purposes of the Articles when the second amendment becomes effective.[9] The courts must decide what effect to give to par values or to gold-value clauses when referred to in contracts or legal instruments. They must also decide whether to modify established legal principles because of the new conditions. Courts are disposed to find practical solutions for all these problems.

Floating Currencies

Effects on New Legislation

The proposed second amendment of the Articles of Agreement is responsible for three classes of legislation that members of the Fund have adopted or are in the process of adopting. The first and most obvious class is legislation that amends the member's Bretton Woods legislation in order to authorize the member to accept the proposed second amendment of the Articles and to enable it to perform its obligations under the Articles when amended. The second class also is legislation that was to be expected. It consists of measures to modify or abrogate the domestic law by or under which a par value for the member's currency is established. The third class consists of a variety of measures that are considered necessary or desirable because of the changes introduced by the other two kinds of legislation. For example, the amendment of the Bretton Woods Agreements Act of the United States,[10] which is to take effect on the occasion of the proposed second amendment of the Articles, has modified the Gold Reserve Act of 1934 (31 U.S.C. 405b).[11]

The 1934 statute, which is entitled "An Act to protect the currency of the United States, to provide for the better use of the monetary gold stock of the United States, and for other purposes," dealt, among other topics, with the Exchange Stabilization Fund, and provided in Section 10(a) as follows:

> For the purpose of stabilizing the exchange value of the dollar, the Secretary of the Treasury, with the approval of the President, directly or through such agencies as he may designate, is authorized, for the account of the fund established in this section, to deal in gold and foreign exchange and such other instruments of credit and securities as he may deem necessary to carry out the purpose of this section. An annual audit of such fund shall be made and a report thereof submitted to the President.[12]

When the second amendment of the Articles becomes effective, the same provision will read:

> The Secretary of the Treasury, with the approval of the President, directly or through such agencies as he may designate, is authorized, for the account of the fund established in this section, to deal in gold and foreign exchange and such other instruments of credit and securities as he may deem necessary to and consistent with the United States obligations in the International Monetary Fund. The Secretary of the Treasury shall annually make a report on the operations of the fund to the President and to the Congress.[13]

The Secretary of the Treasury supported this change because the original language could be viewed as a direction to peg the exchange rate of the dollar. The Secretary testified as follows:

> This is not the policy of the United States. Our policy is clearly reflected in the proposed new Article IV in the Fund Articles of Agreement, which has as its basis the philosophy that exchange rate stability cannot be achieved without orderly underlying economic and financial conditions.
>
> Under the amended Articles, all members would endeavor to direct their economic and financial policies toward the objective of fostering orderly economic growth with reasonable price stability. In this context, they would undertake "to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates." Your proposed amendment of the statute establishing the ESF [Exchange Stabilization Fund] provides that the ESF is to be used in a manner consistent with these and our other obligations in the International Monetary Fund as they evolve over time.
>
> Thus, for example, under the present system of exchange arrangements, the ESF might be used for exchange market intervention to counter disorderly market conditions. Should a different system of exchange arrangements evolve under the amended Fund Articles, suited to different international economic and financial conditions, the ESF could be used in a manner appropriate to those new arrangements. In this way, your proposed statutory change properly provides needed adaptability rather than tying the use of the ESF to any particular exchange rate practice.[14]

The International Finance, Trade and Aid Act, 1977[15] of the United Kingdom provides for various matters relating to the Fund, such as the payment of further subscriptions and the effect to be given to the second amendment of the Articles. The amount payable to the Fund as a further subscription in respect of the increase in the quota of the United Kingdom as a result of the sixth general review of quotas[16] is, of course, denominated in SDRs, but a notable feature of the Act is that certain proposed amendments to provisions of law unrelated to the Fund refer to amounts that also are denominated in SDRs. It may be assumed that this innovation is the result of fluctuations in the exchange rates between sterling and other currencies.

The provisions of law to be amended in the manner referred to are provisions of the Export Guarantees Act, 1975.[17] A distinction is made between two classes of commitments entered into by the Secretary of State under legislation connected with export guarantees, facilities, and loans. One class consists of commitments expressed in sterling and the other of commitments in foreign currencies, with the first subject to a limit denominated in sterling and the second to a limit denominated in SDRs. "Foreign currency" is defined as "any currency other than sterling, including special drawing rights."[18] Amounts expressed in foreign currencies, other than SDRs, are to be calculated for the purpose of applying the limit at specified dates by reference to the equivalent in SDRs at that date. The equivalent is to be determined by the Secretary of State "having regard to what appears to him to be the appropriate rate of exchange."[19] The equivalents are recalculated at quarterly intervals. The limit may be exceeded only if the excess is attributable solely to a recalculation.

Application of Par Values

It is settled law in the Fund that the par value of a member's currency last established in accordance with the Articles remains the par value under and for the purposes of the Articles until a new par value is established.[20] This proposition remains valid even though the par value is not made effective in exchange transactions in the member's territory and even though, as a consequence, the Fund does not employ the par value as the basis for computations involving the currency that are made by the Fund in applying the Articles. The par values in existence will continue to exist, in the sense explained, until the second amendment of the Articles takes effect. Thereafter, it will not be possible to have a par value under the Articles, unless and until the Fund decides by 85 per cent of the total voting power that "international economic conditions permit the introduction of a widespread system of exchange arrangements based on stable but adjustable par values."[21] The Articles will prescribe the conditions that the Fund must take into account in arriving at a decision.[22] Once the decision is taken, each member will be able to decide whether to propose a par value for its currency in accordance with the provisions that will then apply.[23]

The persistence of par values under the Articles until they are abrogated by the second amendment poses a problem for courts because

in present conditions par values are likely to be far removed from the values of currencies in the markets. The Queen's Bench Division of the High Court of Justice in England had to face this problem in *Lively Ltd. and Another v. City of Munich* in June 1976.[24] In 1928 the City of Munich raised a loan by issuing bonds denominated in sterling. Bondholders were given an option to receive payment in sterling or in U.S. gold dollars (defined as dollars of the weight and fineness on November 24, 1928) at the fixed exchange rate of $4.86 to the pound sterling. The terms of the bonds were modified on June 14, 1955. Under the modified terms, payment of principal and interest was to be made in sterling only and calculated on the basis that the nominal amounts payable at the rate of $4.86 to the pound sterling would be reconverted at the rate of exchange determined under Article 13 of the Agreement on German External Debts, dated February 27, 1953. The bonds were payable not later than December 1, 1973. According to Article 13 of the 1953 Agreement, the rate of exchange was to be determined by "the par values of the currencies concerned in force on the appropriate date as agreed with" the Fund under Article IV of its original Articles. If "no such par values are or were in force on the appropriate date" and no rate of exchange was prescribed in a bilateral payments agreement between the two Governments involved, a defined rate of exchange in the market was to be applied. The court recognized that the issue in the case was whether the applicable rate of exchange was the one based on the par values of the U.S. dollar and the pound sterling on December 1, 1973 because they were "in force" on that day, when in fact they were both floating against each other and against other currencies, or the one based on the rate of exchange in the market.

The defendants argued that the last par values of the two currencies established under the Articles of the Fund before December 1, 1973 remained in force on that date and, therefore, that the rate of exchange between the two currencies on the basis of those par values was $2.89 to the pound sterling on that date. The court did not accept this argument. The words "in force" were used in addition to "as agreed." It had to be assumed that each phrase was intended to have some effect. The language was part of a commercial transaction and had to be given a commercially realistic meaning, whatever might be the treaty obligations of members under the Articles. The rate of exchange of $2.89 per pound sterling had no such meaning on December 1, 1973, when the real rate of exchange

was $2.34. The words "in force" in the bonds were intended to mean that the margins for exchange transactions under the Articles were being observed for the currencies that were involved under the terms of the bonds.

The approach endorsed in the *Lively* case of looking at the actual monetary situation on the date that was legally relevant produced a realistic result. The same technique produced a different result in *Fabrizio Gillet v. Commission of the European Communities*, which was decided by the Court of Justice of the European Communities on March 19, 1975.[25] The applicant, a former employee of the Commission of the European Communities, claimed payment of certain allowances, due in Italian lire, to which he was entitled as the result of his resignation on April 1, 1973. He based his claim on the "real parities between the Belgian franc and the Italian lira" on the date of payment.[26] The Commission relied on Article 63 of the Staff Regulations under which an official's remuneration was to be calculated "on the basis of the parities accepted by the International Monetary Fund which were in force on 1 January 1965."[27] Adjustments were made in the amounts calculated in this way to take account of changes in living conditions in the place of residence or employment.

The applicant argued that the literal enforcement of Article 63 would lead to unjustified enrichment of the Commission and would provide a premium to the nationals of those states whose currencies had appreciated. The court held that the system established by Article 63, together with adjustments, had to be applied literally, even though "in a period of monetary instability it is possible that the objective sought by these provisions may not be entirely achieved."[28] Both currencies had par values under the Fund's Articles on January 1, 1965, and the par values were effective. The parity on January 1, 1965 was 12.50 lire to the Belgian franc; the rate of exchange in June 1974 was 17.10 lire to the Belgian franc.

Hardship Clauses and Concept of Contract

Erratic fluctuations in exchange rates and steep upward or downward changes in the value of a currency can have disturbing, and even catastrophic, effects on contracts. There is no need to discuss the question whether these events are more frequent or more disconcerting since the

collapse of the par value system than the substantial changes in par values or the occasional floating of currencies that occurred during the period when the system was in operation. Contracting parties may have had the feeling that there was reasonable stability in exchange rates before August 15, 1971, but they do not have that feeling now. Monetary instability is one of the reasons for a growing concentration by contracting parties on what are called in English "hardship clauses" and in French "les hardship clauses."

The problem of maintaining the equilibrium of contracts in an unstable world and ensuring continued performance is not confined to private contracting parties. The problem may affect the public welfare of the countries in which the private parties operate, because of the importance of the contracts for the economy as a whole. Important sectors of activity, development plans, or progress toward industrialization may be dependent on the performance of contracts entered into by private parties.[29]

A study group on international contracts, convened under the auspices of the Paris journal, *Droit et Pratique du Commerce International*, was composed of lawyers from a number of countries. In its report, the study group notes:

> First of all, it seems that hardship clauses have been used in international contracts in other troubled periods of the twentieth century, but that their insertion seems to have multiplied greatly in the last three or four years. The lack of certainty ensuing from the upsetting of the international economic and monetary system is certainly not foreign to this phenomenon. The *rapid increase* in the recourse to hardship clauses is well reflected in their drafting: from a very simple structure and general composition scarcely a few years ago, some of these clauses have today reached an impressive degree of elaboration.[30]

For obvious reasons, hardship clauses are most commonly stipulated in long-term contracts, and have come into prominence as a result of the needs of entrepreneurs engaged in transnational commercial or financial activities.

A hardship clause may be defined, in broad terms, as a provision that permits review of a contract in the event of a change in circumstances that fundamentally modifies the initial balance between the obligations of the parties, so that performance, although not impossible, becomes unusually onerous for one party.[31] The clause is related to, but can be distinguished from, a number of established principles of the law of contract. For example, the doctrine of *imprévision*, when recognized by a

legal system, refers to a fundamental disturbance in the economics of a contract but applies to supervening events that were unforeseeable when the contract was made, whereas the hardship clause can apply in addition to foreseen events and makes provision for adapting the contract if they should occur. Both *imprévision* and hardship clauses are based on the idea that the events they cover are beyond the control of the contracting parties. If *imprévision* is not recognized in a particular legal system, hardship clauses may have an additional importance but they may raise the problem of validity. In some legal systems, however, hardship clauses may raise less of a legal problem than index clauses.

Hardship clauses must be distinguished also from various clauses that provide for the adaptation of a specific term or terms of the contract in certain defined circumstances, such as changes in costs, prices, or exchange rates. Index or maintenance-of-value clauses fall into this latter category. They may be intended to serve purposes similar to those of hardship clauses, but index or maintenance-of-value clauses may be difficult to draft. Moreover, even if it is possible to draft them with precision, they may be less acceptable because of their complexity and rigidity.

Hardship clauses need not involve a precise definition of the circumstances to which they relate, and they provide not for automatic adaptation but for negotiation on how the contract should be adapted. The procedure to be followed for the purpose of adaptation may range from negotiation between the parties to recourse to arbitrators or experts under elaborate provisions of the contract.

The report cites examples of hardship clauses, among which some that deal explicitly with monetary developments[32] read as follows:

> ...dans le cas où la situation économique ou monétaire subirait des modifications... (p. 62)
>
> Dans le cas de *modifications* importantes pouvant affecter le *système monétaire international,* modifications *notamment* susceptibles d'entraîner des distorsions sérieuses dans les relations entre les monnaies auxquelles il est fait référence dans ce contrat... (p. 67)
>
> Toutes difficultés... relatives à l'obtention de devises, à des mesures de politique commerciale au contingentement, à la manipulation monétaire. (p. 64)[33]
>
> ...en cas de bouleversement du système monétaire international actuel... (p. 64)
>
> En cas de *modifications* de droit ou de fait *dans les parités* du franc belge et du florin... (p. 65)

> If owing to *changed circumstances such as* changes in monetary values... (p. 67)
>
> ...pour effet de renchérir le coût des ressources en devises ou des crédits ou de *réduire le montant* en principal ou en intérêts à percevoir par la banque... (p. 69)

In connection with the references to disturbances on the basis of which a hardship clause can be invoked, the report comments:

> It will be clear that to be specific is not always the same as to be precise, and the establishing of the existence of the circumstances (e.g. "changes in monetary value") may create real problems.[34]

The application of a hardship clause to monetary developments was an issue in *In the Matter of Arbitration of Disputes Relating to the Charters of M.S. John Wilson and M.S. Chilean Nitrate, both dated June 12, 1968, between Ocean Transport Line, Inc., as Owner, and Chilean Nitrate Sales Corporation, as Charterer*, decided by the Sole Arbitrator at New York, N.Y., on April 25, 1973.[35] The dispute arose between the Owner and the Charterer of two vessels under two charter parties entered into on June 12, 1968 for a period of approximately five years. The dispute involved two clauses, of which Clause 53 provided that if the U.S. dollar were devalued in relation to the official price of gold of US$35 per fine ounce, the Owner, upon six months' notice to the Charterer served not later than 90 days after each such devaluation, would have the right to renegotiate the rate of hire. The new rate, if agreed, would come into force six months after the date of notice but not before July 1, 1969. Clause 54 was the hardship clause:

> If conditions which are unforeseen today should arise during the tenure of the Timecharter Party whereby undue hardship should be inflicted on either Owners or Charterers, they mutually affirm that on request of either party they will closely examine the situation with goodwill to ascertain whether it is possible to rectify or ameliorate such hardship. This clause only to come into effect from October 1st, 1970.[36]

The Owner invoked Clause 53, but there is no need to discuss this aspect of the arbitration. Beginning in the latter half of 1971 and continuing through 1972, the Owner pressed for renegotiation under Clause 54 also on the ground that circumstances unforeseen when the charters were entered into had made performance of them economically impracticable. Among these circumstances were the increased cost of wages and of provisioning the vessel as a result of devaluation of the U.S. dollar. The Owner did not succeed in his efforts to renegotiate the rate of hire.

The Owner argued that it was released from the charters. The arbitrator treated the Owner's contention as one based on the common law doctrine of frustration and not on Clause 54, and he therefore found that the criteria for the application of the doctrine were not satisfied. He thought that the devaluation was foreseeable and that the Owner had not proved that the increases in cost had made performance economically impracticable. The combined total percentage change in the operating expenses of the two vessels between 1969 and 1972, resulting from all economic factors, was 48.9 per cent. But only 40 per cent of the Owner's expenses were incurred in currencies other than the U.S. dollar. Furthermore, the Owner's expenses in Chilean escudos were reduced by the devaluation of that currency between August 1971 and May 1972. Mere increase in cost alone was not a sufficient excuse for nonperformance. The increase must be extreme and unreasonable.

In view of the formulation of the Owner's contention, the arbitrator's award in connection with the economic impracticability of performance was not based on the hardship clause. The Owner's contention did not rely on Clause 54 because it provided expressly for the consequences of a failure to reach agreement on renegotiation under it, but the Owner wished to be released altogether from the charters. The award does not answer the question whether the Owner's increase in costs was a sufficient justification for invoking Clause 54. The case shows that even hardship clauses can fall short of the protection that a contracting party may want when circumstances change.

It is, of course, impossible to foresee whether monetary instability will be reduced after the proposed second amendment of the Articles enters into force, and whether, therefore, at least this form of instability will be less of a reason for the inclusion of hardship clauses in contracts. It will be seen in the discussion of Exchange Arrangements and Future Legal Developments later in this pamphlet that under the second amendment members will be free to apply the exchange arrangements they prefer but that they will be bound by certain obligations, including the obligation to collaborate with the Fund and other members "to assure orderly exchange arrangements and to promote a stable system of exchange rates."[37] The provisions of the second amendment on exchange arrangements are reproduced in Appendix C. The Fund will be required to adopt "specific principles for the guidance of all members" with respect to their exchange rate policies.[38] Even if a greater degree of stability is

ensured under future conditions, changes will occur in exchange arrangements and exchange rates, so that the use of hardship clauses tied to monetary developments may not decline, particularly in connection with long-term contracts.

The report concludes that hardship clauses call in question several traditional concepts, including the one referred to in the following passage:

> In the first place, *the concept of contract* itself, as it is interpreted in French Law, is somewhat modified by the insertion of a clause which violates the principle of the contract as law (although such clause itself proceeds from the principle of freedom to contract). The contract, instead of being immutable as before, now becomes evolutionary. The classical distinction between the two stages in the life of a contract—formation and execution—is less sharp: periodical renegotiations can now take place after the initial negotiations. The contract no longer represents a permanent point of balance which is the result of a clash between conflicting interests. It now shows by its successive modifications the evolution of a community of interests which has been established between the parties: a long-term bond is created between them by means of relations which cannot fail.[39]

The question has been raised whether this new concept of contract is so closely associated with transnational contracts that it has become a customary principle that replaces the classical concept of contract in relation to these contracts.[40]

The Fund's practice under stand-by arrangements can be considered a related legal phenomenon. For reasons of policy the Fund has decided that stand-by arrangements shall not be regarded as contracts between the Fund and the member for whose benefit a stand-by arrangement is granted by the Fund.[41] This decision itself illustrates that the legal categories of consensual arrangements are not closed. But, in addition, the Fund's practice is interesting because of certain analogies to the practice under hardship clauses. Stand-by arrangements for amounts beyond a certain norm include performance criteria, i.e., certain policies expressed sometimes in quantitative and sometimes in nonquantitative but objective terms, on the observance of which the member's ability to make purchases of foreign exchange under the stand-by arrangement is made to depend. The Fund recognizes that the member may be unable in certain circumstances to observe the performance criteria, perhaps because of hardship resulting from unforeseen developments or something else. The stand-by arrangement provides, therefore, that if a performance criterion is not being observed, the member will refrain

from requesting purchases until after it has consulted the Fund and reached understandings on the circumstances in which purchases may be made. These circumstances may include observance by the member of modified or new performance criteria.[42]

The Fund's practice includes other examples of the movement from the classical concept of contract to a concept of a continuing relationship based on the necessity to recognize changing conditions. There have been numerous occasions on which a stand-by arrangement provided not only for the modification or substitution of performance criteria when existing performance criteria were not being observed but also for the adoption of new criteria at some time during the period of the stand-by arrangement. This practice has been followed because of the difficulty of reaching understandings between the Fund and the member on certain aspects of the member's economic program at the time the Fund approves the stand-by arrangement in support of the program. For example, the member may have in prospect a budget that will be established during the period of the stand-by arrangement. It is provided, therefore, that understandings will be reached at a later date on certain aspects of the program and that the use of the Fund's resources after a certain date will depend upon the establishment of these understandings and the member's observance of them.[43]

The technique described above became more important in recent years under practices of granting arrangements for discrete periods longer than the normal one year. The Fund decided in 1974 that it will grant "extended arrangements" for periods not in excess of three years in support of programs to correct, over time, balance of payments problems that result from structural difficulties in the economy. The member seeking an extended arrangement presents a program setting forth the objectives and policies for the whole period and a detailed statement of the policies and measures for the first 12 months, with the understanding that for each subsequent 12 months the member will present the Fund with a detailed statement of the progress made and of the policies and measures that it will follow to realize the objectives of the program. The statement includes "such modifications in the member's policies as might reasonably be considered necessary to assist it to achieve its objectives in changing circumstances."[44]

Extended arrangements are not the only arrangements for the use of

the Fund's resources under which purchases of currencies can be made over a period of more than one year. Extended arrangements are intended primarily for the support of a program when an economy is suffering a serious imbalance in its payments that is related to structural imbalances in production, trade, and prices, or when an economy is characterized by slow growth and an inherently weak balance of payments position that prevents pursuit of an active development program. A member may have difficulties that fit into neither of these categories, but it may require a longer period for the pursuit of a program to achieve adjustment in its balance of payments. The Fund may grant stand-by arrangements for periods beyond one year in such circumstances, and the techniques described above are followed in connection with these arrangements also.[45]

Finally, consultation is not confined to the period of the stand-by or extended arrangement. A member undertakes that, even after the period of the arrangement, if the Fund's holdings of the member's currency in excess of the first credit tranche include currency deriving from purchases under the arrangement, it will consult the Fund, either at the initiative of the member or at the request of the Managing Director, on the member's balance of payments policies. The undertaking is based on the thesis that the member's use of the Fund's resources should be consistent with the Articles and with the Fund's policies not only during the period of the arrangement but also during the period in which the use persists beyond a certain level. Consultation is related to the member's policies from time to time and is not confined to the program in support of which the arrangement was approved. The situation may have changed substantially since the program was adopted.[46]

It must be made clear that the practices described in connection with stand-by and extended arrangements are not the product of recent developments in connection with exchange arrangements. Stand-by arrangements have been approved in the past, however, to eliminate instability in the exchange rate for a member's currency, to ensure an orderly management of the exchange rate, or to eliminate or prevent the adoption of restrictions that impede desirable developments in the exchange rate. These objectives are likely to persist as motives, although not the only ones, for approving stand-by or extended arrangements.

Judgments in Foreign Currencies and Other Problems

In *Miliangos v. George Frank (Textiles) Ltd.*,[47] the House of Lords rejected the ancient proposition of English law that English courts can give monetary judgments only in sterling. "[T]he decision in the *Miliangos* case has revolutionised the position and has disposed of the once common assumption that foreign currency must be treated by our courts as if a commodity, e.g. a foreign cow."[48] In the *Miliangos* case, the House of Lords decided not only that a court can give judgment in a foreign currency but also that the rate of exchange for converting the foreign currency is the rate on the date when the judgment is enforced, i.e., when payment is actually made, and not on the date when the debt should have been paid or on the date of the judgment. The rejection of the "breach-date" rule, and for that matter the rule of the date of judgment, is of obvious importance for a judgment creditor when sterling is depreciating. The defendant must pay the amount of foreign currency awarded or the equivalent in sterling at the rate of exchange at the time of payment.[49]

The change in English law has been adopted largely because sterling is floating and because in some cases judgments expressed in sterling when it is floating would be inequitable. The *Miliangos* case and its progeny have been provoked by the depreciation of sterling. The argument of defendants that change from the former principle was unnecessary because sterling might appreciate has not impressed the courts, which have responded that the new principle would render equity to both parties in both situations. The courts have been aware that the inequity that would have followed from the former principle might have deterred nonresidents from doing business with residents of the United Kingdom and therefore might have harmed the financial and commercial interests of the United Kingdom.[50]

The judgment in the *Miliangos* case is still reverberating in English law.[51] The *ratio decidendi* was carefully limited to the facts of the case, but the judges were conscious that a change was being initiated that might have broader effects. Lord Wilberforce stated that:

> I would make it clear that, for myself, I would confine my approval at the present time of a change in the breach-date rule to claims such as those with which we are here concerned, i.e., to foreign money obligations, ... obligations of a money character to pay foreign currency arising under a contract whose proper law is that of a foreign country and where the money of account and payment is that of that country, or possibly of some other country but not of the United Kingdom.

> I do not think that we are called upon, or would be entitled in this case, to review the whole field of the law regarding foreign currency obligations: that is not the method by which changes in the law by judicial decision are made. In my opinion it should be open for future discussion whether the rule applying to money obligations, which can be a simple rule, should apply as regards claims for damages for breach of contract or for tort.... It is for the courts, or for arbitrators, to work out a solution in each case best adapted to giving the injured plaintiff that amount in damages which will most fairly compensate him for the wrong which he has suffered.[52]

The courts have applied the *Miliangos* principle in circumstances other than those involved in that case. In a subsequent case,[53] the court has applied the principle to a debt payable in U.S. dollars in circumstances in which English law was the proper law of the contract and in which the place of payment was in England.[54] In a second case,[55] the defendants failed to accept cloth for which they had agreed to pay in Swiss francs under a contract governed by Swiss law. The court held that damages for breach of contract—as distinguished from the debt in the earlier case—could be awarded in Swiss francs as claimed by the plaintiffs. The judgment was based on the circumstance that there was an obligation of a monetary character to pay foreign currency and that under Swiss law the plaintiffs were entitled to be placed in the same position as if the contract had been performed.

In the *Miliangos* case and the two cases involving the application of the *Miliangos* principle to contracts, the plaintiffs were exporters who were nonresidents of the United Kingdom and who were asserting claims in foreign currency against importers who were residents of the United Kingdom. It has been observed that, as a result of the sharp depreciation of sterling, British businessmen are tending, in their longer-term export contracts, to denominate prices in foreign currency, particularly if the exports are destined for a country having a currency that is expected to remain strong against sterling. In the past most of the exports have been invoiced in sterling.[56] The new development has occurred even though industrialists are said to react more cautiously to changes in monetary conditions than in business conditions because they see themselves as dealing in goods and not in money.[57] British shipping companies, with worldwide trade in the course of which most of their receipts are earned abroad, began to move toward invoicing freight in U.S. dollars after the devaluation of sterling in 1967.[58] More recently, the international shipping industry as a whole has increasingly invoiced freight in terms of a basket of currencies.[59]

Exporters are not the only businessmen who feel the need to reconsider their practices as a result of the floating of currencies. For some businessmen, unilateral action is not possible because their activities are regulated by industrial or professional organizations. For example, it has been reported that, as a result of the depreciation of sterling, the British Insurance Association and the Reinsurance Offices Association are considering jointly what changes should be made in the accounting and settlement systems of the insurance industry. The problem has arisen because an insurance underwriter who accepts overseas risks in the London market is usually paid a premium converted into sterling by the broker but, with the use of these receipts, eventually may have to meet a claim denominated in foreign currency. The higher interest rates on sterling compared with other currencies do not offer adequate compensation for the possible losses. British exchange control limits the amount of foreign exchange that insurers may hold to a proportion of the net premiums received in foreign currencies in the previous year. For additional purchases of foreign currency, the insurers have to pay a premium.[60]

One further example will suffice to illustrate the problems associated with floating, and particularly with depreciating, currencies. British borrowers of foreign currencies have found the repayment of the loans in sterling extraordinarily burdensome. A number of companies have borrowed foreign currencies because of the low rate of interest payable under the loan agreements in comparison with the interest earned on sterling. This advantage has been outweighed in many cases by the additional cost in terms of sterling of servicing and repaying the loan.[61] In his Budget Statement of April 1976, the Chancellor of the Exchequer announced that he would make a final decision in the following year on tax relief in connection with borrowings in foreign currency to compensate for the decline in the value of sterling. Under the existing law, differences in exchange rates may give rise in certain circumstances to relief or liability for trading companies, but there is no relief or charge under the tax code relating to capital gains in respect of exchange losses or profits on the repayment of borrowings in foreign currency. The Inland Revenue, which was working on a change in the law, had asked representatives of business, and of the accounting and legal professions, to "make known their views both on the general principle or more extensive relief and on the details of some workable schemes." In his 1977

Budget Statement, however, the Chancellor of the Exchequer said that he was concentrating for the time being on other forms of tax relief.[62]

The *Miliangos* principle has progressed beyond the field of contract into the territory of tort. An English case decided in 1977 involved a collision between two vessels. It was agreed between the parties that the owner of vessel A was 85 per cent to blame and should pay to the plaintiff, the owner of vessel B, as damages for negligence 85 per cent of the loss and damage suffered as a result of the collision. The plaintiff was a Liberian company whose head office was in Greece and whose vessel B was managed for it by agents with a principal place of business in New York. Repairs to vessel B were carried out in Shanghai, Yokohama, and Los Angeles and were paid for in the domestic currency in each place. The Chinese and Japanese currencies were acquired with U.S. dollars. The question before the court was the currency in which the damages should be awarded. The three possibilities considered by the court were sterling, as the currency of the forum, the currency of expenditure or loss, and the currency with which the plaintiff had the closest connection. The court declared that if it had been free as a matter of law to choose a solution, it would have preferred the third possibility, because it would expose a plaintiff to the effect of changes in the value of his own currency only. The court did not have this freedom, however, because the third possibility had been rejected in other cases. In examining the other two solutions, the court concluded that the second was more compatible with the basic principle of the law of damages, and the *Miliangos* principle made it possible to award damages in the currency in which expenditure or loss had been incurred or in the sterling equivalent at the date of payment.[63]

Courts in the United States have not yet adopted the principle that they can award judgments in foreign currency. The pressure to do so is less, in view of the relative stability of the exchange rate for the U.S. dollar. The courts have been divided on the question whether the rate of exchange to be chosen for converting a foreign currency into U.S. dollars should be the rate on the date of the accrual of the claim (the breach day) or on the date of the judgment. The author of an article published in 1977[64] concluded that little stands in the way of adoption of the *Miliangos* principle on both these questions by courts in the United States:

> Except for a few ancient state statutes, "long buried in oblivion," that speak of money and money judgments exclusively in terms of the dollar, there seems to be nothing to

> stop the state courts... The modern view of "money" is liberal, and state judges have broad power to adopt procedural changes of this type.
>
> Federal courts ... must work their way around an Act of Congress of 2 April 1792, commanding that "all proceedings in the courts shall be kept and had in conformity to" the rule that "the money of account of the United States shall be expressed in dollars."[65]

He felt, however, that the statute would not be violated by judgments expressed in both a foreign currency and the U.S. dollar equivalent at the time of payment and that the Federal Rules of Procedure would not preclude judgments in this form.

According to another author, the courts in the following countries, among others, award judgments in foreign currency: Austria, Brazil, Denmark, Egypt, the Federal Republic of Germany, Italy, Norway, Poland, and Switzerland. In some of these countries, the plaintiff can sue only for the foreign money of account and not for the currency of the forum, but the defendant may request that judgment against him provide for an option to pay in the foreign money of account or the equivalent in the currency of the forum at the rate of exchange on the day of payment. In some countries, such as France, Belgium, and Argentina, the courts award the currency of the forum but at the rate of exchange on the day of payment.[66] The practices of the courts in all the countries mentioned in this paragraph antedate the worldwide floating of currencies.[67]

Exchange Arrangements and Future Legal Developments

During the existence of the par value system, numerous currencies floated, but most of the members of the Fund with substantial roles in international trade and payments maintained effective par values for their currencies during most of the period. Whenever par values were not maintained, the practices in force were regarded as temporary deviations from the system or as aberrations that did not threaten it. International and national law relied on the comfortable conviction of stability in exchange arrangements, or at least the international approval of changes in exchange rates by means of orderly procedures under the Fund's Articles. No basic change in attitude was discernible even when the sentiment for greater flexibility developed.[68] No great change might have occurred even if exchange arrangements had been based, in accordance with the views of the Committee of Twenty, on "stable but adjustable par values" that were subject to approval by the Fund[69] with "floating rates

in particular situations, subject to Fund authorization, surveillance, and review."[70]

The collapse of the par value system initiated changes in international and national law, some of which are discussed in this pamphlet and in Pamphlet No. 19. At this point, it is relevant to consider the prospects for the future. Article IV of the proposed second amendment provides that each member will undertake to collaborate with the Fund and other members to ensure the existence of orderly exchange arrangements and to promote a stable system of exchange rates. Article IV will authorize each member to apply the exchange arrangements of its choice. These arrangements may include, without limitation, maintenance of a value in terms of the SDR or of another denominator selected by the member, other than gold, or cooperative arrangements among members by which they maintain the value of their currencies in relation to the value of the currency or currencies of other members. It will be possible, therefore, for a member to peg the value of its currency to another currency, or to join in such arrangements as the European "snake," but the member will be able to change the peg, or change its exchange arrangements, or withdraw from the cooperative arrangements to which it has been a party. The use of gold as a denominator is the only exchange arrangement that will be prohibited. This step has been taken because gold will cease to have an official value under the second amendment of the Articles, and it is hardly credible that the exchange value of a currency would be maintained in terms of the fluctuating price of gold in the market.

Under the second amendment of the Articles, the Fund will be able, by a decision taken by an 85 per cent majority of the total voting power, to recommend general exchange arrangements that are in accord with the development of the international monetary system. If recommendations were made, the freedom of each member to apply exchange arrangements of its choice would not be impaired. The Fund would be able to determine, by the same majority, that international economic conditions permitted the introduction of a widespread system of exchange arrangements based on stable but adjustable par values. As a consequence of this determination, certain detailed provisions regulating par values will become applicable. Even then, however, a member will not be required to establish a par value for its currency. The common denominator of that par value system may be the SDR or another

denominator chosen by the Fund, but the Fund may not select gold or a currency for this purpose.[71] A future par value system under these provisions will be radically different in some respects from the par value system of the original Articles.[72]

The return to a par value system immediately after the effective date of the second amendment is improbable. The situation is likely to be what it was before the second amendment, subject to two qualifications. The first is that whereas exchange arrangements before the second amendment are inconsistent with the Articles, the same exchange arrangements will become consistent with the Articles after the second amendment. The other qualification is that members will be bound by new obligations after the second amendment, including an obligation "to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates."[73] The Fund will be required to oversee both "the international monetary system in order to ensure its effective operation" and "the compliance of each member with its obligations" relating to exchange arrangements.[74] To fulfill its functions, the Fund will be obliged to "exercise firm surveillance over the exchange rate policies of members" and to "adopt specific principles for the guidance of all members with respect to those policies."[75] The Fund has already formulated certain principles and procedures for the surveillance of exchange arrangements that will become effective when the second amendment is adopted. These principles and procedures are reproduced in Appendix D.

It is not surprising that attempts to introduce flexibility into the par value system have given way to efforts to ensure orderly conditions whatever the exchange arrangements that members choose to apply. Efforts were initiated even before agreement was reached on the proposed second amendment of the provisions of the Articles that deal with exchange arrangements. On June 13, 1974, the Fund adopted its decision on guidelines for the management of floating exchange rates.[76] The guidelines were recommended to members as the way in which, in present conditions, they could perform their undertaking "to collaborate with the Fund to promote exchange stability, to maintain orderly exchange arrangements with other members, and to avoid competitive exchange alterations."[77] The decision states that:

> These guidelines are based on the assumption that in any situation of floating it may be desirable (a) to smooth out very short-run fluctuations in market rates and (b) to offer a

> measure of resistance to market tendencies in the slightly longer run, particularly when they are leading to unduly rapid movements in the rate, and (c) to the extent that it is possible to form a reasonable estimate of the medium-term norm for a country's exchange rate, to resist movements in market rates that appear to be deviating substantially from that norm. Guidelines of this kind are necessary, inter alia, in order to arrive at a clear conception of what competitive exchange alteration is, and to provide safeguards against it.[78]

In the Declaration issued at the Rambouillet summit meeting, in November 1976, the Heads of States and Governments of France, the Federal Republic of Germany, Italy, Japan, the United Kingdom, and the United States agreed to declare, inter alia, that:

> With regard to monetary problems, we affirm our intention to work for greater stability. This involves efforts to restore greater stability in underlying economic and financial conditions in the world economy.
>
> At the same time, our monetary authorities will act to counter disorderly market conditions, or erratic fluctuations in exchange rates...[79]

Principle B of the decision adopted by the Fund on April 29, 1977 for the guidance of members in connection with their exchange rate policies declares that:

> A member should intervene in the exchange market if necessary to counter disorderly conditions which may be characterized inter alia by disruptive short-term movements in the exchange value of its currency.[80]

The provisions of Article IV of the proposed second amendment of the Articles and the principles already adopted by the Fund include no reference to a medium-term norm for a member's exchange rate. The provisions of the second amendment will refer to "a stable system of exchange rates," and not to stability of the exchange rates for individual currencies. They will refer also to the promotion of stability "by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions."[81]

It is not possible to forecast how stable exchange rates will be in the future, but it seems likely that the process of change in international and national law that is the subject of this study will not be arrested or reversed. Even if relative stability in exchange rates prevails because "orderly underlying economic and financial conditions" are achieved, it is improbable that the negotiators of treaties, legislators, or the parties to contracts will draft their legal instruments on the assumptions that they may have relied on in the days when the par value system of the Articles was effective. Stability alone will not suffice because of the unilateral

freedom of members to change their exchange arrangements. Even if exchange rates become more stable than under the par value system, there will no longer be the assurance of the international endorsement of par values and exchange rates that was provided by the par value system. In the drafting of legal instruments, the legalization of exchange arrangements that are now inconsistent with the Articles may not be considered an adequate substitute for the international approval of par values and exchange rates maintained within agreed margins. Finally, the absence of a common denominator for the system as a whole is another reason why it is unlikely that there will be a reversion to the assumptions of the past in the drafting of legal instruments.

The second amendment of the Articles will provide for the possible reintroduction of a par value system, but one that will differ in important respects from the par value system of the original Articles. For example, a member will not be required to establish a par value for its currency,[82] and if it takes this step it will be empowered to abandon the par value unless the Fund objects by a decision taken by an 85 per cent majority of the total voting power.[83] Moreover, the margins around parities within which exchange transactions involving currencies with par values will have to be confined[84] will be wider than those consistent with the original Articles.[85] Even under a future par value system, therefore, it seems unlikely that the drafters of legal instruments will be able to rely, as they might have in the past, on the stability or international endorsement of exchange rates that were permitted to move only within narrow margins.

The conclusion seems justified that the drafting of legal instruments and the development of international and national law will proceed on different assumptions from those that often were made during the life of the par value system, no matter what exchange arrangements may be in effect under Article IV after the second amendment and no matter how stable exchange rates may prove to be.

A world of floating currencies will produce changes in the law, and these changes will modify traditional business practices and affect other activities. Decisions such as those in the *Miliangos* case and its successors may induce contracting parties to contract in a currency that they think is less likely to fluctuate in value than a currency that would have been chosen in the past or in a basket of currencies. Similarly, the attitudes of parties to the settlement or litigation of claims for tort may be affected by decisions establishing that damages may be awarded in the foreign

currencies in which loss was suffered or permitting payment in an equivalent amount of the currency of the forum at the rate of exchange on the date of payment. For example, if the currency in which loss was incurred is a currency likely to appreciate against the defendant's currency, he may prefer to settle rather than to take the risk of having to pay a larger amount in his own currency under a judgment at a later date. If the loss was incurred in a currency likely to depreciate against the plaintiff's currency, he may feel induced to settle instead of awaiting the outcome of suit.

Special Drawing Rights (SDRs)

International Agreements: A Survey

A number of units of account defined in terms of gold can be found in treaty law, among them the Poincaré franc,[86] the Germinal franc,[87] the U.S. dollar of a certain date, or a unit of account so defined as to be equivalent to the gold value of the U.S. dollar from time to time.[88] Changes in the international monetary system have provoked a ferment of activity in the search for a unit of account in substitution for units based on gold. This activity is occurring among states in connection with treaties that give expression to existing or new agreements, among national technical departments and entities which, though official, do not engage the responsibility of states as such, and among nonofficial entities that participate in transnational activities.

The discussion in this section of the pamphlet concentrates largely on efforts to introduce the SDR as a unit of account in treaties.[89] Developments in the Fund must be noted first. Pamphlet No. 19 discussed the change that the second amendment of the Articles will make in the provision of the present Articles dealing with the definition of the unit of value of the SDR.[90] Under the second amendment of the Articles the value of the SDR will not be related to gold. The Fund will be authorized to determine the value of the SDR by decisions taken by 70 per cent of the total voting power, but an 85 per cent majority will be necessary if the decision is to make a change in the principle of valuation or a fundamental change in the application of the principle already in effect.[91]