SOME ISSUES RELATING TO THE IMPACT OF THE ECONOMIC AND MONETARY UNION ON THE CONTINUITY OF CONTRACTS

INTRODUCTION

This paper sets out the approach of the laws of Singapore towards contract law in general. Thereafter, it discusses the specific questions raised by the FLP questionnaire.

APPLICATION OF ENGLISH COMMON LAW IN SINGAPORE

Much like the law of England and Wales, the law of contract in Singapore is largely uncodified and relies on the application of the common law. The Application of English Law Act[1] which was enacted in 1993 states the position in section 3 as follows:

> **"Application of common law and equity**
>
> **3**.—(1) The common law of England (including the principles and rules of equity), so far as it was part of the law of Singapore immediately before 12th November 1993, shall continue to be part of the law of Singapore.
>
> (2) The common law shall continue to be in force in Singapore, as provided in subsection (1), so far as it is applicable to the circumstances of Singapore and its inhabitants and subject to such modifications as those circumstances may require."

It is clear from this statement that the position as regards the continuity of contracts in Singapore will be the same as that in England, except when:—

(a) modified by a Singapore statute; or

(b) if a particular English statute has not been re-enacted in Singapore or an European Council Regulation or Directive is inapplicable in Singapore; or

(c) if the Singapore courts decide that local circumstances require departure from the principles laid down in English cases.

MODIFICATION BY UN SALES CONVENTION

As regards (a) above, one statute which modifies the Common Law at least in the area of formation of contracts for the international sale of

1 Cap. 7A, 1994 Revised Edition.

goods, is the Sale of Goods (UN Convention) Act[2]. This Act gives legislative force to the UN Convention on Contracts for the International Sale of Goods, Vienna (1980). It is commonly known in Europe as the Vienna Sales Convention to which UK is significantly not yet a party to. On the other hand, the UK Sale of Goods Act 1979 as amended by the 1996 Act has been re-enacted in Singapore for domestic sales contracts[3].

FRUSTRATED CONTRACTS ACT (CAP 115)

The UK Law Reform (Frustrated Contracts) Act 1945 was re-enacted in 1959 in Singapore by the Frustrated Contracts Act[4]. The provisions of the Singapore Act are in *pari materia* with those in the UK Act. However, while the UK statute expressly confines the scope of its application to contracts governed by UK law, the Singapore statute has no such express restriction. But it is a principle of statutory interpretation that legislation will not be given extra-territorial effect unless there is clear Parliamentary intention to do so. Hence, while the issue remains untested in Singapore law, it is likely that the courts will interpret the Frustrated Contracts Act to apply only to contracts governed by Singapore law. Other English statutes which deal with the general position for contracts under Singapore Law are also currently law in Singapore e.g. the Unfair Contract Terms Act[5] and the Misrepresentation Act[6].

A. Questions Relevant to all Contracts

Assume that the contract requires payment by one or more parties after the start of the Transitional Period of a sum to be made in the named "old" currency of a participating member State. Assume further that the governing law of the contract is the law of Singapore.

Question:

(1) Does the law of Singapore recognise the principle of *lex monetae* (whether or not it is given that name)? Under this doctrine, the law would follow the terms of the law which applied in the state whose currency was involved. In the present context the payment obligations would be converted into an obligation to pay Euros at the rate fixed according to the law of the member State whose "old" currency is involved (i.e. Fixed by an EU Regulation which formed part of the law of the state concerned).

2 Cap 283A, 1996 Revised Edition.
3 Cap. 393, 1994 Revised Edition, as amended by Act 43 of 1996.
4 Cap, 115, 1985 Revised Edition.
5 Cap 396, 1994 Revised Edition. For other statutes, see list in Part II of the First Schedule of the Application of English Law Act (Cap. 7A).
6 Cap. 390, 1994 Revised Edition.

Answer:

In Singapore law, the principle of nominalism *is* understood to mean that the *lex monetae* (the law of the currency) applies to the question of what is legal tender and what nominal value is attached to the legal tender at the time when a foreign currency obligation is to be discharged. By *lex monetae* is meant the law that exists from time to time in that country of the currency. For example, what 100 French francs are is exclusively defined by French law as there is no other law in the world which would explain the meaning of the denomination.

It appears from the decision of the Singapore High Court in *Indo Commercial Society* v *Ibrahim*[7] that the principles of *lex monetae* and nominalism are recognised in Singapore[8]. The contract must be determined by *lex monetae* and nominalism respectively. This is an inference drawn from the case which followed the decision of the House of Lords in *Miliangos* v *George Frank*[9].

The principle of nominalism has been part of the English common law since the early seventeenth century[10], and therefore received into Singapore common law upon the general reception of English law in 1826. If any confirmation is needed that the principle continues to apply in Singapore, it is to be found in the Singapore Court of Appeal case of *Tengku Aishah* v *Wardley Ltd*[11]. In that case the Court specifically approved and applied the statement of principle[12]. This is the same principle stated in §204 of Dicey and Morris, *The Conflict of Laws* (12th ed), which is generally considered to be of highly persuasive authority in Singapore. In the case, the Court held that the obligation to repay a loan denominated in Swiss francs as the currency of the obligation had to be measured by whatever was legal tender by Swiss law at the date of payment, irrespective of any currency fluctuations. The principle of nominalism also underlies the High Court case of *Indo Commercial Society (Pte) Ltd* v *Ibrahim*[13] which held that a Singapore court could give judgment in foreign currency, and that if the relevant currency of loss is a foreign currency, it is not open to the plaintiff to elect for judgment to be calculated in local currency. In accordance with the principle of

7 [1992] 2 SLR 1041.
8 For a write-up of the case, see attached Annex 1.
9 [1975] 3 All ER 801.
10 See *Gilbert* v *Brett* (1604) Davies 18.
11 [1993] 1 SLR 337.
12 Chitty on Contracts, General Principles (26th ed), §1542.
13 *supra* note 7.

nominalism, this holding puts the risk of the foreign currency appreciation on the debtor and the risk of depreciation on the creditor[14].

As in the English common law, the principle of nominalism as adopted in Singapore is a principle based on the presumed intentions of the contracting parties, and so it is possible for the parties to come to their own arrangements in derogation of the general applicable principles[15]. Further, although the principle is one of domestic law, it is so widely accepted throughout the world that practically speaking, the court will apply the principle as of course even when the foreign currency obligation is governed by foreign law[16].

No local case is known to have dealt with the problem of a complete change of foreign currency, but it follows from the principle of nominalism that currency changes in the *lex monetae* will be followed. Moreover, cases from other jurisdictions applying the principle of nominalism to such situations[17] are likely to be very persuasive authorities in Singapore.

Hence, when the *lex monetae* changes its currency to the Euro, it follows that Singapore law would treat the obligation in the old currency as converted to the new Euro currency. During the transition period, since both the Euro and old currency (as units of the Euro) would be legal tender by the *lex monetae,* it follows that the court would have to determine if the parties intended, as a matter of construction of contract, to use one or the other exclusively, otherwise, either denominations can be used.

Question:

(2) Would the answer be affected by the existence of, or terms of, a Regulation providing for continuity?

Answer:

It is assumed that the Regulation referred to here is the European Council Regulation No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the Euro. It provides for the principle of continuity in relation to obligations expressed in a currency which is replaced by the Euro (an "old currency") or expressed in terms of the ECU (European Currency Unit as defined in Council Regulation No 3320/94).

14 See also Dicey & Morris, *The Conflict of Laws* (12th ed, §1554–1555)
15 *Wardley Ltd* v *Tunku Adnan* [1991] 3 MLJ 366.
16 Dicey & Morris, *supra* at § 1552.
17 See FA Mann, *The Legal Aspect of Money,* Chap IX.

Article 2 of Regulation 1103/97 states:

> "Every reference in a legal instrument to the ECU, as referred to in Article 1098 of the Treaty and as defined in Council Regulation (EC) No 3320/94, is replaced by a reference to the Euro (at the rate of one Euro to one ECU... Council Regulation (EC) No 23320/94 is repealed."

> Article 3 of Regulation 235 states that "the introduction of the Euro shall not have the effect of altering any term of a legal instrument or of discharging or excusing performance under any legal instrument, nor give a party the right unilaterally to alter or terminate a legal instrument."

The recognition of continuity by Singapore courts in the application of the principle of *lex monetae* will be assisted by the terms of Regulation 1103/97 and Article 3 of Regulation 235 in so far as it constitutes the law of the currency concerned, thereby determining what constitutes legal tender in the currency of that country. However, insofar as the regulations modify substantive obligations (eg, changing the currency of the obligation, or the non-discharge and non-excuse clause), they only apply if they are part of the proper law of the contract as determined by the conflict rules of Singapore, or alternatively, as part of the proper law of the foreign currency obligation by way of depecage.

Question:

(3) During the Transitional Period would the law of Singapore require that any claim before its courts for enforcement of the payment obligations be stated in terms of the "old" currency, or could the claimant express his claim in Euros? Is the answer different if under the domestic law of the Member State of the "old" currency

(a) debts expressed in that currency are capable of discharge in Euros, even if they are not required to be discharged in Euros; or

(b) such debts cannot be discharged by payment in Euros, but only in "old" currency?

Answer:

The relevant Singapore procedural law governing how a plaintiff should express his claims in court pleadings is found in *Order 18 r 6(3) of the Rules of Court*[18]. This rule requires that sums be worded

18 1997 Edition, made under Supreme Court of Judicature Act, Cap. 322, 1985 Revised Edition.

in specific, but does not state what currency the sums should be expressed in. Thus, the rules allow the plaintiff to frame his claim in terms of the 'old currency' or 'Euros'.

During the transitional period, whether the plaintiff should state his claim in the "old currency" or in Euros, or whether the plaintiff has a choice between the two depends on whether the parties have made any agreement on the issue, and if not, then on the *lex monetae*. In this context, the contract will have to be scrutinised very carefully to determine if the currency stated therein is intended to mean such currency as may from time to time be legal tender in the country of the currency, or such currency as specified in the contract until such currency fail to exist altogether in that country. *Tengku Aishah* v *Wardley Ltd*[19] is unhelpful in this respect as there was no change of currency in that case, only fluctuation in its exchange value. As a general rule, however, it is reasonable to assume that if parties have not addressed their mind to transitional currency problems, they must have intended to mean such currency as may from time to time be legal tender by the *lex monetae*.

The terms of Article 8(1) of Regulation 10914 of the proposed Maastricht Treaty provides a primary rule that amounts payable in "old currency" units should continue to be paid in those units during the Transitional Period. In so far as it is law in the *lex monetae* that the old currency units must be used as legal tender for obligations measured in the old currency as money of account, the Singapore courts will give effect to this under the principle of nominalism. In so far as this law modifies the foreign currency obligation such that it must be measured by the old currency unit during the transitional period, it can be characterised as substantive law and applicable by way of the proper law of the obligation (whether as proper law of the contract or as proper law of the obligation by depecage). In so far as this law determines what currency can be tendered as a valid discharge for a debt expressed in the "old currency", it may be characterised as an issue relating to money of payment and governed (semble) by the *lex loci solutionis* (law of the place of payment). It may be possible for a law to bear more than one characterisation.

It must be noted that by Singapore law, the plaintiff can only recover an amount calculated in the foreign currency that represents the relevant currency of the loss suffered[20] as ascertained by the court. This currency may not be the currency in which the immediate loss is felt[21]. Hence, it may be the case that the court ascertains that the loss was ultimately felt in one particular currency, eg, the Euro, in which the court will award judgment calculated in that currency.

19 *Supra* note 11.

20 *Indo Commercial Bank, supra* note 7.

21 *The Folias* [1979] AC 685; *The Texaco Melbourne* [1994] 1 Lloyd's Rep 473.

3(a) The court will have regard to the country in which the debt or liability is payable to determine the currency in which it may or must be discharged[22]. This answer proceeds on the assumption that the debt or liability is payable in Singapore. If, during the transitional period, it is stated in the *lex monetae* that debts expressed in the old currency are capable of discharge in Euros even if they are not required to be discharged in Euros, then, to the extent that this law can be characterised as stating that the Euro is legal tender in the country of the old currency, the debt can be discharged in Singapore in Euros as legal tender of the money of account[23].

3(b) If, during the transitional period, it is stated in the *lex monetae* that debts expressed in the old currency cannot be discharged by payment in Euros, but only in the "old currency", then, if the debt or liability is payable in Singapore, the law is relevant as the *monetae* if characterised as stating that the Euro is not legal tender for debts expressed in the old currency. If characterised as a law deciding which currency can be used to discharge the foreign obligation debt, the question would be governed by Singapore law as the proper law or *lex loci solutionis.* In the latter case, the restriction on the use of Euros for discharge of old currency debts would not apply.

Question:

(4) Does it make any difference if the governing law of the contract is

(a) the law of the Member State whose "old" currency is involved;

(b) the law of another Member State; or

(c) the law of a third party state (where no EU Regulation would have direct application)?

Answer:

Three different laws should be distinguished. First, the *lex monetae,* the law governing the currency, applies by way of the principle of nominalism. Second, the *lex causae* governing the obligation is usually the law governing the contract, and this law may alter the nature and extent of the foreign currency obligation, and may also make changes to the general principles of nominalism. Third, the law governing the mode of discharge of the obligation may be relevant.

22 Dicey & Morris, *supra* §208.
23 Dicey & Morris, *supra* at §1579–§1580.

If the contract is governed by foreign law and the debt is payable in Singapore or a third country, then the question arises whether the discharge rule is a rule of the proper law of the contract or of the *lex loci solutionis*[24]. If the court follows Dicey and Morris and applies the mode of discharge as a principle of the *lex loci solutionis*[25], then it is the law of the place of payment that governs what currency can discharge the liability.

(a) If the governing law of the contract is the law of the member state whose "old" currency is involved, that law can apply by way of (a) the *lex causae* defining the foreign currency obligation; (b) the *lex causae* modifying the general principles of nominalism; (c) the *lex monetae* as the law of the currency; or possibly (d) the *lex loci solutionis,* if it is also the law of the place where the debt is payable.

(b) Where the contract is governed by the law of another Member State, European regulations may apply as part of the *lex causae* of this member state, either in defining the foreign currency obligation, in modifying the principle of nominalism, or possibly as the *lex loci solutionis* if it is also the place of payment. Whether the law of this Member State applies to a foreign currency obligation denominated in the currency of another Member State is a question of construction of the applicable law.

(c) Where the contract is governed by the law of a third country, Singapore law will apply the proper law of the contract as the *lex causae* of the debt obligation. No case has arisen where the court has had to consider where the governing law does not have a principle of nominalism. Where foreign law is not pleaded or proven, the Singapore court will assume it to be the same as Singapore law. Practically, as in England, the courts apply the principle of nominalism irrespective of the proper law of the obligation. Hence, to this extent the discussion in the answer to the previous questions will apply.

B. Particular Contracts

In addition to the questions in A above, the following arise;

24 See Dicey & Morris, *supra* at §1581.
25 See also Mann, *supra* at 325–326.

Question:

(1) Commercial contracts (e.g. Sale of goods, joint venture).

What will be the effect on long-term contracts where there is a pricing clause calculated by reference to market conditions for an "old" currency and the "old" currency is replaced by the Euro in circumstances where market conditions for the Euro are different (e.g. where this mechanism includes a formula, one of whose factors is the volatility between the "old" currency and the US dollar or the yen)?

Answer:

The contract continues as it is unlikely to be frustrated. If the governing law of the contract is Singapore law, the Sale of Goods Act[26] (re-enacted from 1979 of UK) would determine what the circumstances of frustration are. Where the Sale of Goods Act is not applicable, then, English common law principles of contract will apply.

Section 7 of the Sale of Goods Act provides for frustration of the contract if the contract is for a sale of specific goods which perish before risk passes to the buyer. The application of section 7 is narrow and Atiyah suggests that the Act does not preclude other cases from falling under frustration. However, frustration at common law is difficult to invoke as the whole basis of the contract need be destroyed[27], or that the obligations of the parties are radically altered (*Davis Contractors* v *Fareham U.D.C.*). Moreover, drastic increase in costs has not been favourably looked upon as a ground invoking frustration[28]. Although Lord Denning said that in long term contracts, a radical change in price could discharge the parties from further obligations[29], Treitel doubts it[30]. The former is the popular view with (in particular) the courts, there appears to be no reason in principle why an increase in costs that engenders a radical change in obligations ought not to fall under the rubric of frustration[31]. However, even if this more flexible argument with respect to increased costs is accepted, it should be noted that the doctrine of frustration is still very strictly applied. In addition, and in relation (in particular) to more short term contracts, the factor of foreseeability would also contribute towards a very strict application of the doctrine. Like English commercial courts, it is likely that

26 Cap. 393, 1994 Revised Edition.

27 *Taylor* v *Caldwell, Krell* v *Henry,* see Treitel, *Frustration and Force Majeure,* generally

28 See the Suez Canal closure cases, e.g. *Tsakiroglou & Co* v *Noblee & Thori GmbH,* [1962] AC 93.

29 *Staffordshire AHA* [1978] I WLR 1387.

30 See Treitel, *Frustration and Force Majeure f-034ff, supra.*

Singapore courts would be very reluctant to allow the doctrine of frustration to be successfully pleaded, hence undermining the purpose and intent of commercial arrangements, save in particularly egregious circumstances.

If the contract is an international contract governed by the Sale of Goods Act (United Nations Convention)[32], an argument invoking frustration can only be made under Article 79. However, it is pertinent to note that Article 79 does not discharge both buyer and seller from their obligations, it merely states that either is not liable. Thus, the contract continues. Article 79 applies only to cases where there is an impediment beyond control. It is uncertain what the phrase means and includes. However, a change in the monetary system affecting pricing clauses may possibly not be an "impediment" to the contract and thus, it is difficult to argue for the application of Article 79.

It is clear from the *travaux preparatories* of the Convention that an important purpose of the Convention is to save and preserve continuity of contracts.

The analysis on the legal consequences of frustration under the Law Reform (Frustrated Contracts) Act 1943 is applicable in Singapore which has re-enacted the Act in the form of the Frustrated Contracts Act[33]. However, in this regard, section 3(5) of the Act should be noted.

> **3.**—(5) This Act shall not apply —
>
> (c) to any contract to which section 7 of the Sale of Goods Act 1979 (which avoids contracts for the sale of specific goods which perish before the risk has passed to the buyer) applies, or to any other contract for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished.

31 Jack Beatson, "Increased Expense and Frustration" in Chapter 6 of *Consensus Ad Idem — Essays in the Law of Contract in Honour of Guenter Treitel* (1996), "Frustration in English Law – A Reappraisal" (1992) 19 Anglo-American Law Review 278 at 286–289

32 *Supra* note 1.

33 *Supra* note 4.

Question:

(2) Loan Agreements:

(a) What is the effect on an "optional currency clause" where the borrower has the right to draw, after the start of the Transitional Period, a currency which will be superseded by the Euro? Will that option be deemed to be converted into a right to draw Euro, will the option cease to be available, or will the whole contract fail (or be affected by a doctrine such as frustration)?

(b) What will be the legal effect of an interest clause

(i) which provides for a fixed rate chosen in relation to the "old" currency and which, post-EMU, is at a level materially different from market rates for the Euro; or

(ii) which fixes a floating rate by reference to a mechanism which does not operate post-EMU?

(c) What if the effect of the substitution of the Euro for the "old" currency of obligation under:-

(i) *force majeure* clauses which, without referring to EMU, excuse one or both of the contractual parties from performance of the contract where performance is prevented or seriously delayed by the happening of an event beyond the parties' control:

(ii) change of circumstance clauses which, without referring to EMU, confer on one of the contractual parties the right to vary or terminate its contractual obligations if the circumstances surrounding the contract have changed since the contract was entered into;

(iii) non-availability of currency clauses which provide for variation or termination of the contract if the currency of obligation ceases to be freely available?

(d) Will typical increased costs provisions enabling the lender to recover any increase in its cost of funding the loan permit it to recover, post-EMU, the costs of complying with reserve or other requirements of the European Central Bank (rather than of the relevant national central bank of the "old" currency of obligation)?

Answer:

(2a) The assumption is that an "optional currency clause" refers to a traditional multi-currency clause where the borrower has the option to draw in any of the currencies listed in the agreement, such options being independent promises[34].

After the start of the Transitional Period, the 'old currency' will remain practically as currency, but legally only as a sub-unit of the Euro. It is arguable that the 'old currency' would still be regarded by the Singapore Courts as legal tender currency.

If the courts do regard so, the option to draw the 'old currency" is still valid. If not, will the option be converted into one that allows drawdown in Euros or cease altogether? It is likely that the application of the principle of *lex monetae* will allow the currency of the Member State to be substituted by the Euro rather than allow the option to cease altogether.

(2bi) and (2bii)

Wood[35] opines that interest clauses would be strictly applied and adjustments are only likely to be made in the event of "disasters'.[36] Fixed rate loan agreements almost invariably do not offer the lender any protection if he is unable to fund. In fixed rate loans, the lender takes the risk that he may not be able to fund the loan at a profit. Floating rate loan agreements generally have a disaster clause which would allow for adjustments in interest rates, but FRNs do have have such disaster clauses.

(2ci) *Force majeure* clauses usually refer to an act of God, or wartime impediments. It is uncertain if the EMU would fall under *force majeure*.

The answer will depend upon the construction of the *force majeure* clauses.

As is the position under English common law, these clauses are strictly interpreted and invoking such clauses to plead discharge of obligations by frustration is seldom successful[37].

34 See International Trustee for the protection of Bondholders v R, [1936] 3 All ER 407, per L Wright MR, taken from Irani, "Multi-currency Clauses and Conflict of Laws Issues", *Current Developments in International Banking and Corporate Financial Operations* at p 77 footnote 10.

35 *International Loans, Bonds and Securities Regulation,* chap 6.

36 As to nature and application of the 'disaster clause', see Gooch, 1983 1 FL Rev June 9 and 1983 1 FL Rev Sept 15.

37 see Atiyah, *The Sale of Goods,* p 332.

Treitel suggests that a *force majeure* clause can apply even though the obstacle to performance which has arisen is not insurmountable[38].

(2cii) A change in circumstance clause allows the parties to vary the contract or terminate the contract if circumstances surrounding the contract has changed since conclusion. The advent of the EMU can fall within this reading. On the principle of the freedom of contract, such a clause should be successfully invoked by parties who wish to vary or terminate the contract. However, it is likely that the Courts may construe these clauses narrowly in the same way as *force majeure* clauses.

(2ciii) If contractual clauses are to be strictly interpreted, this clause can be invoked at the advent of the EMU. It may not offend the EMU policy of continuity in contracts as such clauses provide for variation or termination and leave the parties the freedom of contract to decide for themselves, such freedom as expressly acknowledged in EMU policy as well. Applying the principle of nominalism or the *lex monetae,* the non-availability of currency clause could be construed to refer to the non-availability of Euros.

(2d) Such contractual terms should be enforceable. The answer will depend on the wording of the clause.

Question:

(3) OTC Derivatives

(a) What is the position if the derivative has been designed to hedge an exposure linked specifically to an "old" currency, so that the substitution of a Euro obligation will no longer provide the hedge for which it was designed (e.g. if it hedges an obligation to pay an amount fixed by reference to the "old" currency under a contract which specifically provides a different mechanism on the disappearance of the old currency – say the "old " currency obligation has become a US dollar obligation)?

(b) What if the derivative is a swap between two "old" currencies, both of which will be replaced by the Euro, so that all future volatility between the currencies disappears?

(c) Are there any terms of standard contracts applicable to OTC Derivatives in Singapore which might be affected by EMU?

38 see *Peter Dixon & Sons Ltd* v *Henderson, Craig & Co Ltd* [1919] 2 KB 778, 789.

Answer:

(3a) Since hedging is a device towards minimising risks, the substitution of the Euro for the 'old currency' which would no longer provide the hedge could fundamentally alter the foundation of the contract[39]. At the happening of an extraordinary event that alters pricing structure, an option could be terminated or an appropriate price paid to reflect the new value, depending on the construction of the contract. But legally speaking, "the entity over which the investor had the option disappears where the extraordinary event takes place for the purposes of the instrument..... it would be appropriate that the option should be treated as though it were terminated." The above must be subject to the terms of the contract and market practice in the industry may also provide alternatives to termination. In practice, however, such transactions will not normally be contracted, especially in the period nearer to 1 Jan 99.

What is the position if the derivative has been designed to hedge an exposure linked specifically to an "old" currency, so that the substitution of an Euro obligation will no longer provide the hedge for which it was designed?

Assuming that the performance of the derivative contract is not frustrated (i.e. delivery and/or payment thereunder can still be made). It is doubtful if the Courts would rewrite the contract on behalf of the parties or allow termination thereof even if the contract does not make any commercial sense. One would expect that, putting the economic rationale aside, if payment in the "old" currency is possible during the Transitional Period, the parties would have to continue performance under the derivative transaction.

Upon expiration of the Transitional Period when the "old" currency no longer exists, if the parties are unable to adhere strictly to their obligations under the transaction, the Court may have to apply the principles of *lex monetae* to determine the respective obligations of the parties.

(3b) See answer above to (3a).

(3c) A popular standard form contract that is used in derivative trading is the ISDA (International Swaps and Derivatives Association) standard terms contract. These terms are not in mandatory use, as the Securities Industries Act[40] or the Futures

39 see Alistair Hudson, *The Law on Financial Derivatives* p 82.
40 Cap. 289, 1985 Revised Edition.

Trading Act[41] contain no provisions regulating terms of such contracts.

Clause 8 of the ISDA standard terms contract provides for payment in the contractual currency only and such obligation would not be discharged by the tender of any other currency. As it stands, clause 8 of the ISDA standard terms contract does not accommodate the development in EMU.

However, the ISDA regime allows clause 8 to be modified to accommodate the development in EMU. It is possible to specify all variations in the Schedule to the ISDA Master Agreement containing terms specific to individual transactions.

Nevertheless, it is correct to say that the current clause 8 of the Standard ISDA Master Agreement is not wholly consistent with the Euro. Therefore, International Swaps and Directives Inc had on 8 Jul 97 released an "EMU Continuity Provision" for use in existing and future ISDA Master Agreements where the parties would document their intention that the EMU should not affect the continuity of their contract.

Question:

(4) Exchange-traded Derivatives

Are there provisions relating to the operation of exchanges in Singapore which allow the exchange to adjust the terms of standard products, if the contractual terms might be affected by EMU?

Answer:

The Futures Trading Act[42] deals with the conduct or manner of dealing, but has no provisions regulating the terms of standard products. It is for the exchange to regulate these terms. As seen above [answer to question (3c)], the ISDA standard terms agreement, which is adopted in many exchange contracts, has recently provided for an EMU continuity provision.

It is within the power of the exchange to adjust the terms of the standard products to take into account the changes brought about by EMU.

If necessary, the regulatory authorities may consider suspending all operations in EMU derivative contracts nearer the operative dates in order to avoid the difficulties.

41 Cap. 116, 1996 Revised Edition.
42 *ibid.*

In respect of Exchange-traded Derivatives, the Singapore International Monetary Exchange (SIMEX) has not announced its policy on how contracts involving obligations in "old currencies" will be treated as no existing obligations in such contracts are due beyond 1 Jan 99. However, as and when the need arises, SIMEX will adopt the practices of the European futures exchanges (LIFFE in the UK, MATIF in France and DTB in Germany), which have announced that any obligations in "old currencies" that are due after 1 Jan 99 will be converted to obligations in the Euro at the official conversion rate.

Question:

(5) FOREX

(a) What is the position if both currencies involved in a forward exchange contract are replaced by the Euro, locking the value at the date of replacement, when the parties expected there to be fluctuations for the full term of the contract?

(b) During the Transitional Period, will it be possible under the law of Singapore to have a forward exchange contract between the Euro and an "old" currency, or would such a contract be considered impossible (because the "old" currency was not distinct from the Euro)?

Answer:

Similar to OTC Derivatives, one would expect the contractual obligations of the parties to continue despite the changes in economic benefits and basis for the said transaction. As such, a distinctior have to be drawn between (a) the Transitional Period, when the "old" currencies are still in circulation and remain good legal tender and (b) the expiration of the Transitional Period when the "old" currencies cease to exist.

(5a) The analysis to this question follows closely the answer to question (3a). If both currencies involved in the forward exchange contract have been replaced by the Euro, the exchange products have ceased to exist as such and the foundation of the contract is also fundamentally altered. Alistair Hudson[43] states that "the only solution to the expansion of FX speculation is a single currency. Clearly, it is impossible to speculate between currencies when there is only one currency in existence".

43 *The Law on Financial Derivatives, supra.*

(5b) Forward exchange contracts have been dealing only in legal currencies. During the Transitional Period, the Euro is the legal currency while the "old currency" is a sub-unit of the Euro, having no independent legal existence. Thus, a forward exchange contract between the Euro and the "old currency" may not be legally possible.

Another alternative view is that if the "old" currencies are still in use and circulating during the Transitional Period, thus, they can be traded as commodities on the foreign exchange market. It may not be relevant whether the respective "old" currencies have an independent existence or not. In addition, the ECU will continue trading and hence, will be a proxy for the Euro before it legally exists. Leaving the economic rationale aside, one would imagine that it would be possible to have a forward exchange contract between the Euro and an "old" currency during the Transitional Period as the two co-exist during the Transitional Period.

As it may be possible legally to contractually provide for a distinction to be drawn between the Euro and the old currency for purposes of settlement, it is suggested that this may be considered.

Question:

(6) Insurance and Re-insurance

(a) Many long-term insurance contracts contain terms which require the calculation of interest at a fixed rate. For example, in the UK, pension contracts usually provide that if the beneficiary dies before the policy matures, the premiums will be repaid, with interest calculated at, say, 5% pa. Such fixed rates are chosen on the basis of long-term interest rates for the currency concerned. If the "old" currency in which the policy was written is replaced by the Euro, this might change dramatically the assumptions in which the fixed rates were chosen.

Given the special nature of insurance contracts, would the law in Singapore treat this question differently from the way in which it deals with interest rates in loan agreements (see section 2(b) above)?

(b) It sometimes happens that an insurance contract is written so that premiums and claims are paid in the currency of the state where the insured party resides, but contains limitations (e.g. maximum liability or excess provisions) stated in terms of a different currency. If the latter currency were an "old" currency, what effects would be given to the limitation terms concerned after the end of the Transitional Period?

Answer:

(6a) The advent of the EMU is possibly not a ground for frustration of a long-term insurance contract whose fixed interest rate is calculated on the basis of a chosen currency. Frustration has rarely happened in insurance contracts[44].

The insurer may want to argue that the premiums paid by the insured should be adjusted. However, it is difficult to mount this argument as the premiums have been calculated by the insurer as to his risks before the conclusion of the contract. Even if the insurer stipulates an increase in risk clause[45], the effect of such a clause only absolves the insurer from liability to pay if no notice of the increase in risk is given. These instances of increase in risk is also due to the insured's undertaking and not external circumstantial changes.

The only cases where premiums have been adjusted after the commencement of cover are cases involving 'held cover' clauses. These clauses stipulate that the insurer is liable to pay even when risks not commonly covered in the market materialise. Thus, the clause also allows adjustment of the premium at a "reasonable commercial rate"[46].

"Held cover" clauses are not commonly used by the industry in Singapore. When used, these can be found in marine policies, war risk coverages, blanket policy for group travel insurance, and construction all risks/erection all risks (CAR/EAR). Except for CAR/EAR policies however, the other types of policies mentioned above are short-term policies.

Not many life insurers and general insurers in Singapore have policies where the premiums or claims paid or limits are in a European currency or based on an interest rate of a European currency. Those that do have indicated that they plan to offer the policyholders an option to convert the policies either to Singapore dollars or to the Euro on the date of the implementation of the EMU.

Clauses for the review of interest rates, bonuses and other monetary benefits to be obtained by the assured before payout are fairly standard clauses in life insurance contracts in Singapore.

44 See generally, *MacGillivray on Insurance,* Poh Chu Chai, *The Principles of Insurance Law* (Longman, 1996 4th Ed).
45 see Poh Chu Chai, *The Principles of Insurance Law Vol 1, supra,* chap 12.
46 see *Liberian Insurance Agency Inc.* v *Mosse,* [1977] 2L1 LR 560.

In view of the above, the advent of the EMU may not affect insurance contracts significantly. Even if review clauses are not found in these contracts, it is likely that the insurer would bear the effects of change as the courts are unlikely to make the assured, who is unlike a commercial entity in the loan agreement scenario discussed above, bear the financial effects of the change in the monetary system.

(6b) After the end of the Transitional Period, the "old currency" would cease to be used and the Euro would be the only legal currency. To construe the limitation term which is stated in the "old currency", the principle of *lex monetae* applies. Whatever was the "old currency" is replaced by the new currency in total substitution. This is akin to the case of the East African shilling replacing the rupee in Tanzania (Ordinances Nos. 43 and 44 of 1921)[47].

Note however that if the life policy is issued as a Singapore policy, policy moneys shall be paid in Singapore dollars unless otherwise agreed between insurer and assured at time of payment (section 22, Insurance Act[48]).

Question:

(7) The ECU

The ECU is conceptually different from the "old" currencies which will be replaced by the Euro, in a number of ways. In particular, the ECU would probably not be regarded as a currency under most of the legal tests to define that term. Appendix 2 explains the origins and nature of the ECU and the way it will be dealt with in EMU. Separate consideration therefore needs to be given to (a) Forex trades in ECU (b) ECU loans (c) ECU bonds (d) OTC derivatives involving the ECU.

(a) Will the principle of *lex monetae* apply to translate ECU obligations to Euro obligations, even though the ECU may not be a currency?

(b) What view will be taken under the law of Singapore of provisions which trigger alternative currency obligations or early repayment on the ECU "ceasing to exist"? Would they apply at all, or would the law regard the introduction of the Euro as keeping the ECU in existence?

47 see Mann, *The Legal Aspect of Money* p 258 footnote 7.
48 Cap. 142, 1994 Revised Edition.

Answer:

(7a) It can be argued that since the ECU is not currency as it is only a way of measuring currencies, denominations made in the ECU can be stated in relation to denominations in the specific "old currency", and the principle of nominalism can still apply to translate such "old currency" obligations into Euro obligations (see reasoning in answer to question (6b)). This would be assisted by Article 2 of Council Regulation 1103/97 which provides that references to the ECU will be replaced by reference to the Euro on a one for one basis. In so far as the constituent parts of the ECU have not converted (e.g. sterling) to the euro, the obligation to deliver that currency would be unaltered. However, this view is out of line with the way in which ECU is tracked on financial markets. In commercial terms, the ECU is treated in a way similar to the way in which currencies are treated, and a court may well take the view that the normal course of dealing in the market should lead to a legal treatment analogous to that which would be applied to a currency. On this basis, which is thought to be the one most likely to be adopted, the court would look to the law of the Member States to see how they regarded the change brought about by the replacement of the ECU. In the case of each of the Member States, the position is set out in Article 2 of Regulation 1103/97, under the terms of which ECU obligations are replaced by euro obligations on a one-for-one basis.

(7b) One strict view is that alternative currency options would be triggered off on the ECU ceasing to exist as these options are all regarded as independent promises[49].

Clauses stipulating early repayment on the ECU ceasing to exist are enforceable too.

Contractual clauses as agreed upon by the parties ought to be given effect and it would be unlikely for the law to intervene in interpreting obligations stated to be otherwise so that the Euro could replace the ECU. These agreements do not seem to be repugnant to public policy ensuring the stability of the Euro or continuity of contracts[50].

49 See also answer to question (2a).

50 As to a discussion of whether the ECU is currency and the nature of the ECU in general, see Brown, 1990 18 Int Bus Lawyer 203.

However, there are strong policy grounds against holding that the ECU has ceased to exist. Council Regulation 1103/97 suggests that the ECU has been substituted by the Euro. With the existence of Regulation 1103/97, it can be argued that the intention of the parties is that it was foreseeable that the ECU would be substituted by the Euro. Hence, in the absence of clear words, the parties must have intended that the ECU be substituted by the Euro.

This Paper was prepared by the Attorney-General's Chambers, Singapore in consultation with the following:

- *Banking and Financial Institutions Group, Monetary Authority of Singapore*
- *Insurance Commissioner's Department, Monetary Authority of Singapore*
- *Association of Banks in Singapore*
- *Singapore Merchant Bankers' Association*
- *Members of International Swaps and Derivatives Association*
- *Assoc Prof Andrew Phang, Faculty of Law, National University of Singapore*
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Annex 1

In What Currency Does the Court Give Judgement?

The type of currency that the court gives judgement in is determined by *lex fori* i.e. law of the place of forum, since it is regarded as a procedural matter (see Cheshire & North, *Private International Law,* chapter on "Substance and Procedure", generally).

Early Law

Early law is, as seen in *Havana Railways,* (1961) AC 1007, that judgement can only be given in sterling. This case was overruled by *Miliangos* v *George Frank* (1976) AC 443 that where the governing law of the contract is foreign and where the money of account and money of payment is that of the foreign country, judgement can be given in that foreign currency.

Miliangos is adopted in Singapore by the Court of Appeal and the High Court in *Tatung Electrics (1991) 3 MLJ 212 and, Indo Commercial Society* v *Ibrahim (1992) 2 SLR 1041.* In *Indo Commercial,* Michael Hwang JC was faced with a conflicting decision, the decision of the Privy Council on an appeal from Palestine, in *Khoury* v *Khayat.* However, he was reassured that *Miliangos* could be followed as:

(i) The Singapore Court of Appeal has followed *Miliangos* in *Tatung Electrics* without considering *Khoury* and it was not open to the High Court in *Indo Commercial* to question if the CA had acted per incuriam. Only a court at a horizontal level could do so. (See *Miliangos,* Lord Simon).

(ii) s5(1) of the Civil Law Act (before its repeal) allows the Singapore courts to apply English Law with regard to mercantile matters generally. Thus, an inconsistent Privy Council decision could be ignored in preference of applying English Law.

Developments

The *Miliangos* doctrine has been applied even to claims of damages in breach of contract, see *Kraut AG* v *Albany Fabrics (1977) QB 182,* and claims in tort, see *The Despina R (1979) AC 685.*

In *The Folias (1979) AC 685,* judgement in foreign currency can be given even when the governing law of the contract was English, but the loss of the plaintiff was best represented in the terms of the foreign currency.

Annex 2

To Determine the Governing Law of the Contract
(see Cheshire & North, Private International Law)

Before the court can decide on how to determine the governing law of the contract, it must resolve the issue as to whether it has jurisdiction to do so.

To determine the proper law governing the contract, the court can ascertain first if there is an express choice of law, see *Amin Rasheed, (1984) AC 50.* An express choice of law is usually regarded as conclusive, see *Vita Food Products Inc* v *Unus Shipping Co, (1939) AC 277.*

If the parties have not expressed a choice of law, the choice must be indicated by necessary implication, by the terms of the contract or the circumstances of the case (*Amin Rasheed,* above, see also, *Collier, Conflict of Laws, p 186*). Inferences can be drawn from currency and place of payment, status of the parties (especially when one party is the government of a certain country).

Failure of express choice of law can take place, if the system of law is not nominated directly as in *Compagnie Tunisienne de Navigation, (1971) AC 572,* thus the applicable law governing the contract is imputed to the parties. Such applicable law is that with which the contract is most closely connected. Local cases that have applied the express choice/implied choice/objective choice are: *Las Vegas Hilton Corp* v *Khoo Teng Hock Sunny (1997) 1 SLR 341; Hang Lung Bank Ltd* v *Datuk Tan Kim Chua (1988) 2 MLJ 567; Woh Hup (Pte) Ltd* v *Property Development Ltd (1991) 3 MLJ 82.*

Another principle to aid in determining closest connection is that commodity agreements are governed by the law of the country in which the relevant market is situated, see *Collier, p 193.*

Another consideration under this heading is that of the scission of the contract, otherwise known as depecage. This principle allows parties to stipulate different governing laws for different parts of the contract. In *Libyan Arab Foreign Bank* v *Bankers Trust Co, (1989) QB 728,* imputed scission of the contract was found by the court relating to two bank accounts in different countries.