The Restatement of the Foreign Relations Law of the United States (Revised) and International Monetary Law**

Introduction

The Restatement of the Foreign Relations Law of the United States includes for the first time a chapter devoted to International Monetary Law. Three topics are included in this chapter. The choice of them recalls Winston Churchill's rejection of a pudding because it lacked theme. The first topic is devoted largely to obligations of member states under the Articles of Agreement (Articles) of the International Monetary Fund (IMF) on exchange arrangements, exchange policies, and exchange rates. This topic relates to the behavior of states ("members") and is wholly within the field of public international law. No legal principle is involved that compels members to intrude on the rights and duties of private parties. Even if the exchange rate of a state's currency is in violation of that state's obligations under the Articles of the IMF, the Articles do not provide that the exchange rate is inapplicable to relations between private parties.

*Formerly the General Counsel and Director of the Legal Department, and at present Senior Consultant, of the International Monetary Fund (IMF). The views expressed in this article are those of the author and should not be understood to be those of the IMF or others unless expressly attributed to them.

**This article is based on the so-called Tentative Final Draft (July 15, 1986), as the latest version of the proposed Restatement available to the author at the time the article was prepared. The Black-Letter and Comments in the Restatement are approved by the Council and membership of the American Law Institute and represent the views of the Institute. The Reporters’ Notes contain discussion but are not subject to review by the Council and membership and are not statements of the Institute.

1. T.I.A.S. No. 8937.
The principle that the exchange rate does apply is a logical extrapolation of the ratio decidendi of the English case Lively Ltd. v. City of Munich.2

The second topic relates to article VIII, section 2(b) of the IMF's Articles, which deals with the unenforceability of certain contracts if the conditions of the provision are met. The provision imposes an obligation of public international law on states to ensure that their courts and administrative agencies apply the provision, but here the provision does require that there shall be an impact on contracting parties, whether private or public. The provision displaces the application of certain principles of private international law, but the Restatement does not consider the question whether the provision itself is or is not a principle of private international law. It follows that the Restatement does not discuss the legal consequences of the answer to this question. In my view, the provision itself is not within the field of private international law.3 The unreported English case of American Express International Banking Corporation v. Irvani should be regarded as incorrectly decided in holding that a forum should forbear from applying its own view of the correct interpretation of article VIII, section 2(b) in favor of the interpretation that prevails under the proper law of the contract selected by the private international law of the forum.4

The third topic is devoted to the currency in which courts in the United States express judgments on obligations in foreign currency, and the rate of exchange to be chosen whenever an obligation in foreign currency must be calculated in dollars. Nothing in the IMF's Articles imposes an obligation on states in these matters. The topic is solely one of domestic substantive law. The Restatement recognizes this fact, but justifies treatment of the topic on the ground that it has become more important after the collapse of the par value system established under the IMF's original Articles and the de jure abrogation of the system by the Second Amendment of the Articles, which became effective on April 1, 1978. The rights and duties of litigants are directly affected by U.S. law without reference to the IMF's Articles, although the Restatement declares that the selected law of international economic relations included in the Restatement is limited to rules that govern the behavior of states rather than of private parties directly.

4. Id. at 64-67.
I. The Exchanges

Text of the Restatement. The first topic is discussed here under the heading of "The Exchanges" because the provisions of the IMF's Articles that are the subject matter of this topic contain a number of distinct categories, each of which, as will be discussed below, bears a name that begins with the word "exchange." The black-letter section of the Restatement on the exchanges is formulated as follows:

"§ 821 [851]. Obligations of Member States of the International Monetary Fund Under the Articles of Agreement of the International Monetary Fund,

(1) Member states are free to adopt any exchange arrangement of their choice consistent with orderly economic growth and reasonable price stability, but such arrangements may not
(a) be linked to gold, or
(b) involve multiple currency practices or discriminate against the currency of any other member state, except with the approval of the Fund.

(2) Member states must cooperate with the Fund in its oversight of the international monetary system
(a) by furnishing information to the Fund as required for surveillance of their exchange rate policies, and
(b) by consulting with the Fund with respect to those policies periodically and on request.

(3) Member states may not, without approval of the Fund, impose restrictions on the making of payments or transfers for current international transactions, unless they have reserved the right to avail themselves of transitional arrangements including such restrictions.

(4) Member states may not manipulate exchange rates in order to prevent effective balance of payments adjustment or to gain unfair competitive advantage over other member states."

This text combines some elements of sections 1, 2, and 3 of article IV and of article VIII, sections 2 and 3 of the IMF's Articles.

Article IV of IMF's Articles: Exchange arrangements. With the exception of subsections (1)(b) and (3), § 821 deals with some aspects of article IV of the IMF's Articles. It is useful, therefore, to begin with an outline of the provisions of Article IV in order to evaluate section 821.

Section 2 of article IV deals with "exchange arrangements" and Section 3 with "exchange rate policies." Section 1 deals primarily with "exchange rates" and exchange rate policies. This distribution of subject matter is not rigorously observed, because there is some overlapping among the provisions. Furthermore, the concepts themselves are not precise, and there are difficulties sometimes in classifying a particular exchange practice. Nevertheless, different norms apply to the three concepts. A further point must be made. If article IV were constructed logically, section 2 might come first because of the concept of "exchange arrangements" and because of the norm of members' freedom associated with it. The structure
of article IV has been shaped, however, by a practical consideration. Sections 1 and 3 apply whatever developments occur in the international monetary system. Section 2(b), which establishes the freedom of members to choose their exchange arrangements, is subject to a caveat and is not conceived to be permanent. Both these aspects of the provision are discussed below.

In accordance with the logical order as suggested above, "exchange arrangements" and section 2 of article IV will be discussed first. Under the IMF's original Articles, the only exchange arrangement recognized as an objective of the Articles was a par value for each member's currency defined directly or indirectly in terms of gold as the common denominator of the par value system. The present Articles, almost wholly rewritten by the Second Amendment, permit members, according to article IV, section 2, to choose the "exchange arrangements" they prefer. The examples that appear in the provision show that exchange arrangements are conceived to be the broad framework of members' exchange systems. An exchange system can be defined as the relationships of a member with other countries through the medium of its currency. The stated examples are the pegging of the international value of a currency to the special drawing right (SDR) or to some other denominator of a member's choice, and cooperative arrangements by which members peg their currencies to the currency or currencies of other members. A leading example of the latter arrangement is the European Monetary System, under which a number of European currencies are linked to each other within a framework of fixed, though adjustable, relationships, while not maintaining fixed exchange rates (floating) against other currencies. Only one exchange arrangement is prohibited: pegging the international value of a currency to gold. The reason for the prohibition is that an objective of the Second Amendment is to reduce the role of gold in the international monetary system.

In practice, members have chosen a wide variety of exchange arrangements. The IMF's tabulation of them lists ten separate categories, as well as some of the variations within a number of them. These categories are not legally exhaustive, because members are free to adopt other exchange arrangements. The tabulated categories have a certain normative effect, because members are required by the Articles to inform the IMF promptly of changes in their exchange arrangements.

5. The SDR is a reserve asset the IMF can issue to members to supplement the other reserve assets members hold to support their currencies and for other purposes. It is also the IMF's unit of account. It consists at present of a composite of specified amounts of five major currencies.

The freedom of members to choose their exchange arrangements is subject to the caveat that this freedom applies under an international monetary system of the kind prevailing on January 1, 1976. There are two explanations of this caveat. First, under article IV, section 2(c), to accord with the development of the international monetary system, the IMF may decide to recommend "general exchange arrangements" to its members by decisions taken with eighty-five percent of the total weighted voting power of members. Second, under article IV, section 4, the IMF may determine, by the same majority of voting power, that the conditions exist in which the par value system regulated by schedule C of the Articles can operate effectively, whereupon the IMF must call that system into operation.

Neither decision deprives members of the right to have an exchange arrangement other than the general exchange arrangement recommended by the IMF or a par value under schedule C. The high majority necessary for the decisions implies that most members—or certainly those with major roles in international trade and payments—will act in accordance with a decision, either because the exchange arrangement will be favorable for them or because of the moral suasion of the decision. It is for this latter reason that the United States supported the necessity for the high majority. The weighted voting power of the United States enables it to veto a proposed decision, and thus to ensure that the United States will not consider itself pressed to participate in a system that might be as unfair to it as, in its view, the original par value system had become.

Exchange arrangements are put into operation with "exchange rate policies," which can be considered the actions, or the inactivity, of the monetary authorities of a member that affect the exchange rate of its currency. The exchange rate of a currency can be regarded as the resulting price of the currency in terms of other currencies.

*Exchange rate and exchange policies.* At this point, it is convenient to take up section 1 of article IV. This provision sets forth obligations of members that are both substantive and, as noted already, permanent. Section 1 is difficult to apprehend, because of both the complexity of its economic underpinning and its ambiguities. It must be quoted in full:

**General obligations of members**

Recognizing that the essential purpose of the international monetary system is to provide a framework that facilitates the exchange of goods, services, and capital among countries, and that sustains sound economic growth, and that a principal objective is the continuing development of the orderly underlying conditions that are necessary for financial and economic stability, each member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates. In particular, each member shall:
(i) endeavor to direct its economic and financial policies toward the objective of fostering orderly economic growth with reasonable price stability, with due regard to its circumstances;

(ii) seek to promote stability by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions;

(iii) avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members; and

(iv) follow exchange policies compatible with the undertakings under this Section.

One of the obscurities in the provision is the intended difference between "the essential purpose" and "a principal objective," but it is not rewarding in the brief space of this article to attempt a clarification. The reason is that the language beginning with the participle "Recognizing" that precedes the phrase "each member undertakes" does not have normative force. To have recast this language in the form of an obligation would have extended the obligations of members, and amplified the regulatory jurisdiction of the IMF, far beyond the traditional purview of the IMF and the willingness of members to concede such authority. One consequence would have been to extend the IMF's authority into the territory of trade; another consequence would have been a conflict with the freedom of members under article VI, section 3 to control capital transfers. The language cannot be dismissed as wholly without effect. It could be given the legal value of a preamble, to which resort might be possible to help resolve an ambiguity. To the extent that obligations are imposed on members in relation to "the essential purpose" and "the principal objective," the obligations are to be found in the text that follows the quasi-preambular language.

The fundamental norm of article IV, section 1 is the undertaking of each member to collaborate with the IMF and with other members in the pursuit of two objectives: orderly exchange arrangements and a stable system of exchange rates. The second of these objectives is intended to be a substitute for the concept of "exchange stability" in the original Articles because that concept degenerated in practice into exchange rigidity. Par values were not changed when they should have been. This inflexibility contributed to the collapse of the original par value system. The revised language is intended to convey the thought that exchange rates should be allowed to change so that they are in accord with the underlying conditions prescribed in the provision. Exchange rates will then contribute to the creation of orderly underlying conditions. If conditions are orderly, a stable system of exchange rates can be achieved. Such a system can be maintained without crisis of the kind that brought
about the collapse of the par value system, and without the need for further amendment of the Articles on exchange rates.

Section I then lists four clauses that impose further obligations on members. These obligations are prefaced by the words "In particular, each member shall." The obligations can be considered more specific applications of the broad undertaking of members to collaborate with the IMF and among themselves.

The first two clauses are drafted in a style that differs from that of the other two clauses. The clue to the difference is that the first two clauses apply to domestic policies. They are included in the provision, however, because they can have indirect effects on exchange rates. The other two clauses apply to policies that directly affect exchange rates. In view of this difference, the first two clauses are drafted in a precatory rather than a mandatory style. Members are not bound to achieve a certain result; they are urged to try to achieve the result. The initial verbs "endeavor" and "seek" set the tone. Members were reluctant to undertake obligations that would constitute firm limitations on their discretion to choose domestic policies. A major influence in the negotiation of article IV was the determination of the United States to have freedom to pursue the domestic policies of its choice without the constraint of an obligation to maintain fixed rates for the dollar. Exchange policies and exchange rates are indubitably within the international terrain, and if domestic policies affect them, obligations could not be resisted in principle, but they could be made so subjective that it would be difficult to insist that they were not being performed.

Clauses (i) and (ii) can be classified as "soft law" in the language of modern international law. The initial verbs of clauses (iii) and (iv) are firm directions ("avoid" and "follow"). Members are not urged to try to avoid or follow: they must avoid or follow.

The phrase "In particular" creates a problem of interpretation. Is the list of the four specific obligations complete, or could the IMF evoke further obligations from the undertaking of collaboration by members? The phrase should not be interpreted to give the IMF this authority. Traditionally, the exchange rate for a country's currency has been considered an inherent element of the country's sovereignty. It is reasonable

7. An obvious example would be a member's policies on intervention in its exchange market or understandings among members that exchange rates for their currencies were broadly consistent with economic fundamentals (see the statement of the Group of Seven issued on Apr. 8, 1987). If these members went further and established target zones for exchange rates, which therefore they would defend by intervention and other policies, the understanding could be considered an exchange arrangement. These examples illustrate the difficulties of classification.
to conclude that clear evidence is necessary to establish that an international obligation that limits this sovereignty has been undertaken. A decision by the IMF that purported to draw another specific obligation from the obligation to collaborate could be taken by a majority of the votes cast, as the majority for decisions whenever a special majority is not prescribed by the Articles. It would be difficult to reconcile the conclusion that the Fund could take such a decision with the caution, particularly on the part of the United States, that has made the majority of eighty-five percent necessary for certain decisions affecting the freedom of members that the IMF can take under article IV or schedule C.

Nothing that has been said here about the problem of interpretation raised by the phrase "In particular" should be understood to deny the IMF authority to clarify for members what conduct by them would be consistent with the undertaking to collaborate, particularly in relation to changes in international economic conditions. Throughout its history, the IMF has held the view that it is authorized to specify the conduct by members that would be compatible with other obligations to collaborate imposed on members by the Articles. These decisions, however, did not constitute distinct obligations. If a member did not conduct itself in accordance with a decision on the form that collaboration should take, the member was not necessarily deemed to be violating its obligation to collaborate. The member was able to show that, in its particular circumstances, the conduct it was pursuing was nevertheless consistent with the undertaking to collaborate.

**Surveillance over exchange rate policies.** The IMF is directed by section 3(a) of article IV to oversee the international monetary system in order to ensure its effective operation, and to oversee the compliance of each member with its obligations under section 1 of article IV. To fulfill its functions, the IMF must exercise firm surveillance over the exchange rate policies of members and must adopt specific principles for the guidance of all members with respect to those policies. Each member must provide the IMF with the information necessary for surveillance and must consult with the IMF on the member's exchange rate policies.

Comment (c) to section 821 mistakenly assumes that specific principles become obligations. Principles are not obligations unless they restate obligations included in the Articles. The word "guidance" is a term of art in the IMF that has this connotation. It follows that the failure of a member to act in accordance with a specific principle is not in itself a breach of obligation.

---

8. Art. XII, § 5(c).
9. Comment (b) of § 821 states that as of 1985, "the relevant principles had not been fully elaborated," which mistakenly implies that there is a preordained complete code.
Growth and price stability. Subsection (1) of section 821 is not consistent with article IV, section 1 of the IMF’s Articles. The subsection makes a member’s freedom to choose its exchange arrangement subject to the condition that the choice is “consistent with orderly economic growth and reasonable price stability.” No such condition appears in article IV. The words “orderly economic growth” and “reasonable price stability” appear in clause (i) of article IV, section 1, but they are connected by the word “with,” and not the word “and” as in the Restatement. The primary emphasis in the provision is placed on “orderly economic growth” to placate developing countries. They feared that too much emphasis was being placed on financial stability, and that the effect might be to impede their pursuit of development. “Reasonable price stability” therefore, is not an aim that is equal in emphasis to “orderly economic growth,” as is implied by the Restatement’s substitution of “and” for “with.” “Reasonable price stability” had to be accepted as a brake on “orderly economic growth,” which was in any event implicit in “orderly,” but not as a prime objective, at least for developing countries. Such are the subtle dangers of paraphrase.

The misconstruction discussed above is the result of a nuance in the text of article IV, section 1, but two other features of subsection (1) of section 821 should have been obvious as mistakes. First, clause (i) of article IV, section 1 of the Articles ends with the words “with due regard to its circumstances,” but they have been deleted in the black-letter of the Restatement. These words also were introduced into the provision of the Articles to placate developing countries. The IMF’s doctrine of the uniform rights and obligations of members prevented any mention of developing countries, but the words were inserted in clause (i) to reassure them that their special circumstances would be taken into account in assessing whether they were observing the obligation imposed by clause (i). In deference to the doctrine of uniformity, the qualification of due regard to the circumstances of members applies to all members, including the United States.

The second egregious error is the transformation of the soft obligation of clause (i) into a firm condition that limits a member’s choice of exchange arrangement. The obligation is one of extraordinary softness. Almost every word or phrase is tentative: “endeavor,” “direct . . . toward,” “objective,” “fostering,” and, of course, “with due regard to its circumstances.” But whether soft or firm in formulation, clause (i) is not a condition for the choice by members of their exchange arrangements. It should not take much insight to see that there is no logic by which the domestic policies referred to in clause (i) should control the choice of exchange arrangements.

If, however, clause (i) is thought to be such a condition, why should not all the other obligations of article IV, section 1 be similar conditions?
The obligation imposed by clause (i) has no legal quality superior to the obligations imposed by the other three clauses or to the obligation of members to collaborate.

The drafters of the Restatement might point to some language in article IV, sections 2(c) and 3(b) of the IMF’s Articles to defend their paraphrase. Section 2(c) refers to “the right of members to have exchange arrangements of their choice consistent with the purposes of the Fund and the obligations under Section I of this Article” and section 3(b) to “exchange arrangements of a member’s choice consistent with the purposes of the Fund and Section 1 of this Article.”

The purposes of the IMF are stated in article I and make no mention of orderly economic growth and reasonable price stability as purposes of the IMF. “Development of the productive resources of all members” is referred to as one of the “primary objectives of economic policy.” These objectives, however, are not purposes, but the desired consequences of “the expansion and balanced growth of international trade,” which is a purpose. This thought is conveyed by the words “and to contribute thereby,” which follow the purpose related to trade and precede the mention of the development of productive resources. The drafting of this purpose is another example of resistance to the mention of developing countries as a category of members deserving special treatment not accorded to all members. The source of this resistance is concern that the IMF might be transformed into a development institution. The World Bank was created for that purpose at the same time as the IMF. Nothing that has been said here should suggest that orderly economic growth and reasonable price stability are contrary to the IMF’s purposes: on the contrary, they are among the ends to be achieved by means of the IMF’s purposes.

The language in article IV, sections 2(c) and 3(b) that establishes the freedom of members to choose their exchange arrangements couples mention of the IMF’s purposes with references to article IV, section 1 and to the obligations of members under that provision. These references to article IV, section 1 cannot justify the drafting of subsection 1 of section 821. The only obligation relating to, and the only mention of, orderly economic growth or reasonable price stability occurs in clause (i) of article IV, section 1, and the drafting of that clause is nothing like the drafting of subsection 1 of section 821.

10. “(ii) To facilitate the expansion and balanced growth of international trade, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy.” (Art. 1).

There remains the question of the effect of the language in sections 2(b) and 3(c) of article IV that refers to the purposes of the IMF and article IV, section 1. The question does not really arise on the Restatement, because the words are not incorporated into section 821. Elsewhere, I have explained that the words limit not a member's choice among exchange arrangements but its choice of exchange policies or other policies that affect the exchange rate of the member's currency. Suppose, for example, that the IMF decided, as it could by a majority of the votes cast, that the United States was not complying with its obligation under clause (i) of article IV, section 1, and was failing to achieve orderly economic growth with reasonable price stability. It would be an absurdity to conclude that the United States was then bound to forgo its choice of a floating dollar as its exchange arrangement. It would be an equal absurdity to hold that, as the result of a similar decision, France was bound to withdraw from the European Monetary System. It would not be absurd for the IMF to urge these members to modify their policies while they continue to maintain the exchange arrangements of their choice.

Manipulation. Subsection (4) of section 821 provokes two criticisms. First, it is intended to reflect the obligation that appears in clause (iii) of article IV, section 1 of the IMF's Articles. The obligation to collaborate and the obligations in the other three clauses of article IV, section 1 are overlooked by section 821.

Second, the obligation in subsection (4) of section 821 is a truncated version even of the obligation in clause (iii) of article IV, section 1. Subsection (4) of section 821 declares that members may not manipulate exchange rates in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members. This formulation omits the prohibition of manipulating the international monetary system. That prohibition is associated with gaining an unfair competitive advantage over other members. Only some members are powerful enough to manipulate the international monetary system to gain an unfair competitive advantage over other members. Therefore, the manipulation of exchange rates in order to prevent effective balance of payments adjustment was included in clause (iii) so as to impose an obligation on other members that was somewhat comparable but more suitable to their economic status. In principle, however, though not in fact, both obligations bind all members, again because of the doctrine of uniform rights and obligations.

Other prohibited practices. Subsections (1)(b) and (3) of section 821 are flawed reflections of sections 3 and 2, respectively, of article VIII of the

IMF's Articles. These provisions of the Articles prohibit three categories of measures: multiple currency practices, discriminatory currency arrangements, and restrictions on payments and transfers for current international transactions as defined in article XXX(d) of the Articles. For some reason that is not made clear by the Restatement, the first two categories are presented as limitations on the freedom of members to choose their exchange arrangements, but not the third category.

The treatment of each category is inadequate. It is not stated that the Fund has left open the question whether a special exchange rate for capital transactions creates a multiple currency practice for which the approval of the IMF is necessary under article VIII, section 3 of the Articles. Nor is it stated that the IMF has decided that discrimination in relation to capital transactions is not a discriminatory currency arrangement for which the approval of the IMF is necessary under the same provision, except, perhaps, if the discrimination is in exchange rates.

Discriminatory currency arrangements are described in section 821 as discrimination by a member "against the currency of any other member state." Insofar as discrimination is of this character, it should be understood that the discrimination may be directly unfavorable to another member or other members, or directly favorable to another member or other members and therefore indirectly unfavorable to the rest.

A serious objection to the description of discriminatory currency arrangements in the Restatement is that they need not discriminate against the currency of another member. It would be more accurate to describe them as a member's measures that discriminate against another member or other members through the medium of the exchange system. An alternative description would be measures that discriminate by means of unequal treatment relating to currency. A discriminating member may discriminate against another member by arrangements involving the discriminating member's own currency. For example, the discriminating member may freeze another member's holdings of the discriminating member's currency. Furthermore, a discrimination against a member may relate to all currencies. For example, the discriminating member may forbid its residents to make payments and transfers in any currency to residents of the member discriminated against.

Subsection (3) of section 821, which deals with restrictions, contains a caveat in favor of members that "have reserved the right to avail themselves of transitional arrangements including such restrictions." The caveat is poorly drafted. The transitional arrangements of article XIV of the IMF's Articles apply only to restrictions on payments and transfers for current international transactions, so that the word "including" should not be understood or bring other practices into the embrace of the transitional arrangements.
A member availing itself of the transitional arrangements may nevertheless require the approval of the IMF for some restrictions. Approval will be necessary for a member’s restrictions that were not in effect when the country entered the IMF or that cannot be considered adaptations of such restrictions.

Restatement and treaty provisions. There is a story that Mozart, after playing a new composition, was asked what he meant by it, whereupon he sat down and played it again. Enough has been said to show the dangers of paraphrasing the text of treaty provisions and presenting the redraft as if it had some authenticity. Would it not be more helpful to those who use the Restatement if the authentic text were reproduced and paraphrase included in the Reporters’ Notes? In presenting the provisions of treaties, the drafters of the Restatement should be musicologists and not composers.

II. Unenforceable “Exchange Contracts”

The provision and its official interpretation. Article VIII, section 2(b) of the IMF’s Articles is formulated as follows:

Exchange contracts which involve the currency of any member and which are contrary to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.

The Restatement has paraphrased as follows the first sentence of this provision:

§ 822 [852]. Exchange Controls and Exchange Contracts in Courts of Member States

Member states of the International Monetary Fund may not enforce exchange contracts involving the currency of another member state if such contracts are contrary to that state’s exchange control regulations maintained or imposed consistently with the Articles of Agreement of the Fund.

This text creates no serious problems because of reformulation, but if the purpose of paraphrase by the Restatement is an exact clarification of the law, the reformulation sheds no light on the manifold difficulties of understanding the first sentence of article VIII, section 2(b). The Reporters may have avoided clarification by the black-letter provision because the IMF has issued only a limited interpretation of article VIII, section 2(b), and because the courts of members have not adopted uniform

13. On the Comment and the Reporters’ Notes on § 821, caveat lector: there are many errors in the account of the law and practice of the IMF.
decisions. The condition of U.S. case law may be another reason. Legal analysis of the provision by courts in the United States has been thin, and it may be that the Reporters disapprove of what appears to be the prevailing sentiment of the courts and of the legal profession in the United States. Virtual reproduction of the text of the provision, with no expression of a recommended interpretation by the Reporters, may have seemed the better part of valor.

Interpretation by the IMF has been mentioned above. The IMF is authorized by article XXIX of its Articles to settle with finality issues of interpretation of the Articles arising between members or between the IMF and a member. The IMF's only direct interpretation of article VIII, section 2(b) was adopted on June 10, 1949, under the predecessor of the present article XXIX. The decision declared the "meaning and effect" of the first sentence of article VIII, section 2(b) to be as follows:

1. Parties entering into exchange contracts involving the currency of any member of the Fund and contrary to exchange control regulations of that member which are maintained or imposed consistently with the Fund Agreement will not receive the assistance of the judicial or administrative authorities of other members in obtaining the performance of such contracts. That is to say, the obligations of such contracts will not be implemented by the judicial or administrative authorities of member countries, for example by decreeing performance of the contracts or by awarding damages for their nonperformance.

2. By accepting the Fund Agreement members have undertaken to make the principle mentioned above effectively part of their national law. This applied to all members, whether or not they have availed themselves of the transitional arrangements of Article XIV, Section 2.

An obvious result of the foregoing undertaking is that if a party to an exchange contract of the kind referred to in Article VIII, Section 2(b) seeks to enforce such a contract, the tribunal of the member country before which the proceedings are brought will not, on the ground that they are contrary to the public policy (ordre public) of the forum, refuse recognition of the exchange control regulations of the other member which are maintained or imposed consistently with the Fund Agreement. It also follows that such contracts will be treated as unenforceable notwithstanding that under the private international law of the forum, the law under which the foreign exchange control regulations are maintained or imposed is not the law which governs the exchange contract or its performance. 14

The effects of article VIII, section 2(b), as clarified by the interpretation, on problems of the choice of law when the provision is applicable need give the Reporters of the Restatement no difficulty, and no further explication is necessary. The difficulty, however, is to determine when the provision does apply.

14. For the full text, see the IMF SELECTED DECISIONS OF THE INTERNATIONAL MONETARY FUND AND SELECTED DOCUMENTS, 13TH ISSUE 290-91 (1987) [hereinafter SELECTED DECISIONS].
Rationale of provision. Interpretation of Article VIII, section 2(b) should be guided by the principle that as the provision appears in an economic treaty, the economic rationale of the provision must be taken into account. The provision should make economic sense within the context of the treaty. Courts in the United States have not followed this procedure and instead have concentrated on the mechanical application of what they take to be clear language.

To invoke the economic character of the provision does not provide an automatic solution of the problem of interpretation. The economic rationale of the provision is not obvious, but the Restatement does not attempt an analysis of it. What, then, is the rationale?

The first possibility is that the provision is related to the maintenance of rates of exchange as determined by the monetary authorities of members. Evidence exists\(^\text{15}\) that the provision originated in a proposal by the United States to placate the British delegation at the Bretton Woods Conference of July 1944, from which the Articles emerged. The British delegation feared that the adamant refusal of the United States to undertake an obligation to police its exchange market might result in a discount for sterling. Discount in this sense meant a depreciation of sterling in the market below the parity between the dollar and sterling derived from the par values of the two currencies established under the IMF's Articles. To prevent this depreciation, the United Kingdom would have to use its holdings of gold and dollars to support the exchange rate for sterling, but they would be exiguous after World War II. To allay British concern, the United States proposed the forerunner of article VIII, section 2(b). Originally, therefore, the provision was related to defense of the par value system, and indeed in early drafts presented at the Conference the provision appeared in the proposed article on exchange rates. Some members of the British delegation saw that this maneuver was wholly inadequate to deal with British anxiety, because exchange rates would be determined by executed contracts on which suits would not be brought.

Before the end of the Bretton Woods Conference, the proposed Article VIII, section 2(b) was redrafted and moved from the exchange rate provisions to the place in the Articles it has had in the original Articles and in the Amendments of 1969 and 1978. The par value system was abrogated by the Second Amendment. It was a sweeping modification of the Articles in which few provisions were not amended. An objective of the Amendment was modernization of the Articles, as it was called. Article VIII, section 2(b), however, was retained with no change at all.

The conclusion must be that the economic purpose of the provision is not support for official exchange rates. The decisions of U.S. and some

other courts on the meaning of "exchange contracts" would have an economic rationale only if the defense of official exchange rates was the purpose of the provision.

A second possibility is that article VIII, section 2(b) is to be understood not on the basis of the protection of exchange rates but of international trade. The argument in favor of this analysis would run that a purpose of the IMF, according to article I(ii), is to "facilitate the expansion and balanced growth of international trade." Therefore, the exchange control regulations referred to in article VIII, section 2(b) cannot be regulations that deal with payments and transfers for merchandise transactions and must be regulations that apply to contracts for the exchange of currencies. This analysis would not deserve serious notice except that it is the ratio decidendi in a leading English case, Wilson, Smithett & Cope Ltd. v. Terruzzi,16 which has been endorsed by the House of Lords in United City Merchants (Investments) Ltd. v. Royal Bank of Canada.17

The fallacies in this approach should be obvious. For example, it implies that trade transactions are always beneficial for a country. The IMF, however, is authorized to approve restrictions on payments and transfers of whatever character that the IMF considers appropriate in a member’s circumstances. The IMF has often approved restrictions on payments and transfers for some trade transactions—such as the importation of luxury items—when a member was in balance of payments disequilibrium. Furthermore, trade is only one of the six purposes of the IMF, another of which is to help members overcome maladjustment in their balances of payments, in which condition temporary exchange controls may be necessary.

A third possible rationale might be that article VIII, section 2(b) is related in some way to the IMF’s purpose of assisting in the establishment of the multilateral system of payments and transfers in respect of current transactions, or, as it is sometimes described, the convertibility of currencies for current transactions. The implication of this rationale would be that members should avoid or eliminate exchange controls that impede such an open system, but that temporary derogations might be authorized by the Articles (for example, under the transitional arrangements) or approved ad hoc by the IMF (for example, when a member is suffering an exchange crisis). Article VIII, section 2(b) would apply, therefore, exclusively to restrictions on payments and transfers for current international transactions and not to controls on capital transfers.18

18. In addition, the provision would apply to nonrestrictive controls, to which members attach importance for various reasons.
An objection to the third possible rationale is once again its narrowness. To reject so narrow a view, it is sufficient to recall the monetary history of the period between the two World Wars that induced states to take the radical step of creating an international monetary system with the IMF at its center. The "hot money" flows of capital in the period had produced such disequilibrium in balances of payments and such instability of exchange rates that agreement was reached to authorize members to control capital transfers without the need for the IMF's approval even in a newly organized international monetary system. If members were going to cooperate by recognizing each other's exchange controls, there could be no reasonable justification for the exclusion of capital controls. On the contrary, the authorization of capital controls without the necessity for the IMF's approval of them might suggest that there was a stronger case for cooperation in relation to them than in relation to other exchange controls.

Another economic rationale, often advanced by authors and European courts, is that article VIII, section 2(b) is intended to protect the resources of a country. The weakness of this fourth rationale is the implication that the provision is designed to prevent reduction, or to ensure increase, in the economic resources, or more precisely the monetary reserve assets of the monetary authorities, of a country. Exchange controls are often adopted to serve such objectives, but exchange controls may be designed for other purposes, including sometimes the prevention of increases in monetary reserves. Controls may be imposed on capital inflow for various reasons, such as the desire to prevent the domestic monetary consequences of inflow or to cooperate with countries that would suffer capital outflow.

A fifth economic rationale has been offered that closely resembles the fourth rationale: protection of a member's balance of payments. This view is open to somewhat the same criticisms that are made above of the fourth possible rationale. In its practice, the IMF recognizes, and often approves, restrictions that a member applies for reasons not related to improvement of its balance of payments. The restrictions may have some other economic purpose, or they may have a noneconomic purpose, such as the preservation of national or international security.

One should arrive, therefore, at the sixth, and the appropriate, version of the economic rationale of article VIII, section 2(b). It is that the pro-

---

19. Art. VI, § 3 is the basic provision authorizing members to impose capital controls. They are authorized, in addition, by Art. VI, § 1 (on the request of the IMF) and by Art. VII, § 3(b) (on the IMF's formal declaration of the scarcity of a currency).
20. SELECTED DECISIONS, supra note 14, at 297.
21. Id. at 275-76.
vision relates to the exchange controls of other members on payments and transfers for current international transactions or on international capital movements that affect the balance of payments of the foreign promulgator of the controls. In other words, the provision applies to exchange controls that regulate payments and transfers, whether for current or capital transactions, between residents and nonresidents of the promulgator. Guidance on the compilation of members' balances of payments can be found in the IMF's Balance of Payments Manual.22

This economic rationale of the provision is consistent with the essential character of the IMF as an organization concerned with the balances of payments of its members. The IMF's concern embraces the balance of payments as a whole, which is to say, all the items that enter into the balance of payments. Article VIII, section 2(b) requires members to cooperate, in accordance with the provision, on the exchange regulations by which members control their balances of payments, provided that the regulations are consistent with the Articles because the regulations are authorized by the Articles or are approved by the IMF.

"Exchange contracts." Exchange contracts can justly be considered the central element in article VIII, section 2(b). Paragraph (b) of the Comment on section 822 notes that nowhere in the IMF's Articles there a definition of this concept, but that at least two distinct interpretations have emerged in judicial decisions and writings. The narrow view is that the concept embraces only contracts for the exchange of means of payment in different currencies, or, to put it baldly, the exchange of one currency for another. The broader view is that the concept "might be applied also to other contracts, including contracts for international sale of goods, charter of ships, deposit of funds and similar transactions that have an effect on the balance of payments or exchange resources of the member state imposing the exchange control." This statement of the broader view is strangely tentative, for example, in its use of the verb "might be applied" and in its failure to state forthrightly that all contracts are embraced if they would have an effect on the balance of payments. The Comment discloses no preference of the Institute on the meaning of the term, and therefore departs from Tentative Draft No. 5, in which the Institute supported what was substantially the broader view.

An economic rationale for the narrow view would be something like the first of the six referred to earlier, although courts that have supported this view usually have done so without discussion and for the strictly linguistic reason, stated abruptly by the courts, that everyone knows that an exchange contract is a contract for the exchange of currencies. These

courts have not noticed that they are making the word "exchange" perform a double duty: exchange as currency and exchange as the act of trading something for something else.

The narrow view reduces the provision to triviality. The reason for this criticism is not only that exchange contracts would be one among innumerable categories of contracts that would have similar economic consequences from the standpoint of the IMF. In addition, this single category of contracts is unlikely to be the subject of suit in foreign courts. The contracts would usually be made between a bank and a customer that are residents of the same member country. The exchange control regulations of another member would not be involved. The only regulations that might be relevant would be those of the country in which the contracting parties were resident, but article VIII, section 2(b) does not apply to the regulations of the lex fori. The Articles do not compel a member to cooperate with itself.

The purposes of the IMF relate to the macroeconomic policies of its members and not to individual categories of contracts or transactions. The broader view of "exchange contracts" referred to by the Comment should mean contracts that call for payments and transfers for current international transactions or for movements of capital. "Contracts" mean all such contracts. "Exchange" means the payments and transfers or capital transfers that would be made in the currency of any member or nonmember, whether it be the currency of the promulgator of the regulations or a foreign currency. The word "exchange" is appropriate because the payments, etc., are made internationally.

To interpret "exchange contracts" as a concept that goes beyond payments, transfers, and movements of capital to mean payments, etc., that have an effect on the balance of payments or exchange resources of a member makes the word "exchange" in the provision otiose. The function of affecting the balance of payments is performed by the phrase "involve the currency of any member." The word "exchange" in "exchange contracts" becomes even more obviously redundant under the narrow interpretation of them as contracts for the purchase and sale of one currency against another.

Courts in the United States have favored the narrow interpretation for reasons of policy. The narrow view is highly restrictive, and such contracts are not likely to be the subject of suit. U.S. financial markets can be safeguarded against foreign legal interference that would receive a laissez-passer under a broad interpretation. It becomes possible also to protect domestic creditors.23 Nevertheless, it may be that close inspection would

23. See Allied Bank Int'l v. Banco Credito Agricola de Cartago, 757 F.2d 516 (2d Cir. 1985), in which, however, the court did not discuss art. VIII, § 2(b).
show little, if any, solid authority in the case law of the United States for the narrow interpretation. Expressions of support for such an interpretation in some of the most prominent cases are no more than obiter dicta. For example, the endorsement of that interpretation in *J. Zeevi and Sons Ltd. v. Grindlays Bank (Uganda) Ltd.* was obiter,24 because the Ugandan regulations in issue in the case were not approved by the IMF or authorized by the Articles. Furthermore, as they amounted to confiscation, they were not exchange control regulations. In *Libra Bank Ltd. v. Banco Nacional de Libra S.A.*,25 the court held that the defendants had not proved that the exchange control regulations of Costa Rica were "maintained or imposed consistently with the Articles."

"Involve the currency." It will be apparent from the discussion of "exchange contracts" that the expression does not indicate the member whose exchange control regulations are to be respected under article VIII, section 2(b). That member is the one whose balance of payments would be affected if the court enforced an exchange contract. This is the economic meaning of the phrase "involve the currency of any member." It should be added that the promulgator of the regulations must have internationally recognized jurisdiction to prescribe them in order to benefit from the provision.

The narrow view of exchange contracts leads readily to the interpretation that the currency involved under article VIII, section 2(b) is a currency that is traded for another currency. This interpretation produces strange distinctions for which no economic justification can be advanced. A contract for the sale of French francs for sterling "involves" both currencies under this view, and French exchange control regulations would be respected under article VIII, section 2(b) because the franc was involved, but a contract for a loan in French francs repayable in French francs (or another currency) would be deemed not to "involve" the franc. The result would not be different under the narrow view even if the first contract did not affect France's balance of payments and the second contract did.

**Consistency with IMF's Articles.** Article VIII, section 2(b) applies only if the exchange control regulations on which a party relies are "maintained or imposed consistently with" the IMF's Articles. The Comment on section 822 properly distinguishes between restrictions that require the approval of the IMF and those that are authorized by the Articles and therefore do not require approval. The Comment does not make the point that "exchange control regulations" can be either restrictive or nonrestrictive and that article VIII, section 2(b) applies to both.

The Comment states that as the consistency of a particular exchange restriction with the Articles often cannot be determined simply by interpreting the Articles, it may be necessary for a court to seek the advice of the IMF before passing on the question. It is doubtful, however, whether the consistency of restrictions with the Articles is ever a question of simply interpreting the Articles. But it is sufficient to note here that the Comment poses the issue of consistency with the Articles as one that faces a court when the problem is not simply interpretation of the Articles. The Comment then draws a distinction between two responses of the IMF. If the IMF states that a particular regulation is not maintained or imposed consistently with the Articles, the statement is conclusive. If the IMF states that the regulation is maintained or imposed consistently with the Articles, the statement is entitled to great weight, but the court is required to make the final decision.

The distinction is insupportable for a number of reasons. It is animated by a tenderness for plaintiffs, and denies equal justice for defendants. Justice should require either that all statements are conclusive or that all statements are no more than persuasive. Furthermore, to hold that statements are not conclusive means, in view of the supposition that the issue is not one of interpretation only, that the court is entitled to substitute itself for the IMF in the administration of the IMF's regulatory jurisdiction.

There are other objections to the distinction made by the Restatement. For example, the question of consistency with the Articles may require a detailed knowledge of the history of a country's restrictive exchange system for decades, to see, for example, whether the exchange control regulation in issue is an adaptation of a regulation in force when a member entered the IMF or is a regulation subsequently introduced. Should the court's view prevail over the IMF's practice on the distinction between adaptation and introduction? The IMF's statement may be based on an exercise of discretion under a particular policy of the IMF. Can a court determine whether the policy, or the exercise of discretion under it, is consistent with the Articles? The decision of the Fifth Circuit of Appeals in *Callejo v. Bancomer, S.A.* accepted as conclusive the IMF's statement that certain regulations approved by the Fund were consistent with the Articles. The distinction made by the Comment would mean that the courts of each member could decide conclusively whether regulations were consistent with the Articles. Only if the IMF's statements are treated as conclusive can a uniform application among members be ensured of this aspect of article VIII, section 2(b). A statement by the IMF is made

---

27. 764 F.2d 1101 (5th Cir. 1985).
with the authority of the Executive Board of the IMF: the statement is a
decision of the IMF. Should it not be the public policy of courts in the
United States to support decisions of the IMF?

III. Foreign Currency Obligations and Judgments

Text of the Restatement. The third topic of monetary law appears in
the following provision:

§ 823 [853]. Obligations in Foreign Currency: Law of the United States

(1) Courts in the United States ordinarily give judgment on causes of action
arising in another state, or denominated in a foreign currency, in United States
dollars, but they are not precluded from giving judgment in the currency in
which the obligation is denominated or the loss was incurred.

(2) If the court gives judgment in dollars in accordance with Subsection (1),
the conversion is to be made at such rate as to make the creditor whole and to
avoid rewarding a debtor who has delayed in carrying out the obligation.

The principle as stated here is not confined to contractual claims but
includes, for example, claims in tort. The Comment recognizes that the
traditional American rule has been that courts in the United States can
render money judgments only in U.S. dollars, but the Comment finds no
legal impediment to the expression of judgments in a foreign currency in
appropriate circumstances. The Comment holds that in a world in which
the U.S. dollar and all major currencies fluctuate against each other, courts
should be able to issue judgments in a foreign currency, if two conditions
are satisfied: judgment in this form (a) is requested by the judgment cred-
itor, and (b) will best accomplish the objective of subsection (2). Condition
(b) is intended to mean that the judgment expressed in foreign currency
will make the creditor whole and avoid benefit to the judgment debtor
who has unjustifiably delayed payment. If a judgment is expressed in a
foreign currency, the Comment states that the debtor may satisfy the
judgment either by payment in that currency or by payment of an equiv-
alent amount of dollars calculated at the rate of exchange on the date of
payment. According to English practice, if payment is not made by the
debtor, the date of payment is deemed to be the date on which a court
orders execution of the judgment, so that the order can state the amount
of the recovery in sterling.

The fluctuation and volatility of the exchange rate for the U.S. dollar
made it desirable that courts should have the power to express judgments
in a foreign currency, but the basic question is whether indeed there is
no legal impediment to what would be, in effect, a change of traditional
principle. Little, if any, case law can be cited so far in support of the new
principle. The Comment cites in support of section 823 the decision of
the House of Lords in *Miliangos v. George Frank (Textiles) Ltd.*, a revolutionary decision that was inspired by the floating character of the pound sterling and the desire to protect the United Kingdom as a financial and business center.

**Plaintiff's alleged option.** Condition (a) noted above means that the expression of a judgment in the foreign currency indicated in subsection (1) of section 823 is optional on the part of the plaintiff. The Comment states that the plaintiff is likely to exercise this option in favor of the appropriate foreign currency only when the foreign currency has appreciated against the dollar since the claim arose. The option seems to be based on the idea that it is necessary to ensure that the plaintiff can be made whole. The thought seems to be that if he had received the foreign currency when the claim arose, in this first case he would have profited by receiving a currency that subsequently appreciates. Suppose, however, that the foreign currency has depreciated since the claim arose. In such a case, the Comment assumes that the creditor will request a judgment in dollars. The Comment declares that judgment should be given in such a case at the rate of exchange applicable on the date the claim arose. In this second case also, the plaintiff benefits by receiving a currency at a rate that has appreciated against the foreign currency indicated in subsection (1).

The principle of the Comment is that "Neither party should receive a windfall nor be penalized as a result of currency conversion." It can be argued, however, that the plaintiff does receive a windfall in the second case when compared with the first case. The implication of the first case is that by receiving payment when the claim arose, the plaintiff would have been in a position to retain a foreign currency that has appreciated. If the same assumption were made in the second case, the plaintiff would have retained a foreign currency that has depreciated. The reply might be that in the second case, the plaintiff could have sold or used the foreign currency before it depreciated, and could have avoided the effect of the subsequent depreciation. If, once again, this reasoning were applied to the first case, the plaintiff would have sold or used the foreign currency, and not had the benefit of the subsequent appreciation.

It can be questioned, therefore, whether the solution offered by the Comment is compatible with the principle that neither party should receive a windfall or be penalized by currency conversion. It does not seem that both parts of this principle are satisfied by the plaintiff's option.

---

The question arises whether a better rule is feasible for determining when judgments should be expressed in a foreign currency, if it is assumed that such judgments are indeed permitted by law in the United States. This broad question can be resolved into at least three questions. First, what are the criteria for deciding whether judgments can be expressed in a foreign currency? Second, what are the criteria for choosing the particular foreign currency in which it is appropriate to express judgments? Third, if a judgment can be expressed in a foreign currency, must the court grant such a judgment, or, in other words, has the plaintiff an option, as stated by the Comment, to claim and receive a judgment in dollars? The last of these questions will be considered first.

The Reporters' Notes cite Working Paper No. 80 of the English Law Commission, published in 1981, for the view that experience "appears to have been favorable" with the English rule, "which entitles the claimant, in effect, to elect whether he wants the currency of the obligation or the currency of the forum." The Law Commission's Report on Private International Law: Foreign Money Obligations, published in October 1983, does not conclude that it is established law that the claimant has an option. The Report states that, although there is little judicial authority on the point, a plaintiff should not be able to obtain a judgment expressed in sterling when the claim ought properly to be expressed in a foreign currency. To allow the plaintiff to seek judgment in sterling in the case of a foreign-currency claim would be contrary to the principle in Miliangos. It would be unjust to the defendant, since the plaintiff would be able to make his claim in whichever of the two currencies happened to be the more favourable from his point of view.

Criteria for expression in foreign currency. The rationale of the Miliangos decision is that it is unfair to the plaintiff and beyond the authority of the court to transform what is in essence a foreign currency claim into a sterling claim. The point seems hardly controversial in the case of contractual claims. The logic of holding that a claim is essentially a foreign currency claim prevents the plaintiff from electing to transform his claim so as to obtain a judgment expressed in sterling. To hold otherwise, it is held, would be unfair to the defendant.

It becomes necessary to decide, therefore, when a claim is in essence a foreign currency claim. The Restatement appears to accept the view that there are such claims, even though it does not follow the English logic of preventing transformation of them. It is necessary, nevertheless,
for the Restatement to declare when a claim can be expressed in a foreign currency. The criteria of the Restatement, it has been seen, are that the obligation to be enforced is denominated, or the loss was incurred, in a foreign currency. It is not clear, however, what effect the earlier part of subsection (2) of section 823 has on these criteria. Although no problem is created with respect to the currency of denomination, the question does arise of the relation of the clause "causes of action arising in another state" to "the currency in which . . . the loss was incurred."

Denomination in a foreign currency, which apparently would be the criterion for debts and liquidated damages, creates no problem if the money of account, in which obligations are measured, and the money of payment, in which obligations are to be discharged, are the same. Suppose, however, that the money of account is the domestic currency and the money of payment is a foreign currency. The Law Commission suggests that the English rule is that the judgment should be expressed in the domestic money of account, namely, sterling. (An argument might be made, however, for the currency of payment.)

The concept of the loss incurred appears, in the Reporters' Notes, to cover unliquidated damages for both breach of contract and tort. The Reporters give some examples drawn exclusively from English cases, because it follows from the traditional practice of courts in the United States to give judgments expressed in dollars that there are no American examples. A more systematic statement could be made of the principles of English case law than is attempted by the Restatement. For example, a foreign currency claim exists if the proper law of the contract is English, and the contract expressly or implicitly designates a foreign currency as the currency of account and payment. (If the currencies are different, it has been seen that the Law Commission thinks the currency of account should be decisive.) If the proper law of the contract is foreign, it would seem that the question of the currency in which damages should be awarded would be determined by reference to that law.

If the contract does not expressly or implicitly indicate the currency in which damages should be awarded for breach, a foreign currency claim exists if the loss was felt by the plaintiff, or his loss is most truly expressed, in a foreign currency. These tests do not necessarily mean the currency in which the plaintiff had to make expenditures because of the breach. The currency indicated by the tests might be the currency in which the plaintiff ordinarily conducts his business. If, for example, that currency is sterling, an English court will hold that a foreign currency claim has not arisen, even if the plaintiff had to spend dollars or French francs because of the breach.

The courts take a similar approach in relation to damages for tort, but it is recognized that a plaintiff might be unable to demonstrate that it
would be normal for him to use the currency in which he ordinarily conducts his operations to finance expenditures caused by the tort. In such a case, the currency in which those expenditures were financed would be the currency that would determine whether a foreign currency claim has arisen. The result of the cases is that the circumstances of each claim to unliquidated damages for breach of contract or tort must be examined in detail.

It has been seen that according to the Comment on section 823, a judgment debtor against whom a judgment expressed in a foreign currency has been awarded can discharge the debt in dollars at the exchange rate on the date of payment. This rule would be similar to the English rule, but the question has been asked whether contracting parties should be free to provide, if payments are to be made in England, the rate of exchange at which the sterling equivalent of a foreign currency is to be calculated or the date as of which the rate of exchange is to be chosen. Another question that has arisen is whether contracting parties should be free to agree, when payment is to be made in England, that it shall be made exclusively in a stipulated foreign currency without any option for the debtor to pay the sterling equivalent. The English Law Commission answered these questions in the affirmative, although there was no direct authority for the Commission’s propositions. If correct, the propositions would modify the primary rule of English law that if a debt expressed in a foreign currency is payable in England, the debtor has an option to discharge the debt in sterling at the rate of exchange on the date of payment. It is unclear whether the primary rule applies only if the contract is governed by English law, but the Commission thought that the primary rule should extend to contracts governed by foreign law. The issues raised in this paragraph are not mentioned by the Restatement.

If contracting parties agree that a debt payable in England must be paid solely in a stipulated foreign currency, can the judgment be executed in the foreign currency? On this question, the implications of Choice Investments Ltd. v. Jerommimon (Midland Bank Ltd., garnishee) deserve consideration. Formerly, only “debts” could be attached to satisfy a debt. A sum in foreign currency standing to the credit of a judgment debtor was not regarded as a debt, because foreign currency was a commodity. In the case referred to here, it was held that the Miliangos decision had changed the law. The plaintiff was able to garnish a balance in U.S. dollars standing to the judgment debtor’s credit in an account with a London

32. Id. ¶¶ 3.9-.11.
33. Id. ¶ 2.1.
34. [1981] 1 All E.R. 225
bank. The decision does not solve the question about satisfaction of a debt payable in England only in a foreign currency, because the judgment in *Choice* was expressed in sterling, and the bank receiving the garnishee order purchases sterling with the dollars. But Lord Denning, the Master of the Rolls, stated that the principle of the decision would apply if, for example, the judgment creditor had a judgment in Swiss francs and the judgment debtor held a bank balance in dollars. Lord Denning did not say whether the bank would have to buy Swiss francs with the dollars.

The English Law Commission suggests that, as contracting parties should be permitted to contract for payment exclusively in a foreign currency, procedural rules should conform with substantive law. Therefore, courts should have power to give judgment in the foreign currency, without the debtor's option to discharge the debt in sterling. The Commission recognized, however, that enforcement might be difficult.

Criteria for choice of foreign currency. Often, the determination that it is appropriate to express a judgment in a foreign currency will decide the choice of the appropriate foreign currency as well, but not always. It will be necessary, therefore, to have criteria to determine what the foreign currency should be if the facts of a case involve more than one such currency. The plaintiff may conduct his business in more than one foreign currency. The consequences of a breach of contract may be loss or expenditure by the plaintiff in a number of foreign currencies.

Some of the English rules mentioned already provide criteria for choosing the appropriate foreign currency. For example, if the money of account and the money of payment under a contract are both foreign, it seems that the money of account will be the appropriate currency. For unliquidated damages, the appropriate foreign currency will be the one in which the plaintiff felt the loss or the one that most truly expresses his loss. If it is considered proper in a case to award damages in the currencies in which expenditures were incurred, the expenditures will determine the currencies. The judgment may have to be expressed in a number of currencies.

It has become clear in English jurisprudence that the choice of the currency that will most truly represent the plaintiff's loss or will most fully and exactly compensate him for that loss can be controversial. In *Ozalid Group (Export) Ltd. v. African Continental Bank Ltd.*, the dollar was both the currency of account and the currency of payment, but the

---


36. Cmnd. 9064, ¶¶ 5.14-.17, 5.70-.80.


SPRING 1988
court held that the currency that met the criterion of true loss was sterling. The court took account of the fact that it was reasonably foreseeable by the defendant that the plaintiff's true loss would be suffered in sterling.

Conversion rules. If a judgment expressed in a foreign currency is to be satisfied in dollars, the Restatement provides that the rate of exchange on the date of payment is to be applied in translating the foreign currency into dollars. If a judgment is expressed in dollars, the Comment states a double-barreled rule for translating the foreign currency of obligation into dollars. If the foreign currency has depreciated since the date of injury or breach, the rate of exchange on that date should be chosen; if the foreign currency has appreciated, the rate of exchange on the date of judgment or payment should be chosen. (Both parts of this rule are prefaced with the unexplained clause "Unless the interests require a different result.") The justification alleged for the rule is again that it puts the plaintiff into the position he would have had as a result of the defendant's timely settlement of the claim against him and that it avoids both windfall and penalty for the parties.

The skepticism expressed already about the plaintiff's option applies to the rule on conversion. The Reporters recognize that courts in the United States have not been consistent in their choice of exchange rates. In Competex S. A. (in Liquidation) v. Ronald La Bow, the Second Circuit Court of Appeals questioned whether the breach-date rule achieved the neutrality between the parties that the draft Restatement claimed for it. The court was sympathetic to the proposition advanced by the Restatement that judgments can be expressed in a foreign currency, and thought that such judgments would be a neutral solution. The court did not assert that the law was in accord with the proposition, and seems to have doubted that the plaintiff's option to select the currency of judgment would be proper if the proposition was good law.

38. 783 F.2d 333 (2d Cir. 1986); see Gold, Volume III, supra note 3, at 738-43.