ: oversight and enforcement of policy. Id. at 57. The Commission’s duty is to promote the interests of the EU, rather than those of the member states. Id. at 58. Its areas of responsibility include the administration of EU finances, external relations and trade, and legal actions against member states for violations of EU law. See BERMANN ET AL., \textit{EUROPEAN COMMUNITY LAW} 59, 66 (1993). The European Council coordinates the foreign policy of member states. Id. at 56. It is composed of the heads of state and the President of the Commission. Id. The European Council submits progress reports each year to the Parliament, and sets guidelines on the economic policies of both the member states and the EU as a whole. Id.

\textsuperscript{108} See BEQB, \textit{supra} note 84, at 65.
attend national parliamentary committees, either as representatives of the Governing Council or in their national capacities.\textsuperscript{109}

During Stage Three, the ECOFIN Council will retain responsibility for the choice of exchange rate system of the new currency relative to non-EU currencies, and for the central rate within the system.\textsuperscript{110} However, in order to ensure policies consistent with the goal of price stability, the ECOFIN Council must consult with the ECB before making such decisions.\textsuperscript{111} Exchange rate operations from day to day are left to the ECB, which will initially control up to ECU 50 billion\textsuperscript{112} for the purpose of exchange-market intervention.\textsuperscript{113}

In terms of macroeconomic policy, Stage Three embraces three baseline principles: no excessive deficits; no monetary financing; and no bailouts.\textsuperscript{114} The ECB and the national central banks are prohibited from offering credit facilities to Community institutions or to member states.\textsuperscript{115} They are further prohibited from directly purchasing debt instruments from these institutions.\textsuperscript{116}

1. Convergence Criteria

In order to join the EMU, member states must conform with four threshold criteria measuring economic performance.\textsuperscript{117} First, the member state must demonstrate significant price stability.\textsuperscript{118} In particular, the rate of inflation must be comparable to the three member states with the greatest price stability.\textsuperscript{119} Second, the financial position of the applying state must be sustainable.\textsuperscript{120} Governments with excessive deficits, therefore, will not be eligible.\textsuperscript{121} Third, the state must have adhered to the

\begin{itemize}
  \item \textsuperscript{109} Id.
  \item \textsuperscript{110} Id.
  \item \textsuperscript{111} Id.
  \item \textsuperscript{112} This figure equates to approximately 65 billion United States dollars. Id.
  \item \textsuperscript{113} Id. at 67.
  \item \textsuperscript{114} See BEQB, supra note 84, at 65.
  \item \textsuperscript{115} Id.
  \item \textsuperscript{116} Id.
  \item \textsuperscript{117} See TEU art. 109(j).
  \item \textsuperscript{118} Id.
  \item \textsuperscript{119} The average rate of inflation of the applying state, as observed over a period of one year, must not exceed those of the three best performing states by more than one and one-half percentage points. Inflation is to be measured by the Consumer Price Index. Id. As of early 1997, the maximum allowable annual inflation was about 3%. See Tarallo, supra note 67, at 3.
  \item \textsuperscript{120} See TEU art. 109(j).
  \item \textsuperscript{121} Id. The standards for budgetary performance are found in Article 104(c)(2) of the TEU: first, the ratio of the actual or planned government deficit to GDP must not exceed 3%,
fluctuation margins of the ERM for at least two years, without devaluing against any other member state's currency. The last criterion requires the applying state to maintain interest rates that are comparable to the three member states with the greatest price stability for at least one year.

2. The Changeover

The introduction of the new currency will proceed according to four chronological checkpoints. The first significant step is scheduled to take place approximately one year before Stage Three begins. At that time, the European Council will decide which countries qualify for the EMU based on the convergence criteria. Second, as Stage Three begins, the exchange rates between member states will be replaced by permanently fixed conversion rates. Functionally, the new currency (to be known as the "Euro") and the several national currencies will be interchangeable. Only national banknotes will carry legal tender status until the European banknotes are introduced. The ESCB will then incorporate the Euro as the central unit of its single monetary policy. Although the financial markets are expected promptly to switch to the Euro, most private businesses and individuals are likely to continue using the national currencies for a longer period of time.

The third checkpoint is scheduled no later than three years after Stage Three begins. The ESCB will at that point start to issue the Euro and exchange it against the national banknotes and coins. Finally, six months after the Euro is introduced, the changeover will be complete for

unless either the ratio has substantially declined or the excess is only temporary; and second, the ratio of government debt to GDP must not exceed 60%, unless the ratio is diminishing at a satisfactory rate. See the TEU Protocol on the Excessive Deficit Procedure.

122. See TEU art. 109(j).

123. The average nominal long-term interest rate of the applying state, as observed over a period of one year, must not exceed those of the three best performing states by more than two percentage points. Interest rates are to be measured in reference to long-term government bonds or similar securities. Id.

124. See The European Monetary Institute, THE CHANGEOVER TO THE SINGLE CURRENCY 12, 13 (1995) [hereinafter THE CHANGEOVER].

125. This decision is expected to be made in early 1998. Id.

126. Stage Three is scheduled to commence no later than January 1, 1999. Id.

127. Id.

128. Id.

129. Id.

130. See THE CHANGEOVER, supra note 124.

131. Id. The introduction of the Euro is expected to occur no later than January 1, 2002. Id.
all agents and operations. National currencies will lose their status of legal tender and gradually disappear.

3. Developments Over the Past 18 Months

In December of 1995, then-British Prime Minister John Major expressed serious doubts about the EMU, suggesting that the 1999 launch date was arbitrary and unrelated to economic realities. He was especially concerned about the relationship between the first wave countries and the remaining states that will not make the initial cut. "There is a risk that this could tear Europe apart and destroy the single market . . . resulting in a situation where countries inside the EMU form a protectionist bloc against [EU member states that fail to qualify for the EMU]." Major's remarks reflect the United Kingdom's reticence regarding the EMU, as well as a pessimism that resounds throughout Europe. For example, a 1996 poll conducted by the Harris Polling Institute indicated that seventy-eight percent of the British opposed the EMU, while seventy percent of Germans, fifty-five percent of the French, and fifty percent of Belgians were likewise opposed. This opposition is not surprising, because member states have implemented some significant spending cuts in an attempt to close in on the convergence criteria. These cuts have had a predictably harsh impact on jobs and welfare benefits.

Ironically, officials have noted that the EMU would help stimulate the investment and growth necessary to reduce Europe's chronic unemployment. Former United States Ambassador to the EU, Stuart Eizenstadt, explained the comprehensive effort that is necessary to mitigate the shocks of transition: "Non-wage labor costs must be reduced, heavy payroll taxes must be slashed, labor markets must become more flexible, investments in job training, lifetime learning, and vocation education must

132. The latest date to phase out the national currencies is July 1, 2002. Id.
133. Id.
134. See Joe Kirwin, EU Leaders Summit Reaches Accord on Key Monetary and Trade Issues, 12 INT'L TRADE REP., Dec. 20, 1995, at 2097.
135. Id.
136. Id.
137. See EU to Seek to Conclude Disagreement With Britain, BNA INT'L TRADE DAILY, June 21, 1996, at 16 [hereinafter EU].
138. Id.
139. Id.
Furthermore, it has been pointed out that serious budget-cutting measures by member states with large deficits were inevitable, without respect to the convergence criteria of the EMU. In order to boost morale in Europe, European Commission President Jacques Santer proposed what he calls a “confidence pact.” The central feature of the pact is the Trans-European Network, which is an elaborate infrastructure of transportation, energy, and telecommunications. Santer and other officials are convinced this plan must be carried out in order to compete effectively in the global market. However, the cost of the plan, over a billion United States dollars, would put a strain on surplus EU funds, which member states need to help pay for deficit reductions.

In September of 1996, EU finance ministers met in Dublin and agreed on two important EMU details. The first point of general agreement concerned the formation of a stability pact for the purpose of enforcing budgetary discipline among EMU participants. The pact will establish an administrative council in order to impose economic sanctions against EMU states that develop excessive deficits. Second, the ministers agreed to create a new model of the Exchange Rate Mechanism that will regulate currencies between EMU member states and non-EMU member states. The new mechanism, known as “ERM2,” will enforce a fluctuation band of plus or minus fifteen percent versus the Euro. If a participating currency were to deviate from the maximum range, the European Central Bank would intervene in order to maintain price stability.

141. Id.
143. See EU, supra note 137, at 17.
144. Id.
145. Id.
146. Id.
148. Id.
149. Id.
150. Id. at 1501.
151. Id.
152. Id.
“[t]he EMU is irreversible and on track,” in accordance with the timetable contemplated by the Maastricht Treaty.153

Santer’s optimism was supported by the recent publication of new budgets by several EMU candidates: France, Germany, Italy, Spain, Belgium, and the Netherlands.154 All of the budgets were designed to bring budget deficits down to the required three percent of GDP.155 However, despite the impressive budgets, not all of these countries are in good economic health.156 Belgium, for instance, has traditionally had a very high public debt-to-GDP ratio—more than double the required sixty percent in 1995.157 Elsewhere, Italian Foreign Minister Lamberto Dini suggested in October of 1996 that the EMU launch date should be postponed until his country’s fiscal situation stabilizes.158 In the meantime, Italy has implemented serious austerity measures to get its deficit under control, and as a result bond yields for the lira compared to the Deutsche mark have dropped significantly.159 However, the drastic cuts and the tax hike in the new Italian budget are likely to inhibit economic growth.160

There also appears to have been some creative accounting employed in the new budgets.161 For example, France borrowed money from the pension funds of France Telecom to pay for its budget, while Belgium sold off gold.162 Economist Richard Reid cautioned that “[t]his could very easily come back to haunt these countries after EMU starts because then deficits could skyrocket again without making the really painful cuts needed.”163 Partly based on the newly proposed budgets, other economists have projected that the first wave of the EMU will consist of Germany, France, Austria, and the Benelux countries.164

153. See EMU, supra note 147. For details relating to the EMU timetable, see supra notes 124-33, and appurtenant text.
155. Id.
156. Id.
157. Id. at 11.
158. Id.
159. Id.
161. Id. at 10.
162. Id. at 12.
163. Id.
164. Id. at 11.
On March 17, 1997, the EU finance ministers formally examined and approved the German and French budgets. Until recently, there had been great speculation about the 1999 launch date because of Germany’s twelve percent rate of unemployment. After 500,000 German jobs were lost in January, many economists doubted that the country could attain its projected 2.9% deficit-to-GDP ratio. By April, unemployment had reached its highest mark since Hitler rose to power. Many experts are convinced that, because it is the engine of the EU economy, if Germany fails to meet the convergence criteria, the EMU will not be sustainable.

Further uncertainty mounted in May of 1997 when a dispute arose between the German government and its central bank. The “Bundesbank” objected to German Finance Minister Theo Waigel’s plan to place a higher value on gold and currency reserves as a means of enhancing receipts to the national treasury. The Bundesbank stressed that this dubious accounting technique would damage the credibility of the Euro and open the door for weaker economic powers such as Italy to enter into the first wave of EMU. As a result of this criticism, Waigel stipulated that the revaluation would not occur until 1998.

In France, recent parliamentary elections forced Conservative President Jacques Chirac to share control of the government with the new Socialist Prime Minister, Lionel Jospin. This led to new speculation, because Jospin punctuated his election campaign with criticism against fiscal austerity, and suggested that the stability pact would not have any authority to impose sanctions on member states.

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165. See EU Finance Ministers Approve France, Germany For EMU Membership, BNA INT’L TRADE DAILY, Mar. 18, 1997, at 3 [hereinafter Finance Ministers].
166. Id.
167. Id.
169. See Finance Ministers, supra note 165, at 3.
171. Id.
172. Id.
175. Id. For an explanation of the stability pact, see supra notes 147-49.
Furthermore, the Socialist party demanded a significant shift in EMU philosophy. The party platform called for several conditions precedent to EMU cooperation, including early membership for Spain and Italy; flexible interpretation of the Maastricht agreement; a Euro that is not overvalued; and a new European economic government. Speaking on behalf of the new French Prime Minister, former Commission President Jacques Delors announced on June 9, 1997 that France would seek a protocol to the stability pact which will clarify how member states will coordinate their economic policies after the new currency is introduced—particularly with respect to unemployment.

French concerns were answered in part by the European Council’s adoption of a “Resolution on Growth and Employment,” which is to supplement the stability pact. The new resolution stresses sound economic and budget policies, as well as sustainable growth and employment. It is expected that the resolution will appease France’s insistence on job creation in Europe, where an estimated 18 million people are out of work. A report on the implementation of the Resolution will be submitted to the European Council in Luxembourg in December of 1997. In addition to the Resolution, the principal measures of the stability pact include regulations which establish compulsory standards of fiscal discipline for first-wave countries, and eligibility criteria for the other non-EMU member states.

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176. Id.
177. Id.
179. The details were finalized by the EU Finance Ministers in Amsterdam on June 16, 1997, as part of an intergovernmental conference. See Peter O’Donnell et al., European Council, June 16/17, 1997: Summit Sees EU Stumble Onwards in Amsterdam, EUR. REP., June 18, 1997, at 5.
180. Id.
181. Id.
182. Id. at 7.
183. Id. at 7-9. Beginning June 1st, the Finance Council will evaluate countries to determine whether a country’s deficit exceeds the maximum limit, and will make recommendations to any offending country. The country then has four months to act. If the country fails to act, one further warning will issue. Id. After an additional two months, the Council may impose sanctions under Article 1049(c) of the Treaty. The sanction will vary between 0.2% of GDP and 0.5% of GDP for the first year of infraction. Id. For the second year, the minimum will not apply, but the sanction will still be limited to the 0.5% maximum. However, for the first two years, any money that the country must pay will merely represent a security deposit, to be relinquished upon compliance. If the country continues to violate the
4. Costs and Benefits

The single currency is expected to bring a wide range of benefits to particular classes of individuals. First, investors would be assured that the competitiveness and marketability of exports would be immune from exchange-rate fluctuations. Second, businesses would be able to quote prices in one currency without the risk of prejudicing their own profits. Third, consumers would have a superior basis on which to compare the prices of goods from two or more countries. Fourth, tourists would be able to travel throughout the EEC without having to exchange currencies. And fifth, bankers would be able to borrow and lend throughout the region without any exchange-rate risks.

Furthermore, the changeover is expected to produce a number of systemic advantages. For example, the savings in currency conversion costs are estimated to be more than ECU 15 billion each year, which represents about 0.4% of the EU's annual GDP. The stimulation of trade among EU member states is also likely, because exchange-rate risk contributes significantly to the high cost of international goods transactions. Additionally, since uncertainty among investors is likely to diminish, firms might not have to pay as much in risk premiums in order to invest and raise capital. Reduced uncertainty could also lead to sustained increases in income and decreases in the jobless rate.

185. Id.
186. Id.
187. Id.
188. Id.
189. This figure is the approximate equivalent of 19.5 billion U.S. dollars. Id.
190. See HUNE, supra note 184, at 32. There is some debate about whether the disappearance of currency conversion costs would mean true savings, as opposed to a mere redistribution of wealth. Most of the savings are expected to accrue from the elimination of bank commissions. Other savings would result as corporations eliminate their treasury departments. However, this in turn would imply an increase in unemployment. Thus, the notion of "savings" can be a matter of perspective. Id.
191. Id. at 33.
192. For example, if risk premiums drop by 0.5% points, this reduction might eventually raise income by as much as 5 to 10%. Id.
193. Id.
On the other hand, critics have pointed out that the progress toward the single currency severely hampers the ability of member states to respond to economic shocks in their countries.194 Member states will also lose a great deal of their ability to exercise control over national currencies as a way of influencing their individual economies.195 The abdication of control over monetary policy could result in serious harm to an individual nation's economic well-being.196 This is partly due to the fact that exchange rate flexibility enables a government to choose inflation rates in order to fight unemployment.197

It has also been argued that trade within the EU may actually suffer under a common currency.198 The link between exchange-rate stability and trade has been questioned, because trading companies can hedge in efficient markets at a relatively low cost.199 Finally, opponents note that, at least until the tax laws of the various countries have been harmonized, tax breaks will not be available to counter economic stagnation, as they are in the United States.200

Advantages and drawbacks notwithstanding, the ascendancy of the Euro appears to be highly likely.201 Thus, contractual disputes may arise where payment has been stipulated in one of the moribund currencies. The next section anticipates this problem and suggests strategies by which parties may avoid such complications.


196. Martin Feldstein, The Case Against EMU, The Economist, June 13, 1992, at 19 [hereinafter Feldstein]. According to an example posited by Professor Feldstein, if a U.K. exporter were competing against a U.S. exporter for a French buyer, the U.K. exporter would no longer enjoy any benefit from a devaluation of Sterling as against the dollar when U.K. costs but not EU costs would have necessitated a devaluation. Thus, the U.K. would be forced to lower prices and wages.


198. See Feldstein, supra note 196, at 19.

199. Id.

200. Id.

201. See The Changeover, supra notes 124-133.
V. A Projection of the Impact a Single European Currency Will Have on Medium and Long-Term Transactions

A. Contractual Problems Associated With Impossibility as National Currencies Are Phased Out

For most business parties, who presumably wish to maintain a good reputation in the international community, contractual difficulties related to the changeover in currency should be easily avoidable. The parties can either plan in advance for the new regime, or they can make necessary modifications while their contracts are still executory. However, the changeover presents some potential for abuse if a party should decide to try to take advantage of the currency problem. This section imagines a scenario in which an unscrupulous obligor seeks to be excused from performance by raising the defense of impossibility. Following the discussion of impossibility, suggestions are offered as means by which parties may ensure performance of their mutual obligations without disruption.

1. The Impossibility Defense

The doctrine of impossibility has long been recognized in the United States. This doctrine holds that if an unforeseeable supervening event renders a contractual obligation incapable of performance, the promisor's non-performance is excused. Impossibility is generally divided into two categories. First, performance may be objectively impossible if the supervening event has rendered the contract literally impossible to perform. For example, if a promisor is obligated to provide sound equipment for a concert at Carnegie Hall, the subsequent destruction of the building by fire would discharge the promisor's duty under the contract.

202. See, e.g., Martin Emerich Co. v. Siegel, Cooper & Co., 86 N.E. 1104, 1106 (Ill. 1908) (holding that the continuing existence of a material object is essential to the contract; when the object ceases to exist, performance becomes impossible); Siegel v. Eaton & Prince Co., 46 N.E. 449, 451 (Ill. 1896) (discharging contract to install an elevator because a fire had destroyed the building). See generally Christopher J. Bruce, An Economic Analysis of the Impossibility Doctrine, 11 J. LEGAL STUD. 311, 323-32 (1982).

203. See RESTATEMENT (SECOND) OF CONTRACTS, § 261. See generally E. ALLAN FARNSWORTH, CONTRACTS §§ 9.5-9.9, at 700-37 (2nd ed. 1990) [hereinafter Farnsworth].

204. See, e.g., Mullen v. Wafer, 480 S.W.2d 332, 334 (Ark. 1972) (discharging an obligation for personal services in connection with the sale of a business because the seller died shortly after the sale).

205. For a Nineteenth Century version of this illustration, see Taylor v. Caldwell, 122 Eng. Rep. 309 (1863), where the court stated:
As a second matter, the performance of a contract may be impossible because a supervening event has made the required action illegal.\textsuperscript{206} Thus, if a retailer agrees to buy 200 dual-port videocassette recorders from a manufacturer, and Congress then promptly outlaws the possession and sale of dual-port VCRs, the retailer would be excused for its failure to perform.\textsuperscript{207}

In order to establish either objective or legal impossibility as a defense, a party must demonstrate the following:
1) that an event occurred which rendered performance of a duty impossible;
2) that the non-occurrence of the supervening event was a mutually shared basic assumption on which the agreement was made;
3) that the supervening event occurred through no fault of the party raising the defense; and
4) that the party seeking discharge did not implicitly or explicitly assume the risk of the supervening event.\textsuperscript{208}

2. For Example

Suppose an exporter in Norfolk, Virginia "We Sell" enters into a contract with a buyer in Marseille, France, "Nous Achetons" for the sale of two million armor-plated moth balls. The contract is executed on January 1, 1998. As part of the deal, We Sell extends a six-year term of credit to Nous Achetons. Nous Achetons in turn issues negotiable promissory notes to We Sell in an amount equal to the price of the goods plus the cost of forfait financing. The promissory notes are guaranteed by Banque de Marseilles. We Sell then endorses its guaranteed promissory notes to Fred's Forfaiting at a discount for cash. Pursuant to the credit agreement, Fred presents promissory notes to

The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. In none of the cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. \textit{Id.} at 314.

\textsuperscript{206} \textit{See}, \textit{e.g.}, Vimar Seguros Y. Reaseguros v. M/V Sky Reefer, 515 U.S. 528, 540-41 (1995) (observing that if a provision is illegal or unconscionable it is unenforceable).

\textsuperscript{207} \textit{See} \textit{RESTATEMENT (SECOND) OF CONTRACTS}, § 264; Texas Corp. v. Hogarth Shipping Co., 256 U.S. 619, 630-31 (1921) (discharging promisor's duties where a vessel necessary for performance was requisitioned by the British government).

\textsuperscript{208} \textit{See} \textit{RESTATEMENT (SECOND) OF CONTRACTS}, § 261; Farnsworth, \textit{supra} note 203, at 700-37.
Banque de Marseille on a semi-annual basis. In return, Banque pays Fred in French francs. Banque is then reimbursed accordingly by Nous Achetons.

Meanwhile, on January 1, 1999, the EMU is inaugurated by the first wave of participating member states: Luxembourg, Austria, Germany, and France. Since member states are granted three years in which to phase out national currencies, Banque can continue to pay Fred in French francs during that time. However, in 2002, with nearly two years' worth of payments still to be made, the franc loses its status as legal tender. The parties are now in an awkward position. According to the literal terms of the agreement, Banque has only to issue French currency now stripped of its value. There is no doubt that scrupulous parties will, on their own initiative, modify their contracts to allow for payment in Euros, or perhaps U.S. dollars. However, it is possible that others will try to use this chain of events to their advantage. Banque, for instance, decides to continue issuing the French francs to Fred.

Fred sues in federal district court for breach of contract. He argues that the parties agreed to consideration of actual value at the time the contract was formed, and did not contemplate payment in a dead currency. Banque concedes that it agreed to yield French currency of actual value, but claims that its obligation to so perform has been made impossible by the forces of the EMU. Banque argues first that performance is objectively impossible, because the subject matter of the contract has been destroyed. It further argues that European Union law has rendered its performance legally impossible.

Banque's defense will probably not be very persuasive. In raising the argument, Banque should have no trouble with the first element of impossibility. It simply needs to show that the EMU changeover has deprived the franc of any actual value. Negotiating the second element will require some finesse. Banque will have to show that the parties shared a basic assumption that the French currency would remain valid legal tender. Fred will argue that they did not share such an assumption, because it was common knowledge that France would join the EMU. However, Banque might prevail on this point. The contract was executed prior to the determination of which countries were eligible for EMU membership, so the prospects for France's accession might not have been

209. Assuming no difficulties in obtaining jurisdiction. Note, however, that forfait notes do not generally include clauses, which subject the obligor to a foreign jurisdiction. See Ludwig & Coursey, supra note 16, at 387-88 (citing Tavernier, Legal Aspects of Forfaiting, 11 INT'L BUS. LAW 25, 31 (Oct. 1983)).
Furthermore, the fact that Fred assented to the agreement is strong evidence that he expected the franc to retain its value. The third element will be no problem, because the advent of a single European currency clearly was not attributable to Banque's conduct.

The final element of impossibility is where Banque's defense will fail. Banque must show that it did not assume the risk that the French currency would lose its value. The question of whether or not a party has assumed the risk of a supervening event turns most on whether the event was reasonably foreseeable. Here, the three-year obsolescence of the franc was foreseeable for several reasons. First, the Treaty of Maastricht and its progeny of administrative decisions had already put the world on constructive notice of the changeover to a single currency.

Second, while France's eligibility for the EMU was not certain as of January 1998, that country was clearly engaging in serious efforts to comply with the convergence criteria. Thus, a reasonable business party could have inferred a strong probability of France's accession. Finally, it could be argued that, as a financial institution, Banque should have had its hand even more firmly on the EMU pulse than would be expected of ordinary business parties. Since the currency problem should have been foreseen, the court will undoubtedly reject the impossibility claim, on the ground that Banque voluntarily assumed the risk of monetary unification. In order to vindicate the contract, the court will most likely use its reformative powers to change the terms of the agreement and order Banque to honor the promissory notes in the new currency.

Difficulties related to countertrade would in essence trace the same pattern as the foregoing illustration. In the case of a counterpurchase agreement, for example, a German exporter may be obligated to buy

210. For purposes of this imagined scenario, the contract was signed in January of 1998. Final determinations on EMU eligibility were not made until April of that year.

211. See, e.g., Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co., 508 F.2d 283 (7th Cir. 1974) (holding that government regulation was sufficiently foreseeable to preclude the defense of impossibility); United States v. Wegematic Corp., 360 F.2d 674 (2d Cir. 1966) (holding that problems with construction of a computer system were foreseeable); Eastern Airlines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429 (S.D. Fla. 1975) (holding OPEC oil crisis was foreseeable); Mishara Constr. Co. v. Transit-Mixed Concrete Corp., 310 N.E.2d 363 (Mass. 1974) (holding that a labor strike was foreseeable). But see Opera Co. of Boston, Inc. v. Wolf Trap Found. for Performing Arts, 817 F.2d 1094, 1100-01 (4th Cir. 1987) (stating "[P]ractically any occurrence can be foreseen but whether the foreseeability is sufficient to render unacceptable the defense of impossibility is 'one of degree' of the foreseeability and whether the non-occurrence of the event was sufficiently unlikely or unreasonable to constitute a reason for refusing to apply the doctrine.")

212. See supra notes 74-116.

213. See supra notes 29-35.
limestone from Malawi on a yearly basis for five years. Alternatively, under a bilateral clearing agreement, Austria may be obligated to pay installments to cover its over-consumption of goods with respect to Romania. In each of these scenarios, questions of performance are likely to arise as the Deutsche mark and the Austrian schilling are phased out.

The resolution of these questions would very likely tend to parallel the Fred v. Banque example outlined above, because they share the common issues of consideration and ability to perform. Whether the chosen financing involves forfaiting, counterpurchase, or a clearing agreement, it is important for parties to consider and prevent the potential difficulties linked to the new currency regime. The following subsection suggests negotiating strategies for parties who, unlike Banque, wish to do business in good faith.

**B. Devising Contractual Provisions to Avoid Litigation**

Most conscientious parties will want to avoid Fred and Banque’s predicament by incorporating contract terms which anticipate the currency problem. Any firm wishing to do business with parties in the EU should draft special provisions to ensure a smooth transition. This is true even with respect to countries who do not appear to be likely EMU candidates anytime soon, such as Italy and the United Kingdom. Such a clause is simple to draft. It would only require words to this effect: “In case the denominated currency loses its status as legal tender, the Euro will suffice as a substitute.” Alternatively, the parties may wish to arrange payment in U.S. dollars, or some other hard currency. If these measures are taken at the negotiation stage, subsequent disputes will be easily deflected.

If the parties fail to provide for the currency problem when the contract is executed, there will still be plenty of opportunities to modify the agreement. Assuming that the parties have no interest in ambushing each other, they should be willing to reform the contract as appropriate. Once again, a simple clarification about what constitutes acceptable currency under the contract will do. Under United States law, no new consideration is necessary, so long as the modification is fair under the circumstances.

**VI. CONCLUSION**

Forfaiting enables an exporter to ship capital goods to a buyer whose credit standing may be obscure or non-assessable, by shifting virtually all of the transaction risks to a forfafter who buys the exporter’s
receivables without recourse.\textsuperscript{216} The notes are secured by the guarantee of a bank in the importer’s country, who is primarily liable to the note-holder for payment.\textsuperscript{217} The note-holder is then able to cash in the notes periodically according to the credit terms.\textsuperscript{218} In return for the notes, the note-holder receives payment in the currency prescribed by the agreement.\textsuperscript{219}

Other forms of medium and long-term trade agreements include counterpurchase and bilateral clearing agreements. A counterpurchase contract is a transaction in which one party agrees to buy goods from another on condition that the second party promises to make a subsequent purchase from the first.\textsuperscript{220} Bilateral clearing agreements involve reciprocal lines of credit between countries for a predetermined period of time.\textsuperscript{221} Along with forfaiting, these techniques help to facilitate international commerce.

It is possible, however, that many of these agreements fail to contemplate the implications of a single currency in Europe.\textsuperscript{222} For medium and long-term credit agreements, the denominated currency is in danger of a fatal changeover.\textsuperscript{223} Although scrupulous business parties should be able to adapt their contracts to solve the currency problem, some opportunists may insist that their duties are discharged by adhering to the literal terms of the agreement. If one party sues for breach, the obligor may try to claim that the changeover in currency rendered performance impossible. However, this defense is likely to fail because the obligor assumed the risk of the supervening event.

\begin{flushright}
\textsuperscript{216} See supra notes 3-12 .
\textsuperscript{217} See supra note 9.
\textsuperscript{218} See supra note 10.
\textsuperscript{219} See supra note 8.
\textsuperscript{220} See supra notes 29-35.
\textsuperscript{221} See supra notes 36-40.
\textsuperscript{222} See supra notes 78-83.
\textsuperscript{223} Id.
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