It seems that the SDR was substituted for the deutsche mark, which appeared in earlier proposals,[152] as the unit of account for the purpose of limiting liability. One reason for the choice of the SDR may be that nonmembers of the Council of Europe may be invited to adhere to the convention.

The Council of Ministers of the European Communities received from the Commission on September 9, 1976 a Proposal for a Directive relating to the approximation of the laws, regulations, and administrative provisions of the Member States concerning liability for defective products.[153] The proposed Directive, like the convention, moves from the principle of fault to the principle of liability irrespective of fault. The Directive is consistent with the convention, but goes beyond it in some respects. The limits of liability under the Directive are expressed in European Units of Account (EUA).[154] The Directive would apply only to members of the three European Communities.[155]

Gold

Valuation Under the Articles of Agreement

The section above, entitled Special Drawing Rights, deals to a large extent with efforts to find a suitable unit of account in lieu of gold or a unit of account based on gold for the purposes of a growing number of treaties. This section deals with certain problems connected with gold-value and other value clauses. Some of these problems arise under domestic legislation that gives effect to treaties that are going to be amended or supplanted but were still in force without change on the date relevant to the problem under consideration. The domestic legislation continued, therefore, to refer to gold value.

The valuation of gold under the Articles before and after the proposed second amendment takes effect must be summarized because of the bearing these aspects of the Articles can have on the solution of the legal problems referred to. Since August 15, 1971 no member of the Fund supports the value of its currency by freely buying and selling gold in accordance with Article IV, Section 4(*b*) of the Articles before the second amendment. As a result, there is no currency that can be said to be maintained in value in relation to gold and therefore can be taken to be the "reference currency," by means of which to determine the gold value

of other currencies on the basis of exchange rates between them and the reference currency. In this predicament, the Fund has ceased to use the U.S. dollar as the reference currency for the purpose of determining gold value when that determination is necessary for applying the provisions of the Articles.

It will be recalled that the SDR is defined by the Articles in terms of gold. The Fund, by administrative decision, has deemed the SDR to be equivalent to the sum of the specified amounts of the currencies of 16 members of the Fund, as shown in Appendix A. The SDR of this composition is now the Fund's unit of account and is applied in computations for the purpose of applying the provisions of the Articles on the thesis that it is equivalent to the amount of gold in the definition of the SDR, as shown in Appendix B.

When the second amendment of the Articles becomes effective, the SDR will no longer be defined in terms of gold. The Fund will then be required, not by administrative decision but by the Articles themselves, to employ the SDR as its unit of account,[156] and the Fund will have authority to determine the method of valuation of the SDR.[157] The official value of gold under the Articles before the second amendment (SDR 1 = 0.888671 gram of fine gold or SDR 35 per fine ounce of gold) will disappear for all but a few exceptional purposes of the Fund. The Fund will continue to apply the former official price of gold for particular purposes under some provisions, most of which relate to certain dispositions or possible dispositions of the gold held by the Fund on the date of the second amendment. The provisions can be summarized as follows:

(1) The Fund must complete the sale, which began in January 1977, of 25 million ounces of fine gold held by it on August 31, 1975 to those members that were members on that date and agree to buy. The sales are in proportion to quotas on that date and at the price of SDR 35 per fine ounce of gold.[158]

(2) The Fund must complete the sale, which began in June 1976, of another 25 million ounces for the benefit of developing members that belonged to the Fund on August 31, 1975. The amount realized by the Fund in excess of the price of SDR 35 per fine ounce of gold from a major portion of these sales goes into the resources of the Trust Fund.[159]

(3) Without prejudice to the sales that must be made under (1) and (2) above, the Fund may sell gold held by it on the date that the second amendment becomes effective to members that belonged to the Fund on

August 31, 1975. These sales also would be in proportion to quotas on that date and at the price of SDR 35 per fine ounce of gold.[160]

(4) The Fund will have the further power to sell gold at any time on the basis of prices in the market.[161] The proceeds in excess of the price of SDR 35 per fine ounce of gold will be held in the Special Disbursement Account for transfer to the General Resources Account for immediate use in operations and transactions authorized by other provisions, or held in the Special Disbursement Account for use in operations and transactions not authorized by other provisions but consistent with the purposes of the Fund,[162] or, without being held in that Account, for investment through the Investment Account.[163]

(5) The excess of the value of any gold held on the date of liquidation of the Fund that it held on August 31, 1975 over the price of SDR 35 per fine ounce would be distributed in liquidation to members that were members on August 31, 1975, in proportion to their quotas on that date.[164]

(6) Any obligation of a member to pay gold in repurchase of its currency or as a subscription that is outstanding on the date that the second amendment enters into force must be discharged in SDRs, or, if permitted by the Fund, in the currencies of other members. For the purpose of this provision gold is valued on the basis of the price of SDR 35 per fine ounce, but the amount of currency that is payable is determined by the value of the currency in terms of the SDR at the date of discharge.[165]

If the Fund enters into other operations and transactions in gold under the second amendment, the former official price of SDR 35 per fine ounce will be irrelevant and will not be replaced by any other official price. The provision that sets forth most of the powers of the Fund to deal in gold begins with a subsection that directs the Fund to be guided, inter alia, "by the objective of avoiding the management of the price, or the establishment of a fixed price, in the gold market."[166] Sales of gold under (4) above must be "at a price agreed for each transaction on the basis of prices in the market."[167] If the Fund accepts payments in gold, the price is to be determined in the same way.[168]

In connection with the avoidance of any official price for gold by the second amendment of the Articles, except for the limited uses of the former official price of SDR 35 per fine ounce, it will be recalled that members will not be allowed to maintain the value of their currencies in

terms of gold [169] and that gold may not be the common denominator of a par value system if such a system were to be established in accordance with the provisions of the Articles. [170]

Valuation by Members

The question of the valuation of gold by members may arise in various ways. A member may feel the necessity to deal with the question for some reason of policy. Another reason may be that a member wishes to give guidance in connection with the application of gold-value clauses in domestic legislation that gives effect to treaties.

Since January 9, 1975 the French authorities have valued their gold holdings on the basis of prices in the most representative markets. Prices in the London market have been selected for this purpose. A new valuation is made at the end of each semester on the basis of average market prices during the last three months of the semester and the average exchange rate between the U.S. dollar and the French franc during the same period. [171] According to a report of the Bank of Italy, gold has been deposited as collateral for a loan by the Deutsche Bundesbank. The quantity of gold corresponds to the amount of the loan on the basis of the assessment of a market price with a discount of 20 per cent. [172]

These arrangements are not inconsistent with the Articles even before the second amendment enters into force, because under the Articles a member is authorized to sell gold in the market to purchasers other than members at whatever price above par prevails there. The valuation may be based on the assumption of sale in the market. Sales between members can take place under the Articles before the second amendment becomes effective only at the official price. For this reason, the terms and conditions of the Fund's Invitation to Bid in the auctions of gold it is conducting on behalf of the Trust Fund provide that no bid may be submitted by the governmental or monetary authorities of a member or by an agent acting on behalf of these authorities at a price inconsistent with the Articles, i.e., the equivalent of SDR 35 per fine ounce of gold. [173]

The confusion that exists in the application of gold-value clauses is illustrated by the results of a questionnaire addressed on August 30, 1975 to the contracting parties to two international conventions, which were asked to reply during the period that ended on March 30, 1976. The

contracting parties include both members and nonmembers of the Fund. The answers to the question about the method employed for converting into domestic currency the gold franc that served as the unit of account in the conventions revealed wide differences of practice. Some countries applied the official par value. Some of these par values had been established in the period 1971–73, but others had been adopted 20 or even 30 years earlier. Other countries made the conversion through another currency (including the U.S. dollar) or through the SDR. One country used an unofficial par value, another applied exchange rates published for another purpose, and a third had no special procedure. No country made the calculation on the basis of the price of gold in the market.

The United Kingdom has dealt with the problem of one gold-value clause by exercising statutory powers to determine the value of gold in domestic currency. The Carriage by Air Act of the United Kingdom,[174] which gives the force of law to the Warsaw Convention in that country, authorizes the Minister of Aviation to determine by statutory instrument the sterling equivalent of the Poincaré franc, in which limitations on liability were expressed.[175] These equivalents are binding in judicial proceedings.[176] Sterling began to float on June 23, 1972. The Secretary of the U.S. Treasury, George P. Shultz, announced the intention on February 12, 1973 to change the par value of the U.S. dollar to 0.828948 special drawing right, or the equivalent in terms of gold of forty-two and two-ninths dollars per troy ounce of gold. The par value became effective on October 18, 1973, although exchange rates in the market began to reflect the proposed par value as soon as it was announced. The British Minister of Aviation has exercised his powers under the statute by means of Orders that came into operation on July 27, 1973,[177] April 12, 1974,[178] and October 24, 1975.[179] These Orders were based on an exchange rate, on the respective dates, of one pound sterling equal to $2.5736, $2.2934, and $2.15929.[180] An explanatory note attached to the Order, but not as part of it, declared that:

> The sterling equivalents have been calculated on the basis of current market rates for sterling in terms of the U.S. dollar on the basis of the valuation of gold at $42.2222 per fine ounce.[181]

The solution avoids basing the determination of gold value on the par value of the pound sterling under the Articles of the Fund.[182] Although

the par value of the pound sterling will continue to exist under the Articles until the second amendment becomes effective,[183] the par value is not being maintained as the basis for exchange rates.

The solution as embodied in the 1973 Order was realistic in taking account of the intention of the U.S. authorities to change the par value of the dollar before the change was made in accordance with the applicable legal procedures, because the exchange markets began to reflect the future official change immediately after announcement of the intention to make it. The solution was based, however, on the assumption that the par value of the dollar would continue to be a basis for calculating gold value even though the United States is not freely buying and selling gold for dollars in transactions with the monetary authorities of other members and even though the dollar is floating. The assumption on which the solution is based does not correspond with the one made by the Fund in its computations for the purpose of applying the provisions of the Articles.

Members may adopt legislation in the future under which broad powers are granted to value gold. A bill introduced in the Canadian House of Commons to amend the Currency and Exchange Act and other legislation is an example which goes beyond gold and takes cognizance of currencies under existing exchange arrangements and SDRs:

> Notwithstanding any other enactment, where any enactment or any treaty, convention, contract or agreement to which Canada is a party makes reference to
>
> (a) a currency of a country other than Canada,
>
> (b) a unit of account that is defined in terms of currencies of two or more countries,
>
> (c) gold, or
>
> (d) a combination of any of the foregoing,
>
> the Governor in Council may make regulations specifying the equivalent dollar value or the means of determining or method of calculating the equivalent dollar value of such currency, unit of account, gold or combination thereof.[184]

It has been noted earlier in this pamphlet that some contracting parties to treaties in which gold-value clauses appear are suggesting that a new unit of account should not be adopted for the time being. Some organizations have concluded that no change need be made, at least until amendment of the treaty becomes possible. This conclusion may create a dilemma when the second amendment of the Articles becomes effective.

The problem can arise under the provision that prevents a member from maintaining the value of its currency in terms of gold:

> Under an international monetary system of the kind prevailing on January 1, 1976, exchange arrangements may include (i) the maintenance by a member of a value for its currency in terms of the special drawing right or another denominator, other than gold, selected by the member.... [185]

This provision proscribes maintenance of the value of a currency in terms of gold for the purpose of exchange arrangements, i.e., in transactions in which one currency is exchanged for another currency. The provision will not prevent a member from defining the value of its currency in terms of gold and applying that definition for some domestic purpose not involving exchange transactions. The United States, for example, has adopted legislation to abrogate the par value of the U.S. dollar except for one domestic purpose. [186]

The argument can be made that domestic legislation that gives effect to a treaty containing a gold-value clause does not deal with exchange arrangements. It provides for the amounts of domestic currency that can be awarded to claimants. The argument is a weighty one, but if a purpose of the gold-value clause is to ensure equal value whatever the currency of recovery might be, it could be argued that the domestic currency is being valued in relation to other currencies on the basis of gold. It is true that exchange transactions would not be involved, but the method of valuation would be for international as well as domestic purposes, and possibly therefore within the "mischief" [187] that the provision in the second amendment of the Articles is directed against.

Opposition to this reasoning would be more likely to be based on the argument that exchange arrangements were not involved than on the argument that there was no implicit international valuation of the currency. If the latter argument were made, it might be interpreted as an admission that the value attributed to the currency in terms of gold did not represent its value in exchange arrangements. This admission would be incompatible with the concept of equal value that was the rationale of the gold-value clause.

Valuation by Courts

At least two tribunals have recently determined gold value by reference to the price of gold in one of the commodity markets. The decision of October 2, 1973 of the General Average Assessor of Göteborg, Sweden, in the matter of the *Motor Ship "Saga"* [188] and of the Court of Appeals of Athens [189] adopted this solution. The General Average Assessor chose

what appears to have been the price of gold in the London market on the date the claim arose. The Athens court chose the price of gold and gold coins on the Athens Stock Exchange on the date of the judgment of the lower court. The Assessor noted that Sweden, unlike the United Kingdom, had not established an official value of the Poincaré franc in terms of the domestic currency.

Another approach has been to reject the commodity price of gold and to apply a method of valuation for which endorsement can be found in the practice of the Fund. This solution has been applied by the Supreme Court of the Netherlands in *Hornlinie v. Société Nationale des Pétroles d'Aquitaine*[190] and by the Hanseatic Higher Regional Court at Hamburg in *Transarctic Shipping Corporation, Inc. Monrovia, Liberia v. Krögerwerft (Kröger Shipyard) Company.*[191]

On December 29, 1976, the Hamburg District Court (Division 64) in the *Matter of the Khendrik Kuivas* adopted a pioneering decision on the application of a gold-value clause in a provision of national law that gives effect to an international convention.[192] A collision had occurred between the Soviet vessel *Khendrik Kuivas* and the German vessel *Corvus* on October 30, 1976. The owner of the Soviet vessel petitioned the court in order to deposit a sum of money to which its liability was to be limited under Section 738 of the Commercial Code and Regulations related thereto. The amount to which liability can be limited under Section 487a of the Commercial Code is expressed in the Poincaré franc, in accordance with the International Convention Relating to the Limitation of the Liability of Owners of Seagoing Ships.[193]

In considering the question of the conversion of Poincaré francs into deutsche mark, the court referred to the decision of the Hanseatic Higher Regional Court at Hamburg in the *Transarctic* case on July 2, 1974.[194] The court noted that in the earlier case it had been held that it was not permissible to apply the par value of the deutsche mark, which had been established in terms of gold in October 1969 and had remained unchanged since then. It was held that, in view of the revolutionary development of the international monetary system, the central rate as declared to the Fund in terms of the SDR must be applied as the most practical procedure for achieving uniformity in international limits of liability.

The latest central rate, the court continued, had been established on

June 29, 1973 and had not been changed, but a further development had occurred in the international monetary situation, which had already been noted in the *Transarctic* case. This development was the adoption by the Fund of the "standard basket" technique of valuing the SDR that became effective on July 1, 1974. The definition of the SDR in Article XXI, Section 2 of the first amendment of the Fund's Articles had not been changed and continued to be equivalent to a fixed amount of gold, but the method of expressing the value of the SDR in terms of a currency was now different. This value was not fixed but was calculated daily by the Fund.

The effect of the Fund's method of calculation was that a change in the exchange rate of any currency in the basket had a bearing on the value of the other currencies in terms of the SDR. This flexibility was a further reason for using the SDR as a means of giving effect to the objective of a reasonably standardized limit of liability in all contracting countries while taking account of changing economic conditions.

The court declared that the valuation of the deutsche mark in terms of the SDR according to the technique of the "standard basket" entailed disadvantages. The daily fluctuation in value resulting from the technique might induce the petitioner to take speculative considerations into account in connection with the institution of proceedings. Moreover, it might become necessary to determine the amount of liability anew if further proceedings were to be initiated. "These disadvantages, which, according to experience gained hitherto, are negligible must, however, be endured in the interest of international uniformity in arriving at the amount of liability, which has been mentioned."[195]

On the day of the decision the most recent value, as announced by the Fund on December 20, 1976, was DM 1 = SDR 0.363745 and SDR 1 = DM 2.7492. The court employed this valuation. The calculation, as set forth by the court, for arriving at the equivalent in deutsche mark of the Poincaré franc in applying the limits of liability based on the tonnage of vessels was as follows:

1.	0.888671	gram of fine gold	=	SDR 1
2.	1	gram of fine gold	=	$\frac{\text{SDR 1}}{0.888671}$
3.	0.0655	gram of fine gold (65 1/2 mg)	=	$\frac{\text{SDR 1} \times 0.0655}{0.888671}$

4.	0.0655	gram of fine gold with a fine gold content of 900/1000	=	$\frac{\text{SDR 1} \times 0.0655 \times 900}{0.888671 \times 1000}$
5.	SDR 1		=	DM 2.7492
6.	0.0655	gram of fine gold with a fine content of 900/1000	=	$\frac{2.7492 \times 0.0655 \times 900}{0.888671 \times 1000}$

The calculation is comparable to the solution adopted by some international organizations, which have calculated the relationship between the SDR and a gold franc on the basis of the definition of each in terms of gold. Thereafter, the equivalent of the SDR in terms of the currency involved is made according to the Fund's method of valuation. This admirably realistic solution suggests two comments. First, the solution did not depend on the fact that the Federal Republic of Germany has declared a central rate for the deutsche mark in terms of the SDR. Second, it is possible to go easily from the Poincaré franc or any unit of account expressed in gold to currency via the SDR as long as the SDR is defined in terms of gold. Will it be equally easy to calculate this relationship in the interval between the date on which the second amendment of the Articles takes effect, when the SDR will cease to be defined in terms of gold, and the date on which the Convention on Limitation of Liability for Maritime Claims, 1976 and national legislation based on it become effective? It might be possible to hold that the relationship could continue to be based on the last definition of the SDR in terms of gold and on the residual uses of that definition under the second amendment, but it is obvious that a new legal problem will arise, at least for the courts. International organizations might be able to continue to determine the relationship on the basis of the former definition of the SDR in terms of gold if they have the necessary administrative authority.

Gold-Value and Currency Clauses

On June 5, 1933, after gold coins and gold certificates had been withdrawn from circulation as money in the United States and after the private ownership of gold by citizens and residents of the United States had been forbidden except for certain limited purposes, Congress adopted the Joint Resolution declaring gold clauses unenforceable.[196] The Joint

Resolution has been, and is still being, given an extensive interpretation by courts in the United States.

On December 31, 1974, citizens and residents of the United States regained the right to own and deal in gold under a statute which provides that:

> ...no rule, regulation, or order in effect ... [on December 31, 1974] may be construed to prohibit any person from purchasing, holding, selling, or otherwise dealing with gold in the United States or abroad.[197]

The statute was adopted as part of the policy of the United States to reduce the role of gold in the international monetary system.[198]

It has been argued that as a consequence of this measure the right of American citizens and residents to contract by reference to gold should be, and may already have been, restored.[199] The debates on the 1974 statute, however, did not mention gold-value clauses, and the Gold Clause Joint Resolution was the equivalent of a statute and not a "rule, regulation, or order." On October 27, 1976, a U.S. District Court in Tennessee concluded that the measure has not explicitly or implicitly repealed the Joint Resolution, so that a lessee was required to pay only $1,500 a month under a term in the lease requiring it to pay in gold coin of the weight and fineness as of May 1, 1927, or its equivalent at the date of payment. The defendant's claim to approximately $13,500 for the month of January 1975 on the basis of the market price of gold was rejected.[200]

Efforts were made in 1974 to prevent the application of the Joint Resolution to multicurrency obligations providing for "payment in dollars or a foreign currency or foreign currencies," and there was an attempt in 1975 to repeal the Joint Resolution in full. These efforts failed, notwithstanding a statement by the Secretary of the Treasury that he saw no reason why U.S. businessmen should not be able to deal in securities containing multicurrency obligations that were offered in international markets. This statement was made at the end of 1974 when the law was changed to permit the private ownership of gold.[201]

Senator Helms, who has championed the legalization of gold-value clauses, pursued this cause during congressional hearings on amendment of the U.S. Bretton Woods Agreements Act. In requesting the views of witnesses, he received an answer from Mr. Yeo, the then Under Secretary of the Treasury, which provides one explanation for official reluctance to repeal the Joint Resolution. Repeal might create the impression, which

would be particularly unfortunate when the Articles of the Fund were about to be amended, of an intention to restore the role of gold, notwithstanding the objective of a gradual reduction in its role that is a feature of the second amendment. The question and answer were as follows:

> *Question.* Would the Treasury Department favor a set date to restore the freedom of Americans to use gold clause contracts? Would the Treasury favor an amendment of this kind on the IMF legislation?
> *Answer.* As Secretary Simon stated in his letter to you on May 6, the Gold Clause Joint Resolution, by making unenforceable contract provisions for the payment of the obligation in gold or in an amount of dollars measured in gold, helps to assure that gold will not again assume a monetary role through widespread use in private transactions. Secretary Simon, at that time, also expressed concern that the emergence of gold clauses which might result from repeal of the Joint Resolution, could call into question the strength of the dollar and undermine our efforts to control inflation and maintain confidence in our currency. For these reasons, the Joint Resolution appears to us to have a substantial and important rationale and its repeal at this time would be unwise.
>
> In our view, careful and thoughtful consideration should be given to the bill you introduced on June 14 to repeal the Gold Clause Resolution. However, because of its importance and our concerns regarding its repeal, it should not be handled hastily in the context of the Bretton Woods legislation. Rather, the Gold Clause Resolution can and should be considered on its merits. At an appropriate time, officials from this Department would be happy to participate in full, frank, and open discussions on this matter and to examine our concerns in light of all the points of view expressed in those hearings.[202]

The letter of May 6, 1976 from Secretary Simon to Senator Helms contained, in addition to the views recalled by the Under Secretary, the following passage:

> In addition to gold clauses, you mentioned in your letter the removal of legal strictures against multiple currency clauses which would result from repeal of the Joint Resolution. As you pointed out, I have in the past expressed the view that consideration of a change in the law in this regard would be desirable. Multiple currency clauses do not raise the same concerns as gold clauses, and removal of the legal strictures against multiple currency clauses could be accomplished without repealing in full the Joint Resolution.[203]

Meanwhile, one consequence of the present legal position is that the effect of the Gold Clause Joint Resolution on the enforceability in courts in the United States of clauses denominated in SDRs remains uncertain.[204]

A proposal has been made to amend Canadian law to permit the use in Canadian contracts of units of account such as the SDR. Subsection 12(1) of the Currency and Exchange Act would be amended to include (b) below:

> Every contract, sale, payment, bill, note, instrument and security for money and every transaction, dealing, matter and thing whatever relating to money or involving the payment of or the liability to pay any money, that is made, executed or entered into, done or had, shall be made, executed, entered into, done and had according to the currency of Canada, unless it is made, executed, entered into, done or had, according to
>
> (a) the currency of a country other than Canada; *or*
>
> (b) a unit of account that is defined in terms of the currencies of two or more countries.[205]

In England, a case decided in 1956 raised for the first time the question whether a gold-value clause was valid in a purely domestic contract (a lease for 99 years). The issue was not resolved because the court construed the clause as drafted as one that dealt with the mode of discharging the debt and not as measuring its extent. According to this construction, the obligor was permitted alternative modes of payment of a fixed amount of sterling, one of which was a specified amount of "gold sterling" and the other the same specified amount of Bank of England notes. The obligor was entitled to settle in accordance with the latter alternative and was not required to pay the market value of the specified amount of gold sovereigns or their gold content.[206] Nevertheless, doubt was cast on the validity of a gold-value clause in a domestic English contract by a passage in one of the opinions in the Court of Appeal. Lord Justice Denning, as he then was, said:

> In external transactions it is, of course, quite common for parties to protect themselves against a depreciation in the rate of exchange by means of a gold clause. But in England we have always looked upon a pound as a pound, whatever its international value. We have dealt in pounds for more than a thousand years — long before there were gold coins or paper notes. In all our dealings we have disregarded alike the debasement of the currency by kings and rulers or the depreciation of it by the march of time or events. ... Creditors and debtors have arranged for payment in our sterling currency in the sure knowledge that the sum they fix will be upheld by the law. A man who stipulates for a pound must take a pound when payment is made, whatever the pound is worth at that time. Sterling is the constant unit of value by which in the eye of the law everything else is measured. Prices of commodities may go up or down, other currencies may go up and down, but sterling remains the same.[207]

Lord Justice Denning continued:

> The principle which I have stated is so well established that it is disturbing to find a creditor inserting a gold clause in a domestic transaction. I am not altogether sure that it is lawful. In the United States gold clauses are declared by the joint resolution of Congress to be contrary to public policy.... Many other countries have like legislation.... We might find every creditor stipulating for payment according to the price of gold; and every debtor scanning the bullion market to find out how much he has

> to pay. What, then, is to become of sterling? It would become a discredited currency unable to look its enemy inflation in the face. That should not be allowed to happen.[208]

A case decided by a court of first instance in May 1977 has rejected Lord Justice Denning's view.[209] In a domestic transaction, a loan was made on a mortgage under which the principal repayable and the interest were expressed in sterling but subject to variation. The payments were to be "increased or decreased proportionately if at the close of business on the day preceding the day on which payment is made the rate of exchange between the Swiss franc and the pound sterling shall vary by more than three per cent" from the rate of approximately 12 francs to the pound sterling prevailing on the date of the mortgage. The court held that this clause was enforceable and not contrary to public policy. Among the reasons given for this conclusion were the widespread use of index clauses in relation to amounts expressed originally in sterling, particularly in long-term commercial contracts and contracts of employment, the linking of pensions and savings bonds to the cost of living under Parliamentary authority, the disagreement among economists on the question whether indexing promoted inflation, the rapid erosion of the value of the currency, the danger that capital might not be forthcoming if lenders could not protect themselves, and the validity of indexing in some other countries. Moreover, in connection with a somewhat analogous problem it had been held in the *Miliangos* case that judgments could be expressed in currencies other than sterling. Lord Denning himself had joined in this departure from the nominalist principle on which he had relied in 1956.

The decision implies that a clause in a domestic or transnational contract providing for the variation of an obligation expressed in sterling in accordance with the value of sterling in terms of the SDR would be valid in English law. The decision probably implies that it is valid to express the obligation in SDRs.[210]

As private parties cannot hold SDRs or contract for payment in SDRs, the SDR can serve only as a unit of account for them. Authorized holders of SDRs are not able to agree on the transfer of SDRs in the direct settlement of obligations under the present Articles. They can use SDRs only indirectly in settlement, i.e., by transferring SDRs for currency and using the currency in settlement. When the second amendment of the Articles enters into force, the Fund will be able, by a decision taken by a 70 per cent majority of the total voting power, to permit authorized

holders to agree on the transfer of SDRs in the direct settlement of obligations.[211] Under the second amendment of the Articles, SDRs may be held by participants and the Fund, and by such nonmember states, nonparticipating members, institutions that perform functions of a central bank for more than one member, and other official entities as may be prescribed by the Fund. The Fund also determines the terms and conditions on which a prescribed holder may accept SDRs and engage in operations and transactions in them.[212]

Conclusions

Floating Currencies

The breakdown of the par value system of the original Articles of the Fund and the failure of the Fund's efforts to substitute a comparable system based on central rates are producing widespread effects in international and domestic law. Some of the consequences have been discussed in this pamphlet. The drafters of new legislation must take account of the existing situation, even if the legislation is not related to the Fund. The courts are called upon to interpret contracts that refer to par values in circumstances in which they will continue to exist according to the law of the Fund until the second amendment of the Articles becomes effective but in which they are irrelevant to actual exchange rates. Unsettled monetary conditions have contributed to the spread of "hardship clauses" in contracts. This phenomenon is seen as one that blurs the distinction between the formation and the execution of a contract and that modifies the principle that a contract establishes immutable rights and obligations between the parties. The contract establishes a relationship that produces adaptations of the contractual terms.

The Fund's practice under stand-by arrangements is a similar phenomenon on the international plane, even though these arrangements are not intended to be contractual.

The floating of sterling has been an impetus to the reversal of the ancient rule that English courts can give monetary judgments only in sterling. Floating has also influenced the choice of the exchange rate on the day when payment is actually made, and not when it should have