Choice of Law in Foreign Currency Debts: A Comparative Study

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I. INTRODUCTION

Choice of law in foreign currency debts is an area where several contradictory rules exist; leaving it unclear how a court will treat said issue. This article aims to explain the reasons courts have created uncertainty in this field. In Part One, I will survey the choice of law rules on foreign currency debts in four different jurisdictions. The first two jurisdictions are the United States and England, which are common law jurisdictions while the other two, France and Egypt, are civil law jurisdictions. In Part One, I demonstrate that courts tend to deal with foreign currency debts not as a single legal issue governed by a single choice of law rule but as a set of legal issues that requires the use of several choice of law rules and doctrines.

In Part Two, I examine the manner in which courts have handled choice of law in foreign currency debts through the evaluation of courts' use of the choice of law rules and doctrines. I explain that, in most cases, courts have misused the choice of law rules and that the real explanation for their attitudes towards the choice of law in foreign currency debts is a desire to balance the need for enforcing agreements to the maximum extent possible, which requires using the party autonomy choice of law rule, and the need for complying with restrictions, imposed by the forum's law, foreign law, or even the International Monetary Fund (IMF) Agreement, (the "IMF Agreement"),[1] that guide courts towards other choice of law rules or doctrines such as *lex loci solutionis*.[2]

In Part Three, I suggest a better choice of law approach to foreign currency debt that is based on enforcing the parties' agreement by using the parties' autonomy as a basic choice of law rule. However, the use of a party's autonomy choice of law rule will be restricted in accordance with the IMF Agreement whenever the parties' agreement contradicts the law of a member state. I explain that this restriction should take place once the parties' agreement, at the time of conclusion or at the time of enforcement, will affect the IMF member state's monetary system.

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[1] Bretton Woods Agreement, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39, as amended through June 28, 1990, available at http://www.imf.org/external/about.htm.

[2] *Lex Loci Solutionis* is the Law of the place where the payment or performance of a contract is to be made. *See* BLACK'S LAW DICTIONARY 911 (6th ed. 1990).

II. CHOICE OF LAW AND FOREIGN CURRENCY DEBTS

In this part, I survey the choice of law rules and doctrines used by courts in the selected jurisdictions. Here distinctions must be made among four separate issues. First, the determination of the debt's nominal value, which I will refer to as the "Money of Account", which courts usually determine via the parties' autonomy choice of law rule. Second, the actual payment of the debt is governed by the *lex loci solutionis* choice of law rule. Third, the forum's law governs the court's ability to issue judgments and may mandate issuing the judgment in the forum's currency, which means that the court will have to convert the parties' claims from the foreign currency to the forum's currency and vice-versa. These "Conversion Rules", actually reflect the court's desire to effectuate substantive justice and to overcome its inability to award any damages beyond interest. Fourth, the effect of the Foreign Currency Control Rules (F.C.C.R.) and how the courts apply or ignore Article VIII 2(b) of the IMF Agreement.[3]

A. United States

1. *Currency of Account*

So far no American court has placed any limitation on the parties' choice of currency in denominating debts. American courts apply the principle of nominalism[4] to all debts irrespective of the currency used by the parties. Therefore, an obligation to pay a sum of money in a certain currency is not affected by the changes that occur in that currency's value.[5] This rule is applied to debts denominated in both U.S. dollars and foreign currencies. An example is *Strenberg v. West Coast Insurance Co.*, where the California Court of Appeals ruled that an insurance policy made in California that required the insured to pay the premiums in Chinese currency was enforceable even though the Chinese currency had depreciated in value to such an extent that it had become worthless.[6] The court did not accept the defendant's argument that a plaintiff's duty to pay should have been altered in light of the Chinese currency's depreciation.[7]

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[3] Bretton Woods Agreement, *supra* note 1.
[4] Nominalism means that the creditor can discharges his debt by paying off the face value of the amount owed to the debtor regardless of any changes that might occur in the currency's purchasing power due to inflation or debasement of the currency itself. *See* Gilbert v. Brett (Case De Mixt Moneys) (1604) Davis 18 (P.C. of Ireland).
[5] Knox v. Lee Parker, 79 U.S. 457, 508 (1870); *see also* Die Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 519 (1926).
[6] Sternberg v. West Coast Life Ins. Co., 196 Cal. App. 2d 519, 521 (Cal. Ct. App. 1961).
[7] *Id.* at 526.

2. *Currency of Payment*

American courts apply the law of the place of payment to determine all legal issues related to paying a debt.[8] The law of the place of payment will both supersede any agreement made by the parties concerning the debtor's duty to pay the debt and determine the legal tender status of the currency used to pay the debt.[9] In *Johansen v. Confederation Life Association*, the Federal Court of Appeals for the Second Circuit ruled that the currency of payment should be Cuban pesos even though the insurance policy mandated payment in U.S. dollars. The policy stipulated that payment would take place in Cuba and since U.S. dollars were no longer legal tender under Cuban law, the debtor's obligation to pay could be discharged only through a payment in Cuban pesos.[10]

3. *Conversion Rules*

Traditionally, American courts have held that they were unable to issue their judgments in a foreign currency due to the Dollar Judgment Rule.[11] However, American courts differ about the reasons behind adopting this rule. Some emphasize the need to respect the forum's sovereignty, which means that courts must not issue judgments in a currency other than the forum's currency. Other courts have justified the rule by constructing section 20 of the 1792 Coinage Act.[12] As a result, it became necessary for American courts to issue their judgments in U.S. dollars and then convert those judgments into foreign currencies. Now there are two main conversion rules

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[8] Johansen v. Confederation Life Association, 447 F. 2d 175, 177 (2d Cir. 1971).

[9] *Id.*

[10] *Id.* at 177.

[11] Hicks v. Guinness et al., 269 U.S. 71 (1925); Frontera Transportation Co. v. Abaunza, 271 F. 199, 202 (5th Cir. 1921); Liberty National Bank v. Burr, 270 F. 251, 252 (E.D. Pa. 1921).

[12] § 20 of the 1792 Coinage Act stated that "[A]nd be if further enacted, that the money of account of the United States shall be expressed in dollars, or units, . . . of a dollar . . . and that all accounts in the public offices and all proceedings in the courts of the United States shall be kept and had in conformity to this regulation." This section was constructed, rightly, to be an impediment against issuing judgments in foreign currency by the Courts in the United States. International Silk Guild, Inc. v. Rogers, 262 F.2d 219, 224 (D.C. Cir. 1958). *See also* Shaw, Savill, Albion & Co. v. The Fredericksburg, 189 F.2d 952, 954 (2d Cir. 1951). However, § 20 of the Coinage Act was repealed by the enactment of 31 U.S.C. § 5101 (1988) which omitted the phrase "all accounts in the public offices and all proceedings in the courts of the United States shall be kept and had in conformity to this regulation." The Dollar Judgment Rule still stands as good law because of the House Report on section 5101 that clearly indicates that the recodification was not intended to change the law which prohibits the Courts in the United States form issuing their judgment in a foreign currency. For more details *See* Note, The Uniform Foreign-Money Claims Act: No Solution to an Old Problem, 69 TEX. L. REV. 1203, 1209-14 (1990).

followed by American courts, the Breach Day Rule and the Judgment Day Rule.

a. Breach Day Rule

The Breach Day Rule is considered the basic conversion rule used by both state and federal courts if the cause of action arises under U.S. domestic law. This rule mandates the conversion of a court's dollar judgment into the foreign currency at the exchange rate prevailing when the creditor brought the action[13] regardless of whether the debt was the result of a duty to compensate for a tort[14] or a debt on an unpaid negotiable instrument.[15]

b. Judgment Day Rule

The Judgment Day Rule is followed exclusively by federal courts. It was introduced by the United States' Supreme Court in a lawsuit filed by a U.S. citizen to recover German marks deposited in a bank located in Germany.[16] Due to currency restrictions in Germany, the bank did not allow him to do so until the marks had depreciated severely.[17] The Court decided to adopt the Judgment Day Rule instead of the Breach Day Rule because the German bank's duty to remit the deposit was governed by German law, which meant that the conversion of the Court's U.S. dollar judgment into German marks would take place at the time the Court authorizes the enforcement of its judgment.[18] Nonetheless, this rule is considered secondary to the Breach Day Rule because it is only applied by the federal courts when the cause of action is based on foreign law.[19]

c. Explanation

There have been various attempts by courts and scholars to explain the existence of two different conversion rules within U.S. federal law. Some

[13] Ladd v. Parkell 40 Super. (8 J. & S.) 150 (1875); Hoppe v. Russo-Asiatic Bank, 235 N.Y. 37; 138 N.E.497 (1923), *aff'd,* 200 App. Div. 460, 193 N.Y. Supp. 250 (1st Dept. 1922); Redo y Cia v. First National Bank, 200 Calif. 161, 252 P. 587(1926); Hicks v. Guiness et al., 269 U.S. 71 (1925); Det Forenede Dampskibs Selskab v. Insurance Co. of North America, 31 F.2d 658, *affirming* D.C. 28 F.2d 449, *cert. denied,* 280 U.S. 571 (1929); The Muskegon 10 F.2d 817 (D.C.N.Y. 1926); Taubenfeld v. Taubenfeld, 276 A.D. 873 (1949).
[14] Simonoff v. Granite City Nat. Bank, 279 Ill. 248 (1917); Pavenstedt v. New York Life Ins. Co., 203 N.Y. 91 (1911).
[15] Gross v. Mendel, 171 App. Div. 237 (1916).
[16] Die Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517 (1926).
[17] *Id.* at 529.
[18] *Id.*
[19] *Id. See also* Zimmermann v. Sutherland, 274 U.S. 253 (1926); Thornton v. National City Bank of New York, 45 F.2d 127 (C.C.A. 2d 1930); Royal Ins. Co. v. Compañía Transatlántica Española, 57 F.2d 288 (E.D. N.Y. 1923).

have suggested that the conversion rules reflect differing choice of law approaches. According to them, the Breach Day Rule will be used if the court adopts the local law theory because it cannot enforce a right beyond the limits of the foreign law.[20] In other words, the court is only enforcing a pre-existing right and not creating a new right, which directs the court towards converting its dollar judgment into the foreign currency according to the prevailing exchange rate at the time the plaintiff brought suit. On the other hand, if the court follows the vested rights theory then it would be expected to use the Judgment Day Rule to indemnify the plaintiff to the largest extent possible by delaying the date of conversion until the court issues its judgment.[21]

I find this explanation to be unsatisfactory for a number of reasons. First, this explanation tries to tie the conversion rules and the theory used by the court in dealing with foreign law. In reality, such connections do not exist because just as the American courts disagreed on how to deal with the foreign law they also disagreed on which conversion rule should be used in converting foreign currency debts from a foreign currency into U.S. currency. Second, this explanation does not explain why courts differ among themselves in characterizing the conversion rules. Some courts characterize conversion rules as substantive rules,[22] so that a federal court sitting in diversity must follow the state's conversion rule; while others characterize them as procedural rules governable by federal law.[23] The local law and vested rights theory explanation would be valid if the conversion rules were always treated as substantive, but they are not.[24]

A second explanation is that the courts are trying to provide the plaintiff-creditors with the maximum amount of protection against fluctuations in the foreign currency's value. The courts are supposedly motivated by the common law doctrine barring creditors from achieving any compensation beyond interest for the debtor's delay in paying the debt.[25] Therefore, a court will resort to the Judgment Day Rule instead of the Breach Day Rule if the currency of payment depreciates because the Judgment Day Rule will allow the court to compensate the creditor by issuing a dollar judgment that will be converted into the foreign currency at that time. Thus, the court will be able to compensate the creditor and prevent the debtor form achieving a profit through breaching his duty to pay because the

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[20] J.G.G., *The Measurement of Foreign Money Obligations*, 36 VA. L. REV. no. 2, at 215, 222 (1950).

[21] *Id.*

[22] In re Oil Spill by The Amoco Cadiz Off the Coast of France, 954 F.2d 1279, 1330 (7th Cir. 1992).

[23] Vishipco Line v. Chase Manhattan Bank, 660 F.2d 854, 865 (2d Cir. 1981).

[24] *Id.*

[25] J.G.G., *supra* note 20, at 217. *See also* Joseph Dach, *Conversion of Foreign Money: A Comparative Study of Changing Rules*, 3 AM. J. COMP. L. no. 2, at 155, 182 (1954).

conversion from the foreign currency to the U.S. dollar according to the Judgment Day Rule will adopt the exchange rate prevailing at the time the court issues its judgment.[26] In other words, it will be the debtor, not the creditor, who will bear the foreign currency's loss of value by paying his debt with a higher amount of U.S. dollars than if he had paid the debt when it was due.

I find this to be a reasonable explanation. First, the Nurnberg case, the first U.S. Supreme Court case adopting the Judgment Day Rule, involved a currency that had depreciated in value at a phenomenal rate.[27] In that case, if the Supreme Court had followed the Breach Day Rule it would have amounted to punishing the creditor while allowing the debtor to take advantage of the currency's depreciation.[28]

Another example is *Competex v. LaBow*.[29] LaBow was a New York citizen who had lost a substantial amount of money on the London Metal Exchange Market, leaving a debt that was paid by LaBow's broker, Competex. Competex demanded reimbursement and obtained a default judgment against LaBow before the English High Court of Justice for £187,929,82 (English pounds), when the exchange rate was one (£1) pound for $2.20 U.S. dollars.[30] Competex sought to enforce the English judgment in New York and by then the English pound had depreciated to one (£1) pound for $1.50 U.S dollars.[31] LaBow moved the court to allow him to pay the English judgment in English pounds, which would have saved him $236,000.[32]

In normal circumstances, as we have seen, the federal court should follow the Judgment Day Rule and convert the English judgment to U.S. dollars at the new exchange rate as of the time of enforcement. However, the court followed the New York Breach Day Rule by characterizing the conversion rules as substantive rules to be governed by New York law.[33] This enabled the court to protect Competex from the loss resulting from the new exchange rate because the action was brought in diversity.[34]

The drive to adopt an approach that achieves protection for creditors from fluctuations in the exchange rate between the U.S. dollar and foreign currencies led to the emergence of a flexible approach. One approach is the one mentioned in the Restatement Third of Foreign Relations Law, section 823 (2) which states that a court should choose a date of conversion such that the exchange rate will "make the creditor whole and will avoid

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[26] Comment, *Damages in Foreign Currency*, 31 YALE. L.J. 198 (1921).
[27] Die Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517 (1926).
[28] *Id.*
[29] Competex, S.A. v. Labow, 783 F.2d 333, 334 (2d Cir. 1986).
[30] *Id.*
[31] *Id.* at 335.
[32] *Id.*
[33] *Id.* at 334.
[34] *Id.*

rewarding a debtor who has delayed in carrying out the obligation."[35] This view has been adopted by several courts[36] despite the fear that it could give plaintiffs windfalls.[37]

4. Foreign Currency Control Rules (F.C.C.R.)

Prior to the establishment of the IMF, courts in the U.S. had generally enforced the American F.C.C.R. while ignoring the F.C.C.R.'s of other nations.[38] If the law governing the cause of action was American, whether state or federal, then an American court would refuse to apply the foreign F.C.C.R. as a defense to the contract even if doing so made it impossible for the debtor to pay his debt.[39] The courts either characterized the F.C.C.R. as a foreign revenue law that had no effect beyond the territory of the foreign sovereign[40] or saw it as violating the forum's public policy.[41] They continued to ignore foreign F.C.C.R.'s even when the law governing the claim was foreign, arguing that those rules affected the performance of the debt, which was a procedural matter, governed solely by the forum's law.[42] In short, the application of a foreign F.C.C.R. by American courts was the exception rather than the rule.

Unfortunately, U.S. courts continued to ignore foreign F.C.C.R.'s after the enactment of the IMF Agreement because they were foreign revenue rules[43] or by interpreting Article VIII (2)(b) in a very narrow manner that

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[35] Comment (c) to § 823 states that "the date used for conversion should depend on whether the currency of obligation has appreciated or depreciated depending relative to the dollar. In general, if the foreign currency has depreciated since the injury or breach, judgment should be given at the rate of exchange applicable on the date of injury or breach; if the foreign currency has appreciated since the injury or breach, judgment should be given at the rate of exchange applicable on the date of judgment or the date of payment. . . ."

[36] Nikimiha Securities Ltd., v. The Trend Group Ltd., 646 F. Supp. 1211 (1986); El Universal v. Phoenician Imports Inc., 802 S.W. 2d. 799, (1990); Teca-Print A.G. v. Amacoil Machinery, Inc., 138 Misc. 2d 777, 525 N.Y.S. 2d 525 (1988); Aker Vedal A/S v. Neil F. Lampson, 828 P.2d 610 (1942); Siematic Mobel Werke GmbH v. Simatic Corp., 669 F. Supp. 156 (S.D.N.Y. 1979).

[37] *Competex*, 783 F. 2d at 333; S.A.R.L. Aquantonic-Laboratories PBE v. Marie Katella, Inc., 2007 U.S. Dist. LEXIS 61682 (D. AZ 2007).

[38] Hartmann v. United States, 65 F. Supp. 397 (1946); Norman v. Baltimore & O.R. Co., 294 U.S. 240 (1935).

[39] Barnes v. United Steel Works Corp., 11 N.Y.S. 2d 161 (Sup. Ct. 1939); Central Hanover Bank & T. Co. v. Siemens & Halske Aktuen-Gesellshcaft., 15 F. Supp. 927 (S.D.N.Y. 1936); David v. Veitscher Magnesitwerke Actien Gessellschaft, 348 Pa. 335(1944); Loeb v. Bank of Manhattan Co., 180 N.Y.S. 2d 497 (Sup. Ct. 1939); Lann v. United States Works Corp., 166 Misc. 465, 470 (Sup. Ct. 1938).

[40] Marcu v. Fischer, 65 N.Y.S. 2d 892 (Sup. Ct. 1946); Bercholz v. Guaranty Trust Co., 18 Misc. 1043 (Sup. Ct. 1943).

[41] A.W.B. & Berrien C. Eaton, *The Treatment of Foreign Exchange Controls in the Conflict of Laws*, 34 VA. L. REV. no. 6, at 697, 702 (1948).

[42] Sabl v. Laenderbank Wein Aktiengesellschaft, 30 N.Y.S. 2d 608 (Sup. Ct. 1941); Cermak v. Bata Akciova Spolecnost, 80 N.Y.S. 2d 782 (Sup. Ct. 1948).

[43] Banco Do Brasil v. A.C. Israel Commodity Co., 12 N.Y. 2d 371 (1963).

allowed the U.S. courts to enforce contracts that violated a foreign F.C.C.R.[44] Even when the courts applied a foreign F.C.C.R. it was through the act of state doctrine, which requires the payment of the debt to occur within the borders of the foreign state in question.[45] This means that U.S. courts have applied foreign F.C.C.R.'s in a territorial manner both before and after the enactment of the IMF Agreement.

B. England

1. *Currency of Account*

Like their American counterparts, English courts apply the principle of nominalism to measure the quantum of the parties' obligations regardless of the law governing the claim itself.[46] As to the determination of the currency used by the parties in setting their obligations the English courts apply the *lex pecuniae*. Therefore, a promise to pay a sum in a foreign currency is a promise to pay whatever is considered legal tender under the *lex pecuniae*.[47] So if the parties agree to use the Egyptian pound ("EGP") then the EGP will be defined according to Egyptian law. However, if the *lex pecuniae* provides a special definition for what constitutes legal tender for the proposed transaction in other states then that definition will be determinative.[48] In other words, sometimes a foreign state will grant its currency the status of legal tender in regards to domestic transactions only in order to impose a limit on the currency's circulation. In this case, the English courts will consider that the parties did not specify a currency for their contract if the foreign currency was used in an international transaction and that they have therefore implicitly chosen the currency of the *lex contractus*.

It should be noted that the construction and legality of the duty to pay the foreign currency debt are considered by the English courts to be matters governed by the *lex contractus* and not the *lex pecuniae*. Consequently, if there was ambiguity over the debt's currency, such as whether the word

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[44] *See* J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda), 37 N.Y.2d. 220 (N.Y. 1975) ("Exchange Contract" in Article VIII 2(b) does not include letters of credit).

[45] Allied Bank International v. Banco Credito Agricola de Cartago, 757 F.2d 516, 521 (2d Cir. 1985). *See also* William Blair Q.C., *Interference Of Public Law In The Performance Of International Monetary Obligations*, *in* INTERNATIONAL MONETARY LAW ISSUES FOR THE NEW MILLENNIUM 395 (Mario Giovanni ed., 2000).

[46] Gilbert v. Brett (Case de Mixt Moneys) (1604) Davis 18 (P.C. of Ireland); 2 DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS 1978 (Lawrence Collins et al eds., Sweet & Maxwell 14th ed. 2006).

[47] In re Chesterman's Trusts, (1923) 2 Ch. 466, 478; Pyrmont Ltd., v. Schott, (1939) A.C. 145, 157 (P.C.); Geoffrey Cheshire and Peter North, PRIVATE INTERNATIONAL LAW 499 (11th ed. 1987); F.A. Mann, *Problems of the Rate of Exchange*, 8 MOD. L. REV. 177, 181 (1945).

[48] Marrache v. Ashton, (1943) A.C. 311; Ottoman Bank v. Chakarian, (1938) A.C. 260; MARTIN WOLFF, PRIVATE INTERNATIONAL LAW 472 (1945).

"dollars" should mean Canadian dollars, Australian dollars, or American dollars, then that will be determined according to the rules of construction under the *lex contractus*.[49] Also, the determination of whether a gold clause is a gold value clause or a gold payment clause is made according to the *lex contractus*.[50] Finally, the legality of using a foreign currency in setting the parties' obligation or the legality of using gold or index clauses will be determined according to the *lex contractus* and not the *lex pecuniae*.[51] In a similar manner, revaluation of the foreign debt will be determined according to the *lex contractus* because it affects the content of the parties' contractual duties by resetting the quantum of their obligations.[52]

2. Currency of Payment

English courts have consistently applied the *lex loci solutionis* to decide all legal issues relating to acceptable modes or methods to perform the duty to pay a foreign currency obligation.[53] As a result, the place of payment will determine which currency is to be used in discharging the debt since the currency of payment might not be the currency of account. For instance, it is a general rule under English law that debts payable in England can be discharged by paying them in sterling pounds regardless of the law governing the debt and without regard to the currency of contract. Finally, English courts presume that, unless otherwise stated by the parties' agreement or by the *lex loci solutionis*, the currency of account and the currency of payment are identical.[54]

3. Conversion Rules

English courts follow the Breach Day Rule.[55] The rationale behind adopting this rule was to put the creditor in the same position he would have

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[49] Adelaide Electric Supply Co. Ltd v. Prudential Assurance Co. Ltd., (1934) A.C. 122, 145; Auckland City Council v. Alliance Assurance Co., (1937) A.C. 587, 599. *See also* Bonython v. Commonwealth of Australia, (1951) A.C. 201, 221.

[50] R. v. International Trustee for the Protection of Bondholders (1937) A.C. 500; WOLFF, *supra* note 48, at 457; DICEY *supra* note 46, at 1998.

[51] *Id.* at 1997; John G. Fleming, *The Impact of Inflation on Tort Compensation*, 26 AM. J. COMP. L. 51, 53 (1978); J.H.C. MORRIS & P. M. NORTH, CASES AND MATERIALS ON PRIVATE INTERNATIONAL LAW 509 (Butterworths ed. 1984).

[52] Anderson v. Equitable Assurance Society of the U.S. (1926) 134 L.t. 557, 566; DICEY, *supra* note 46, at 1994; CHESHIRE & NORTH, *supra* note 47, at 500.

[53] DICEY *supra* note 46, at 2001; WOLFF, *supra* note 48, at 467.

[54] DICEY *supra* note 46, at 1986.

[55] Owners of SS Celia v. Owners of SS Volturno (1921) 2 A.C. 545; Re United Railways of Havana and Regla Warehouses Ltd., (1961) A.C. 1007.

enjoyed had the payment took place.[56] The English courts use the commercially usual and published rate at the time payment was due.[57] However, unlike the American courts, the English courts have developed a rule that allows them to issue judgments in a foreign currency if the contract is governed by a foreign law and the currency of the contract was a foreign currency. This is known as the Miliangos Rule, created by the House of Lords.[58]

This seems to be an attempt to protect creditors against changes in exchange rates. By allowing the English courts to issue their judgments in foreign currencies, the House of Lords has opened the door to a solution similar to the Judgment Day Rule because the conversion will take place at the time the enforcement of the English judgment is authorized. Thus, the English court will be able to overcome the common law doctrine that restricts compensation for the delay in performing the duty of payment to awarding interest[59] and rendering the depreciation of the foreign currency's value against the sterling pound too remote a consequence for the breach of contract.[60] The Miliangos Rule allows English courts to take into consideration the depreciation of the foreign currency by rendering its decision in the foreign currency instead of the sterling pound after calculating the amount of damages necessary to compensate the creditor for the delay in paying the debt. This shifts the risk of depreciation to the debtor to protect the creditor. This might explain why the English courts have extended the Miliangos Rule to tort cases.[61] The rationale behind this is the need to assess the damages inflicted by the defendant in the currency in which his loss was felt and that was reasonable for the defendant to foresee.

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[56] F.A.Mann, *The Rate of Exchange: An Urgent Appeal for a Minor Reform*, 15 MOD. L. REV. 369, 370 (1952).

[57] Versicherungs und Transport A.G. Daugava v. Henderson, (1934) 49 Ll. L. Rep. 252; Cummings v. London Bullion Co., Ltd., (1952) 1 All E.R. 383; Mann, *supra* note 47, at 192. However there are some courts that followed the black market exchange rate instead of the official exchange rate. *See e.g.*, Graumann v. Treitel (1940) 2 All E.R. 188.

[58] Miliangos v. George Frank (Textiles) Ltd., (1976) A.C. 443. Lord Wilberforce explained that there are several reasons to allow the English Courts to issue foreign currency judgments. The most important from my point of view are: 1) English Case Law has shown a tendency towards issuing foreign currency judgments; 2) English Courts have already allowed Arbitral Awards issued in foreign currency to be enforced despite the fact that the arbitration took place in London and therefore the same rule should apply to the English Court's judgments; 3) justice demands that a creditor should be protected from fluctuations in the value of the Sterling Pound when he has bargained for his own currency; and 4) providing substantive justice for the parties must prevail over procedure.

[59] HALSBURY'S LAWS OF ENGLAND 175 note (e);(f);(g) (Sarah L. Hornsby ed., Butterworths 1931).

[60] Di Ferdinando v. Simon, Smits & Co., (1920) 3 K.B. 409.

[61] Services Europe Atlantique Sud (SEAS) v. Stockholms Rederi AB Svea (The Folias) [1979] AC 685.

For example, In *The Despina R*, the plaintiff-creditor, the owner of the Eletherotira, had incurred expenses in Chinese yuan, Japanese yen, and U.S dollars to fix a ship after a collision off the coast of China.[62] However, the plaintiff had its principal place of business in New York City and the bank account used to cover the cost of repairs was an account denominated in U.S. dollars, so it was reasonable to expect that the plaintiff felt the loss in terms of U.S. dollars and that it was reasonable for the defendant to expect to pay for the loss in that currency, so the court awarded damages in U.S. dollars.[63]

Later on, the English courts extended the Despina R doctrine to include cases where the loss resulted from breach of a contract governed by English law. In *Services Europe Atlantique Sud of Paris v. Redteriktiebload Svea*, the court awarded the plaintiff damages in French francs.[64] The plaintiff had signed a charter party with the defendant, governed by English law, to ship onions from Spain to Brazil with the freight payable in U.S dollars.[65] However, the shipment was damaged due to a malfunction in the ship's refrigeration system and the plaintiff paid the receivers an indemnity in Brazilian cruzeiros.[66] Yet the court awarded damages in French francs[67] because that was the currency used by the plaintiff in operating his business and keeping all his books and bank accounts, and because to pay the indemnity he had had to sell French francs to obtain Brazilian cruzeiros.[68] The court did not award the damages in U.S. dollars because it deduced from the circumstances that the parties' choice of U.S. dollars was not meant to be the currency used to assess the damages resulting from breach of contract.[69]

In other words, if the parties choose a currency for their contract and contemplate its use to measure their obligations; then, their choice will be respected by the English courts. If they did not contemplate the use of the contract's currency to assess damages for breach of contract then an English court will issue its judgment in the currency in which the plaintiff's loss was felt. Accordingly, an English court's power to issue its judgments in a foreign currency is no longer restricted to a specific rule but is now contingent upon the circumstances of the case and the need to protect the plaintiff from the risk of depreciation.

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[62] MORRIS, *supra* note 51, at 519.
[63] *Services Europe Atlantique Sud (SEAS)*, [1979] AC 685.
[64] MORRIS, *supra* note 51, at 519.
[65] *Services Europe Atlantique Sud (SEAS)*, [1979] AC 685.
[66] MORRIS, *supra* note 51, at 522.
[67] *Id.*
[68] *Id.*
[69] *Id.* at 523.

4. Foreign Currency Control Rules

The English courts enforce the English F.C.C.R. to the fullest extent, and it does not allow the transfer of foreign currency or sterling pounds abroad unless the debtor obtains permission. The debtor's duty to pay arises only after he obtains that permission.[70] As to foreign F.C.C.R.'s, English courts do enforce them but are not consistent in using a single choice of law rule. Some English courts apply the F.C.C.R. as a part of the law governing the contract,[71] which is in accordance with applying the *lex contractus*.[72] Other English courts apply the F.C.C.R. as part of the *lex loci solutionis*, which is in accordance with applying the law of the place of payment. In other words, the English courts do not consider foreign F.C.C.R.'s as foreign revenue rules or foreign public law rules that English public policy would bar from being applied by English courts. On the contrary, those rules are applied as an integral part of the *lex contractus* or *lex loci solutionis*. In an interesting contrast to the American courts, English courts had consistently applied foreign F.C.C.R.'s even prior to the establishment of the IMF.

C. France

The French law on foreign currency debts is characterized by distinguishing between international contracts and domestic contracts.[73] In international contracts the parties can choose a foreign currency and stipulate that the payment of the debt will be in said foreign currency. However, domestic contracts must be denominated in euros and any stipulation that mandates the use of a foreign currency will be void because it breaches French public policy. For the sake of providing an accurate account of French law I will examine the foreign currency rules for both types of contracts.

1. Currency of Account

Parties to international contracts have the freedom to establish their obligations in a foreign currency or to include gold and index clauses.[74] However, such freedom does not exist in domestic contracts and if the

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[70] Mann, *supra* note 47, at 369.
[71] R. v. International Trustee for the Protection of Bondholders A.G. (1937) A.C. 500.
[72] De Béeche v. South American Stores, (1935) A.C. 148; St. Pierre v. South American Stores, (1937) 1 All E.R. 206; DICEY, *supra* note 46, at 2003; WOLFF, *supra* note 48, at 480; Trevor C. Hartley, *Mandatory Rules in International Contracts: The Common Law Approach*, 266 RECUEIL DES COURS 341, 422 (1997).
[73] Dach, *supra* note 25, at 162.
[74] PIERRE MAYER, DROIT INTERNATIONAL PRIVÉ 518-19 (1977); BERNARD AUDIT, DROIT INTERNATIONAL PRIVÉ 709 (3d ed. 2000).

parties attempt to use foreign currency or gold clauses in domestic contracts the French courts will void that clause for breach of French public policy.[75] In any event, the French courts will apply the principle of nominalism enshrined in Article 1895 of the *Code Civil* to all contracts regardless of the currency used in defining the parties' obligations.[76] Therefore, a promise to pay a certain sum, whether in euros or not, will be a promise to pay the exact number of currency units specified by the contract.

The legal definition of the foreign currency is the *lex pecuniae*, provided that the contract is an international one.[77] However, the construction and legality of gold and index clauses are determined according to the *lex contractus*, similar to the English courts' practice.[78] Nonetheless, revalorization of debts is absolutely forbidden under French law regardless of the *lex contractus* or the *lex pecuniae* because revalorization means resetting the parties' obligations, which is contrary to the principle of nominalism under French law.[79]

2. Currency of Payment

French courts adhere to applying the *lex loci solutionis* to all legal issues concerning the payment of debt denominated in foreign currency. Consequently, the *lex loci solutionis* will determine which currency the debtor can use to discharge his debt.[80] Therefore, if the payment is to take place in France or if the plaintiff-creditor is seeking to enforce a foreign judgment in France, then French law would mandate that the payment be made in euros even if the debt in question was the result of a transaction that occurred outside France and was governed by foreign law.[81]

Nonetheless, this does not mean that French courts will not take into account the *lex contractus*. The legal effects of payment on the parties' contractual rights and obligations will be governed by the *lex contractus*.[82] For example, the *lex contractus* will determine if the payment will allow the debtor to subrogate the creditor if there were other co-debtors. Also, the *lex contractus* will determine if there were defenses that the defendant-debtor

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[75] FRANCOIS TERRE, PHILIPPE SIMLER AND YVES LEQUETTE, DROIT CIVIL: LES OBLIGATIONS 992 (6th ed. 1996); Fleming, *supra* note 51, at 53.

[76] CODE CIVIL [C.CIV] art. 1895 (Fr.).

[77] MAYER, *supra* note 74, at 518; 3-2 ERNEST RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 32 (1958).

[78] Philipe Malaurie, *Les Obligations Libellés en Monnaies Etrangères*, TRAV. COM. FRA. DR. INT. PRIVÉ (1975-1977) 18, 19; AUDIT, *supra* note 74, at 708.

[79] Mann, *supra* note 47, at 288.

[80] HENRI MAZEAUD, LEON MAZEAUD AND JEAN MAZEAUD, 2 LEÇONS DE DROIT CIVIL: PREMIERE VOLUME 939 (François Chabas ed., 6th ed. 1978).

[81] Philipe Malaurie, *Note sur C.A.M.A.I. v. García et Société Dabi*, 1 R.C.D.I.P. 73, 75 (1976).

[82] HENRI BATIFFOL, LES CONFLITS DE LOIS EN MATIÈRE DE CONTRAT 447 (1st ed. 1938).

could use to dismiss the plaintiff-creditor's claim, such as the application of moratoriums or the plaintiff-creditor's action being barred by limitation.[83]

3. Exchange Rate

French courts, like their American counterparts, as a general rule can only issue their judgments in euros.[84] As a result, there is a need to convert the French euro-denominated judgment into the foreign currency through the use of conversion rules. However, unlike the American and English courts the French courts have an array of conversion rules that are applied according to the circumstances of the case and the attitudes of both the plaintiff-creditor and the defendant-debtor.

The first conversion rule is the Due Payment Day Rule, under which the court converts its judgment into the foreign currency at the prevailing exchange rate when the debt was due. It is applied in the following situation: first, if the defendant-debtor pays his debt at the specified time; second, if there was a delay in payment that was not accompanied by objection from the plaintiff-creditor; and third, if the delay in payment was due to circumstances beyond the defendant-debtor's control.[85] In this case, the defendant-debtor's attitude was the attitude of a person who was acting in good faith and therefore deserves protection against fluctuations in the exchange rate between the euro and the foreign currency.

The second conversion rule is the Date of Proceedings Rule, under which the court converts its judgment into the foreign currency at the exchange rate prevailing when the creditor brought his lawsuit. In this case the defendant-debtor's attitude was the attitude of a person who is behind in paying his debt and should bear the consequences of his delay after the plaintiff-creditor has officially stated his wish to be paid.[86]

The third conversion rule is not a rule but rather an approach that allows the court to apply the most favorable exchange rate from the plaintiff-creditor's point of view. This rule is followed when the defendant-debtor acted deliberately in bad faith by speculating on the change of the exchange rate in his favor or when the creditor resorted to the *mise en demeure* procedure.[87] In these cases the defendant-debtor should be liable for any

[83] MAYER, *supra* note 74, at 520.
[84] Malaurie, *supra* note 81, at 30.
[85] RABEL, *supra* note 77; GEORGES R. DELAUME, AMERICAN-FRENCH PRIVATE INTERNATIONAL LAWS 60 (1965); TERRÉ, *supra* note 75, at 992.
[86] Dach, *supra* note 25, at 165.
[87] *Mise en Demeure* is a procedure whereby the debtor serves the creditor through an official process server with a writ that directs the creditor to perform this due debt. It is used to official demand the performance of the debt and to establish the creditor's failure to pay the debt on time. *See* LEXIQUE DES TERMES JURIDIQUES 379 (14th ed. 2003).

potential loss including an unfavorable exchange rate for the plaintiff-creditor.[88]

The main remark that I have on the French conversion rules is their application on all international contracts regardless of the law governing the contract. Although French law requires a contract to be an international one in order for the parties to choose a foreign currency to denominate their obligations, there is no mention of the choice of law. Thus, the French conversion rules, unlike the American and English rules, are treated as a legal issue independent of the law governing the contract or the *lex loci solutionis*. In other words, the French conversion rules are not associated with the choice of law analysis, but with achieving justice in the case. Here, the French courts are trying to overcome their inability to provide plaintiff-creditors with compensation beyond awarding interest through adopting a set of conversion rules that are applied according to the circumstances of the case.[89]

4. Foreign Currency Control Rules

French courts are consistent in applying the French F.C.C.R. but they have not adopted a unified approach towards applying foreign F.C.C.R.'s. There are instances of French courts refusing to annul contracts that violated foreign F.C.C.R.'s or contracts that were concluded with an aim to violate foreign F.C.C.R.'s.[90] An example is *Basso es-Qualité v. Janda*, where the French Cour De Cassation refused to annul a contract made between Czech citizens in violation of the Czech F.C.C.R.[91] Although the contract was made specifically to smuggle a sum of U.S. dollars from Czechoslovakia to France to avoid the Czech F.C.C.R., the court did not annul the contract as it usually does with contracts that aim at violating the laws of other nations.[92] The court held that F.C.C.R.'s are territorial rules because they are public law rules that are not applicable by French courts beyond the borders of the sovereign that issued them.[93] Nevertheless, the majority of French cases support annulling contracts that violate foreign F.C.CR.'s so that the law on foreign currency obligations will be in line with French law on the choice of law rules especially the doctrine of *Fruade à Loi*.[94]

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[88] JACQUES FLOUR, JEAN-LUC AUBERT ET AL., LES OBLIGATIONS: LE RAPPORT D' OBLIGATION 110 (12th ed. 2007).

[89] CODE CIVIL [C.CIV] art. 1153 (Fr.); TERRÉ, *supra* note 75, at 611.

[90] PIERRE MAYER & VINCENT HEUZÉ, DROIT INTERNATIONAL PRIVE 499 (7th ed. 2001).

[91] Jean-Pierre Eck, *Place Actuelle de la Théorie du Paiement International dans le Droit Monétaire Français*, 53 R.C.D.I.P. 441 (1964).

[92] *Id.* at 662.

[93] *Id.*

[94] *Fruade à Loi* is a French choice of law doctrine that allows the court to disregard the normal operation of the choice of law rules if it believes that it was manipulated by a party

D. Egypt

1. Currency of Account

Egyptian law adopts nominalism and one would expect it to be applied to all debts regardless of the currency used.[95] However, according to the Egyptian Civil Code Official Explanatory Memorandum (the "Explanatory Memorandum"), the principle of nominalism applies to all debts denominated in EGP while the principle is applied to foreign currency obligations only if those currencies have a *cours legal*.[96] Foreign currencies that do not have a *cours legal* are not subject to the principle of nominalism. The Explanatory Memorandum explains that nominalism is not considered a matter relating to public policy and if the parties insert a clause in their contract that violates the *cours legal* of the currency then the Egyptian court will void that clause.[97] This is interesting considering Egypt's long history in imposing its F.C.C.R. to protect the Egyptian economy from imbalances in its balance of payments since the First World War.[98]

On the other hand, Egyptian law does not know the French law distinction between international and domestic contracts and as a result gold and index clauses are prohibited and as a general rule obligations that are to be enforced in Egypt should be denominated in EGP unless Egyptian law allows the parties to set their obligations in a foreign currency.[99] Articles 429

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for the sake of achieving an illicit gain such as avoiding mandatory rule, in our case the F.C.C.R. MAYER, *supra* note 74, at 520. For a more detailed discussion on the *Fraude à Loi* doctrine see, Géraud De La Pradelle, *Fraude à Loi*, TRAV. COM. FRA. DR. INT. PRIVÉ (1972-1974) 117.

[95] Article 134 of Law No. 131 of 1948 (the "Egyptian Civil Code") states that "[when the object of an obligation is a sum of money, the debtor is bound only to the extent of the actual figure of the sum of money stated in the contract, whatever be the increase or decrease in the value of such money at the date of payment. . . ." Law No. 131 of 1948 (Civil Code) *Al-Jarida Al-Rasmiyya*, 29 July 1948, §134 (Egypt).

[96] Al-Qanun al-madani: magmu'at al-a'mal al-tahdiriyyah, vol. 1, page 230. Article 134 is an echo of Article 241 of the old Egyptian Civil Code.

[97] *Id.* at 230.

[98] *See* Arvind Subramanian, *The Egyptian Stabilization Experience: An Analytical Retrospective*, IMF Working Paper, September 1997; C. Bresciani-Turroni, *Some Considerations on Egypt's Monetary System*, 1 REVUE AL QUANON WAL IGTISAD (1934); David Seddon, *The Politics of Adjustment: Egypt and the IMF* 1987-1990, 17 no. 47 REVIEW OF AFRICAN POLITICAL ECONOMY 95 (1990).

[99] Article 108 of Law No. 88 of 2003 (the "Law of the Central Bank") and Article 42 of the Presidential Decree No. 101 of 2004 (the "Executive Regulation of Law No. 88") exempts certain operations from the need to demonetize the obligations in EGP such as tourist operations, free trade zone operations, and financial instruments. Law No. 88 of 2003 (Law of the Central Bank, the Banking Sector, and Monetary Policy), *Al-Jarida Al-Rasmiyya*, 15 June 2003, Article 108 (Egypt); Presidential Decree No. 101 of 2004 (Promulgating the Executive

and 510 of the New Commercial Code, allows the parties to draw up negotiable instruments in a foreign currency, are an example of the above.[100]

2. Currency of Payment

The parties' freedom to denominate their obligations in a foreign currency is limited by statute. As a result, Egyptian courts will allow creditors to demand the payment in a foreign currency if Egyptian law allowed the parties to set their obligations in the foreign currency from the outset, as is the case under Article 510 of the Egyptian Commercial Code.[101] Thus in some circumstances, unlike French or English law, Egyptian law does not mandate that payment be in EGP.

Another important feature of Egyptian law is the distinction between the legality of the duty to pay the foreign currency debt and the legality of the method used in paying the debt. If Egyptian law allows the parties to denominate their obligations in foreign currency then the payment of that debt must occur according to Egyptian law through an authorized institution.[102] If the parties agreed through a clause in their contract that the payment should take place through black market operations in order to bypass the Egyptian F.C.C.R., then the Egyptian court will void that clause.[103]

3. Conversion Rules

As previously mentioned, Egyptian courts can issue judgments in a foreign currency but the Egyptian Cassation Court has not adopted a universal conversion rule. As discussed in the Explanatory Memorandum the Egyptian Civil Code draft used the Due Payment Day Rule as a basic conversion rule.[104] However, the revision committee decided to leave the matter for judicial discretion because it requires the consideration of the economic circumstances surrounding each individual case.[105] On the other hand, Article 510 of the Egyptian Commercial Code adopts the Due Payment

Regulations of the Law of the Central Bank, the Banking Sector and Money), 21 March 2004, Article 42 (Egypt).

[100] Law No. 17 of 1999 (Commercial Code), *Al-Jarida Al-Rasmiyya,* 17 May 1999, Article 429 & 510 (Egypt).

[101] Case no. 263/1989/Court of Cassation (Egypt); Case no. 2543/1990/Court of Cassation (Egypt).

[102] Law No. 88 of 2003 (Law of the Central Bank, the Banking Sector, and Monetary Policy), *Al-Jarida Al-Rasmiyya*, 15 June 2003, Article 111 (Egypt).

[103] Case no. 2479/1988/Court of Cassation (Egypt); Case no. 163/1989/Court of Cassation (Egypt).

[104] The Egyptian Civil Code Official Explanatory Memorandum, *supra* note 96, at 230.

[105] *Id.* at 231.

Day Rule for negotiable instruments,[106] while Article 429 adopts a creditor's choice conversion rule.[107] This means that, other than with cases involving negotiable instruments, an Egyptian court is not bound to follow a particular conversion rule. This leaves the Egyptian court freedom to adopt the French model of conversion rules though a case-by-case approach especially since Egyptian law does not allow courts to award damages beyond interest for injury resulting from the delay in paying a debt.[108]

4. Foreign Currency Control Rules

Egyptian courts enforce the Egyptian F.C.C.R. vigorously because of Egypt's economic situation requiring tight control over transactions involving foreign currencies.[109] As a result, the Egyptian courts have characterized the F.C.C.R. as being related to Egyptian public policy that may override the parties' agreement[110] and it can be applied to all contracts involving foreign currency, even retroactively.[111] However, I could not find any Egyptian judgment dealing with the enforcement of a foreign F.C.C.R., which could be explained by several reasons. First, Egypt is not an international financial center such as the U.S., England, or France, which makes it less likely for the Egyptian courts to hear cases about enforcing foreign currency obligations. Second, Egypt adopted a command economy during the mid-1950's through the 1990's which left little or no room for individuals to use foreign currencies in their contracts.[112] Third, the presence of an extensive F.C.C.R. in Egyptian law made it more likely that disputes heard before the Egyptian courts involved evading the Egyptian F.C.C.R. and not a foreign F.C.C.R.

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[106] Law No. 17 of 1999 (Commercial Code), *Al-Jarida Al-Rasmiyya,* 17 May 1999, Article 429 (Egypt).

[107] The creditor has the choice between the rate of exchange when the bill of exchange was due or the rate of exchange when the bill of exchange was paid if the payee did not honor the bill of exchange. Law No. 17 of 1999 (Commercial Code), *Al-Jarida Al-Rasmiyya,* 17 May 1999, Article 429 (Egypt).

[108] Article 226 of the Egyptian Civil Code; Ramadan Abuel Seoued, Ahkam Al-Iltizam, 150 (2008). I believe that the Egyptian Courts should model their conversion rules according to the attitude of the parties, the plaintiff-creditor and the defendant-debtor, as in article 429 of the New Commercial Code which gives the creditor the choice if the bill of exchange was not honored.

[109] *See* Denis J. Sullivan, *The Political Economy of Reform in Egypt*, 22 INT'L J. MIDDLE EAST STUDIES 317 (Aug. 1990).

[110] Case no. 1332/1981/Court of Cassation (Egypt); Case no. 385/1985/Court of Cassation (Egypt).

[111] Case no. 1617/1997/Court of Cassation (Egypt).

[112] Farouk Abdelwahed, *Egypt's Road to a Mixed Economy*, 18 MGMT. INT'L REV. 23 (1978).

E. General Remarks

One can draw from the law on foreign currency debts several observations. First, the parties' freedom to choose a currency for their contract is not absolute. Their freedom can be restricted by the need to meet certain requirements, such as the need to have an international contract, as in French law, or to respect the national F.C.C.R., as in Egyptian law. Second, the place of payment plays an important role in determining the modes and methods through which a debtor can pay his creditor. The place of payment will determine if the foreign currency has legal tender status because if that is not the case then the debtor can legally discharge his debt by paying through the domestic currency irrespective of the parties' original choice of currency. Third, the parties' selection of a given currency is considered a reference to the issuing state's law to determine what constitutes that currency. Therefore, the parties can provide a definition for their currency other that provided by the issuing state. Fourth, nominalism is applied by all jurisdictions to all foreign currency debts in the same manner the principle is applied to all domestic currency debts. Fifth, the courts in the surveyed jurisdictions will attempt to convert their domestic currency judgments into the foreign currency chosen by the parties using the conversion rule that achieves substantive justice because they cannot award any damages beyond interest. To that end, courts will try not to adhere to a conversion rule that will harm a party acting in good faith whether that party was the creditor or the debtor. Alternatively, the courts will try to issue their judgments in the foreign currency in question, if they may do so, to avoid using conversion rules. Finally, the courts enforce their own countries' F.C.C.R.'s, but tend not to apply foreign F.C.C.R.'s even though the surveyed jurisdictions are members of the IMF.

III. Evaluation of the Choice of Law in Foreign Currency Debts

How do we explain the current law on foreign currency debts through the choice of law doctrines used by the courts? In other words, is there a single choice of law doctrine that could explain how the courts apply the law on the foreign currency debts? Do the courts use the choice of law doctrines properly? I will examine the party autonomy and place of payment as choice of law rules or what I call "Positive Indicators." These "Positive Indicators" allow the courts to apply both the *lex fori* and foreign law to resolve choice of law issues related to foreign currency debts beside the public policy and foreign revenue rule choice of law doctrines or what I will call "Negative Indicators" that prevent the courts from applying foreign laws.

A. Positive Indicators

The Positive Indicators are the choice of law rules that allow courts to apply either their laws or foreign laws to foreign currency debts. In Part One, I examined three positive indicators: (1) the party autonomy choice of law rule, (2) the *lex loci solutionis*, and (3) Article VIII 2(b) of the IMF agreement. Here, I will evaluate how courts in the surveyed jurisdictions have applied these rules in light of the prevailing choice of law jurisprudences in their jurisdictions.

1. Party Autonomy

Party autonomy is a very simple choice of law rule. Under this rule, the parties have the freedom to choose the law governing their contract as part of their general freedom to contract.[113] Therefore, when the parties choose a law to govern their contract, that law will determine all legal issues under it, including the duty to pay a foreign currency debt.[114] Accordingly, the party autonomy choice of law rule mandates, at least in theory, that if the parties choose a certain currency for payment, or use a variable indicator for setting their rights such as gold clauses or index clauses as a device for hedging against inflation and depreciation, then their choices should be enforced.

Nonetheless, the courts in the surveyed jurisdictions do not consider the parties' freedom of contract to be absolute and, as a result, the party autonomy choice of law rule's scope of application is restricted by excluding several issues such as defining the currency of contract and the legality of gold or index clauses. All the surveyed jurisdictions define the currency of contract through the *lex pecuniae*, while some courts in the surveyed jurisdictions consider the legality of the gold and index clauses to be a matter resolved through the *lex loci solutionis*. The same thing occurs with the most crucial part of the contract, the payment of the foreign currency denominated debt, where the party autonomy choice of law rule is replaced with the *lex loci solutionis*.

It is true that the construction of the duty to pay the foreign currency debt is done according to the *lex contractus*, but it is the *lex loci solutionis* that determines how the debtor may pay. If the *lex loci solutionis* allows the debtor to pay his debt in the domestic currency because it has legal tender status or prohibits the payment of the debt in a foreign currency, then this will override any agreement to the contrary. This leads to the following

[113] MAYER & HEUZE, *supra* note 90, at 472.

[114] F.A. MANN, THE LEGAL ASPECT OF MONEY: WITH SPECIAL REFERENCE TO COMPARATIVE PRIVATE AND PUBLIC INTERNATIONAL LAW 442 (5th ed. 1992); J.G.G. *supra* note 20, at 220; Anthony G. Guest, *Instruments Denominated in a Foreign Currency*, 27 AM. J. COMP. L. 533, 534 (1979).

question: are the courts applying the *lex loci solutionis* as the primary choice of law rule in regards to foreign currency debts?

2. Lex Loci Solutionis

The *lex loci solutionis* is a simple choice of law rule. The court applies the law of the place where the payment takes place. As we have seen previously, the courts in the surveyed jurisdictions consider the *lex loci solutionis* to be the only applicable law rule to determine the acceptable means, including the currency of payment, which the debtor may use to pay.[115] Nonetheless, the courts in the surveyed jurisdictions have not explained why the *lex loci solutionis* has an overriding power over the parties' choice of law. There are two possible explanations: either the courts apply the *lex loci solutionis* as part of the parties presumed choice of law or they apply the *lex loci solutionis* as a mandatory rule.

The application of the *lex loci solutionis* as a part of the parties' choice of law can be explained through adopting a part reference approach to the party autonomy choice of law rule. This means that the parties' choice of law is a choice of legal system, including that system's choice of law rules, even if they may result in voiding the contract itself or frustrating the parties' intentions.[116] In other words, the parties' choice of law indicates their willingness to submit the contract to the chosen law.[117]

However, this is not a satisfactory explanation for several reasons. First, if the parties' choice of law is the basis for applying the *lex loci solutionis* then it would be more reasonable to enforce the parties' express choice of law instead of their presumed choice of law. This means that the *lex contractus* should prevail over the *lex loci solutionis*. Second, not all courts and choice of law scholars agree that the party autonomy choice of law rule should be dealt with a reference approach. On the contrary, there are those who believe that the best approach to party autonomy should be the incorporation of the chosen law into the contract.[118] Therefore, it will not be possible for the court to ignore the *lex contractus* under any circumstance because the contract is the only legal framework it may use.[119] Third, none of the case law on the subject suggests, even remotely, that the parties' explicit choice of the *lex loci solutionis* is the basis for applying that law instead of the *lex contractus*.

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[115] *See supra* text accompanying note 4.

[116] Mo Zhang, *Parties Autonomy & Beyond: An International Perspective of Contractual Choice of Law*, 20 EMORY INT'L L. REV. 511, 530 (2006); Jean-Michel Jacquet, *L'Incorporation de la Loi dans le Contrat*, TRAV. COM. FRA. DR. INT. PRIVÉ (1993-1994) 24, 27.

[117] MAYER & HEUZE, *supra* note 90, at 481.

[118] Zhang, *supra* note 1166, at 530; RESTATEMENT (SECOND) ON THE CONFLICT OF LAWS §183 (1972).

[119] Jacquet, *supra* note 1166, at 27.

On the other hand, applying the *lex loci solutionis* as a mandatory rule has its logic. Mandatory rules, in a strict sense, reflect the state organization of a certain field of law that cannot be overridden by contract.[120] This is the case with rules governing foreign and national currency because no currency can function, legally or economically, without a monetary system set up through a set of rules.[121] For example, no currency can act as a medium of exchange unless it has the status of legal tender that forces creditors to accept it as a means to discharge debts or else the creditors, alongside other market actors, could choose to refuse payment in that currency.[122]

Usually, mandatory rules are enforced through either a built in criterion[123] or through a choice of law analysis that aims at defining the mandatory rule's scope of application through discovering the policy behind enacting that rule.[124] An example of the built in criterion is Article 42 of the Egyptian Central Bank Law's Executive Regulation. Article 42 states that "[a]ll operations taking place in Egypt should be denominated in Egyptian Pounds."[125]

Nonetheless, the above should have directed the courts to enforce the F.C.C.R. at the *lex loci solutionis* along with any prohibitions irrespective of the parties' will or the *lex contractus* in order to prevent them from evading those rules where the court has ignored a foreign F.C.C.R. This is not what we have seen in the law on foreign currency debts. In addition, the courts tend to follow their own conversion rules to convert their judgments form the forum's currency to the foreign currency in question without any reference to the *lex loci solutionis* even if this means jeopardizing not only the creditor's

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[120] Ph. Francescakis, *Quelques Précisions sur les "Lois D'Application Immédiate" et leurs Rapports avec les Règles sur les Conflits de Lois*, 55 R.C.D.I.P. 1, 13 (1966); Thomas G. Guedj, *The Theory of the Lois de Police: A Functional Trend in Continental Private International Law: A Comparative Analysis with Modern American Theories,* 39 AM. J. COMP. L. 661, 678 (1991); YVON LOUSSOUARN ET PIERRE BOUREL, PRÉCIS DE DROIT INTERNATIONAL PRIVÉ 121 (1999); F. Mosconi, *Exceptions to the Operation of Choice of Law Rules*, 217 RECUEIL DES COURS 9-214, 139-40 (1989).

[121] Geneviève Burdeau, *L'Exercice des Compétence Monétaries par les États*, 212 RECUEIL DES COURS 221-370, 235 (1988).

[122] There is a phenomenon known as "currency substitution" where a foreign currency replaces, totally or partially, the domestic currency as a store of value, medium of exchange and as a unit of account. *See* Mohamed El-Erian, *Currency Substitution in Egypt & The Yemen Arab Republic: A Comparative Quantitative Analysis*, 35 IMF STAFF PAPERS no. 1 at 85 (March, 1988).

[123] Guedj, *supra* note 1200, at 665; UKASHA ABDEL EL, TANAZ' AL QUANEEN: DIRASHA MUQARNAH 474 (2002).

[124] LOUSSOUARN & BOUREL, *supra* note 1200, at 123; Franceskis, *supra* note 1200, at 17.

[125] Presidential Decree No. 101 of 2004 (Promulgating the Executive Regulations of the Law of the Central Bank, the Banking Sector and Money), 21 March 2004, Article 42 (Egypt).

interest in receiving payment in the currency he bargained for but also neglecting the place of payment's interest in enforcing its F.C.C.R.[126]

3. *Article VIII(2)(b) of the IMF Agreement*

Article VIII(2)(b) of the IMF Agreement is the last positive indicator used by the courts to justify their decisions on foreign currency debts. According to Article VIII(2)(b), "exchange contracts which involve the currency of any member and which are contrary to the exchange control regulation of that member maintained or imposed with this agreement shall be unenforceable in the territories of any member."[127] This Article clearly states that a contract that violates the F.C.C.R. of any member of the IMF Agreement shall be enforceable if the F.C.C.R. was maintained according to the IMF Agreement. Article VIII(2)(b) is a codification of a well-established rule of international law that imposed the duty on every state to respect the monetary sovereignty of other states. Monetary sovereignty is the prerogative power of the states to issue, replace or abolish its own currency along with establishing the foreign currency exchange regime that best suits the state's interests.[128]

The IMF was established, partly, to monitor the exercise of the monetary sovereignty of the member states in order to prevent members from abusing their monetary sovereignty, avoid currency wars, and protect the stability of the international monetary system.[129] As a result, a member state that wishes to adopt an F.C.C.R. or an official exchange rate between its currency and a foreign currency must notify the IMF first.[130] The IMF will then inform the other members.[131] In this case all member states of the IMF are obliged to enforce the other member state's F.C.C.R. to the extent that their courts cannot use their own public policy as a bar against enforcing those rules.[132] However, this does not help explain the current law on foreign currency debts because several courts have ignored that rule when faced with defenses based on the application of another nation's F.C.C.R. This brings us to the following question: why did the courts ignore the application of Article VIII(2)(b)?

I believe that courts could not rely on Article VIII(2)(b) despite their willingness, in general, to avoid contracts that were concluded with the

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[126] Guest, *supra* note 114, at 535.
[127] Bretton Woods Agreement, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39, as amended through June 28, 1990, available at http://www.imf.org/external/about.htm.
[128] Burdeau, *supra* note 1211, at 229; ROSA M. LASTRA, LEGAL FOUNDATIONS OF INTERNATIONAL MONETARY STABILITY 23 (2006).
[129] Bernard Audit, Note, 1 J.D.I. 66, 71 (1975); Burdeau, *supra* note 1211, at 257.
[130] JOSEPH GOLD, EXCHANGE RATES IN INTERNATIONAL LAW AND ORGANIZATION 113 (1988).
[131] Art VIIIIII § 5 IMF Agreement (1944).
[132] Audit, *supra* note 129, at 113.

purpose to evade foreign law without the need for an express rule such as Article VIII(2)(b). This lack of reliance is caused by the manner in which Article VIII(2)(b) was drafted. The rule was drafted so ambiguously that it cannot be a clear authority on how courts should handle an F.C.C.R.

For instance, the phrase "exchange contract" is not defined in the IMF Agreement. Some writers and courts believe that the word "exchange contract" is limited to contracts that involve the exchange of one currency for another.[133] Others believe that the phrase should have a wider meaning to include all contracts that involve payment, which virtually includes all contracts that use foreign currency given that the purpose of Article VIII(2)(b) is to protect the member states' foreign currency reserves from depletion.[134] Other writers believe that the phrase should include all forms of transactions, whether or not in contract form, that have an effect on the member state's foreign currency reserves.[135] Another example of the difficulties the courts face while implementing Article VIII(2)(b) is interpreting the word "currency". Is the word "currency" a reference to the currency of the member states, which is the traditional interpretation of the word in light of Article VIII(2)(b)? Or does the word "currency" refer to all methods of payment such as gold coins, titles of ownership, and negotiable instruments, since they are usually subject to a F.C.C.R.?[136]

Even if the courts were able to find an appropriate interpretation for Article VIII(2)(b), the penalty for violating the rule is not clear. Article VIII(2)(b) states that a contract that violates the F.C.C.R. of a member state is unenforceable in the courts of all IMF members, but does this means that the contract creates an *obligation naturalis*[137] or does it mean that the contract is null and void?[138] Another question that arises is, when is the contract to be considered unenforceable? Article VIII(2)(b) does not offer direction in this regard. Do we look to the F.C.C.R. at the time the contract was concluded[139] or the time the parties sought to enforce the contract?[140]

Finally, Article VIII(2)(b) does not have a clear structure. If we consider that Article VIII(2)(b) is a choice of law rule, then what type of

[133] F.A. Mann, *The Private International Law of Exchange Control Under the IMF Agreement*, 2 INT'L & COMP. L.Q. 97, 101; Elisa Kripis, *Money in International Private Law*, 120 RECUEIL DES COURS 192-306 (1967).
[134] Audit, *supra* note 129, at 70. *See also* Mann, *supra* note 133, at 101.
[135] Kripis, *supra* note 1333, at 288.
[136] The Court in J. Zeevi & Sons, Ltd. v. Grindlays Bank, Ltd. (Uganda), 37 N.Y.2d. 220 (1975) held that "currency" is restricted to the literal meaning while other writers see otherwise. *See e.g.*, Mann, *supra* note 133, at 102.
[137] Hans W. Baade, *The Operation of Foreign Public Law*, 30 TEX. INT'L L.J. 429, 472 (1995); Kripis, *supra* note 133, at 298.
[138] Mann, *supra* note 1333, at 102.
[139] *Id.* at 370.
[140] Kripis, *supra* note 1333, at 297.

choice of law rule is it? If we consider it a traditional choice of law rule then it must have a connecting factor and if the connecting factor is the currency we have several problems. First, the parties might choose one currency as the currency of account and choose another as the currency of payment. Which "currency" should we use to implement Article VIII(2)(b), the currency of account or the currency of payment? Second, if we choose the currency as a connecting factor then this means that the applicable F.C.C.R. will be the one included in the *lex monetae*. Nonetheless, there are writers who believe that the proper application of Article VIII(2)(b) requires that we apply the F.C.C.R. of the member state whose foreign currency reserves are affected.[141] In other words, the courts should apply the F.C.C.R. of the *lex partimoni* instead of the *lex monetae*.

On the other hand, we cannot consider Article VIII (2)(b) as an expression of a forum's legislative policy on how courts should handle foreign currency debts that can be used in forming a “government interest” analysis or a “most significant relationship choice of law” analysis because Article VIII(2)(b) merely directs the member state courts to respect other member states F.C.C.R. If we use government interest analysis, as a choice of law analysis, while implementing Article VIII(2)(b) this would allow the courts to refuse the application of the F.C.C.R. either to advance the forum's interest when the court finds that applying the F.C.C.R. to the merits of the case will have adverse effects on the forum's interests[142] or when ignoring the F.C.C.R., instead of enforcing it, will benefit the forum's citizens.[143] The same results will occur if the court adopts a choice of law analysis based on the most significant relationship because the court should consider that it is advancing the forum's interest as a factor under this approach when implementing the Article VIII(2)(b), which will open the door to reach similar results had the court adopted a government interest analysis.[144]

Second, if we consider Article VIII(2)(b) to be a substantive rule then it will be useless because we will be limiting its scope of application to the instances where the forum's law is the applicable law. For example, if the forum was an American court and Article VIII(2)(b) was a substantive federal law then it would be applied if the applicable law was a U.S. state or federal law because it would be both the *lex contractus* and *lex loci solutionis*.

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[141] *Id.* at 290-1; Mann, *supra* note 133, at 103.

[142] A. Hill, *Governmental Interest Analysis and the Conflict of Laws - A Reply to Professor Currie*, 27 U. CHI. L. REV. 463, 481 (1960).

[143] Mahmood Bagheri, *Conflict of Laws, Economic Regulations and Corrective/Distributive Justice*, 28 U. PA. J. INT'L. ECON. L. 113, 121 (2007).

[144] Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Laws*, 41 N.Y.U. L. REV. 267 (1966); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1589, 1585 (1966).

However, if the applicable law is a foreign law then Article VIII(2)(b) as a substantive federal rule of law would not be applicable. In this case, if Article VIII(2)(b) was not a part of the *lex contractus* or the *lex loci solutionis* the F.C.C.R. of a member state will not be enforced and the contract that violated that member state's F.C.C.R. will be enforceable contrary to the purpose of Article VIII(2)(b). Some might say that all jurisdictions should follow the English courts' lead by applying the F.C.C.R. as a part of the *lex contractus* or the *lex loci solutionis*.[145] In my opinion, this leaves room for the parties to evade the member state's F.C.C.R. by selecting a law governing their contract and a place of payment that does not have a substantive rule that implements Article VIII(2)(b) or contains a less restrictive F.C.C.R .

To conclude, Article VIII(2)(b) does not provide clear authority for courts to apply the F.C.C.R.'s of other nations due to the Article ambiguous drafting. As a result, the outcome of any case will depend on how the court constructs Article VIII(2)(b) before applying it to the particular facts of the case. This explains why the courts hesitate to enforce other nations' F.C.C.R.'s despite what appears to be clear authority in the IMF Agreement to do so.

B. Negative Indicators

I previously mentioned that there were two negative indicators used by the courts to justify their rules on foreign currency debts. Public policy was used as an excuse for not enforcing other nation's F.C.C.R.'s because their application would create results repugnant to the forum's public policy. Other courts resorted to the Foreign Revenue Rule Doctrine to justify their refusal to enforce the F.C.C.R.'s of other nations, treating them as revenue rules which have a territorial scope of application. In this section, I will examine both indicators to see if they are truly is an obstacle against enforcing foreign F.C.C.R.'s.

1. Public Policy

As we have seen in Part I, some courts refused to apply foreign F.C.C.R.'s as a matter of public policy. Here I will answer the following question: do those public policies actually prevent a court from enforcing the F.C.C.R.'s? To answer this question we have to define public policy.

Public policy is the fundamental principle of the forum's legal system that cannot be disregarded when the court applies a foreign rule of law.[146] In

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[145] Friedrich K. Juenger, *A Third Conflicts Restatement*, 75 IND. L.J. 403, 405 (2000).

[146] Mosconi, *supra* note 120, at 62; Monard G. Paulsen & Michael I. Sovern, *The Pubic Policy in the Conflict of Laws*, 56 COLUM. L. REV. 969, 981 (1956); Holly Sprague, *Choice of Law: A Fond Farewell to Comity and Public Policy* , 74 CALIF. L. REV. 1447, 1450 (1986); Andreas Bucher, *L' Ordre Public et le But Social des Lois en Droit International Privé*, 239 RECEUIL DES COURS 9-116 (1993).

other words, public policy represents the core values or prudential considerations of a forum that foreign rules of law must not violate in order to be enforced.[147] An example is a forum's refusal to apply a foreign rule of law that allows the sale of human organs or facilitates illicit transactions such as trafficking in persons.

An important feature of public policy as a legal concept is that its content differs from one jurisdiction to another and can change within the same jurisdiction depending on socio-economic development.[148] The elastic nature of public policy draws criticism from writers who see it as an easy escape device that allows courts to avoid unwanted results.[149] Nonetheless, public policy is used by the courts when two requirements are met.

The first requirement is that the application of foreign law would produce effects that are not compatible with the forum's values. Therefore, the mere difference in the content between the foreign F.C.C.R. and the corresponding rule in the forum's F.C.C.R. should not be a sufficient basis to use the forum's public policy as a bar against enforcing the foreign F.C.C.R.[150] In order for the court to use public policy as a bar against enforcing the foreign F.C.C.R., it must, for instance, deprive the creditor of the foreign currency through confiscation without indemnity or discriminate between domestic creditors and foreign creditors.

The second requirement is the presence of a sufficient relationship between the forum and the facts of the case, to ensure that the forum's core values are indeed in danger of harm if the forum enforces the foreign rule of law.[151] Therefore, an American court, whether state or federal, should not use the forum's public policy if the case was about enforcing the Egyptian F.C.C.R. on a contract of sale made in France and denominated in euros. In this example, there is no relationship between the court and facts of the case to suggest that the forum's core values would be harmed if the Egyptian F.C.C.R . was enforced.

Even when the above requirements are present, the court does not have full freedom to disregard the foreign law. The court will only have the power to refuse to apply those that are repugnant to the forum's public policy and to replace those repugnant rules with corresponding rules from

[147] Bucher, *supra* note 146, at 47; UKASHA, *supra* note 123, at 468.
[148] Mosconi, *supra* note 120, at 80; UKASHA, *supra* note 123, at 492.
[149] AUDIT, *supra* note 74, at 264; Bucher, *supra* note 146, at 66.
[150] UKASHA, *supra* note 123, at 511; Mosconi, *supra* note 120, at 66.
[151] Home Insurance Co. v. Dick, 281 U.S. 397 (1930) (upheld the Texas Supreme Court's decision to refuse the Texas public policy defense to bar an action made by the insured against the insurance company because the insurance policy was made to cover the danger of fire over a vessel within the Mexican waters). *See also* Holzer v. Deutsche Reichsbahn Gesellschaft, 277 N.Y. 474 (1934); Dougherty v. Equitable Life Assurance Soc., 266 N.Y. 71 (1934); Boardman v. United Servs. Auto. Assoc., 470 So. 2d 1024 (Miss. 1985); Paulsen & Sovern, *supra* note 146, at 970; AUDIT, *supra* note 74, at 270.

the forum's law, if possible.[152] In other words, the forum's law might not completely replace the foreign law. For instance, suppose that a French court saw that an Egyptian F.C.C.R. rule had a discriminatory effect on a contract made in France to export perfumes to Egypt and the contract was denominated in Egyptian pounds. In this case, the French court should not replace the Egyptian F.C.C.R as a whole and replace it with the French F.C.C.R., but it should replace the Egyptian F.C.C.R. rule that has the discriminatory effect while applying the rest of the Egyptian F.C.C.R. as is.

Nevertheless, despite the above being the logical consequence to the use of public policy as a defense against enforcing a foreign F.C.C.R, it does not explain the current law on foreign currency debts. It is true that some American courts, both state and federal, refuse to apply a foreign F.C.C.R. under the pretext of protecting public policy, but the use of the public policy was not done as previously explained. It is not clear why American courts find foreign F.C.C.R.'s repugnant to public policy nor have they established in their reasoning a sufficient connection between the court and the facts of the case to justify the use of the public policy defense. In fact, the courts should have refrained from resorting to the public policy defense due to the IMF Agreement prohibition on member states' courts resorting to public policy as a bar against enforcing any F.C.C.R. compatible with the IMF Agreement.[153]

In conclusion, the public policy defense has been inappropriately used by courts to avoid enforcing F.C.C.R.'s despite being required to do so under the IMF Agreement. Public policy as a defense against applying foreign law does not give the courts absolute power to ignore the foreign law unless there is a strong violation of the forum's core values. This is not the case with foreign F.C.C.R.'s.

2. Foreign Revenue Rule Doctrine

The Foreign Revenue Rule Doctrine has been used by courts in several jurisdictions as an excuse for not enforcing an F.C.C.R. Under this doctrine, foreign revenue rules have only a territorial scope of application and therefore are not applicable beyond the borders of the sovereigns that issued them.[154]

The conventional wisdom behind the Foreign Revenue Rule Doctrine is that foreign penal rules or public law rules could not be applied by a court outside the sovereign that issued those rules because that would require

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[152] Nevcal Enterprises, Inc. v. Cal-Neva Lodge, Inc., 194 Cal. App. 2d 177 (1961); AUDIT, *supra* note 74, at 274.

[153] United States v. Pink, 315 U.S. 203 (1942); Perutz v. Bohemian Discount Bank in Liquidation, 304 N.Y. 533, 537 (1953).

[154] Att'y Gen. v. Lutwydge (1729) 145 Eng. Rep. 675 (Ex. Div.); Holman v. Johnson, (1775) 98 Eng. Rep. 1120, 1121 (K.B.); Kripis, *supra* note 133, at 283.

allowing the court to review the validity of another state's revenue laws in light of the court's own constitutional requirements, which is not consistent with the court's respect for the other state's sovereignty.[155] For example, if an F.C.C.R. contains a criminal penalty for selling foreign currency in an unofficial market then this penalty cannot be enforced by a foreign court unless that criminal penalty meets the constitutional requirements within the forum's law. If the F.C.C.R.'s criminal penalty did not meet the constitutional requirements of the forum's law then that would prevent the court from enforcing it.

Nonetheless, I believe that courts have used the Foreign Revenue Rule Doctrine inappropriately as a bar against enforcing foreign F.C.C.R.'s just as other courts have with the public policy defense. First, F.C.C.R.'s are not revenue or tax law rules or penal rules because they are mandatory substantive rules that aim at regulating the movement of foreign currency to protect foreign exchange resources.[156] Second, there is no direct legal bar against enforcing other nations' foreign revenue rules if they do not prescribe criminal penalties.[157] A foreign revenue rule that mandates the payment of taxes or compliance with certain procedures is no different than a foreign rule that mandates compensation for injuring a creditor or requires the registration of a land conveyance. Even if a foreign revenue rule contains a criminal sanction, it is always possible to exercise *dépeçage* in order to separate the civil aspects of the rule in question from its criminal aspects and to apply the earlier only to the case.[158] Third, some courts have in fact enforced foreign revenue rules as a part of the *lex contractus* or the *lex loci solutionis* and courts have referred to the foreign currency rules to define what constitutes the foreign state's currency and the acceptable modes of payment. This means that even if a court treats a F.C.C.R. as a foreign revenue rule, it is not *per se* a sufficient reason for not applying those rules.

To conclude, the Foreign Revenue Rule Doctrine is not a hurdle against enforcing the F.C.C.R.'s of other nations, rather, it is the courts' unwillingness to engage in enforcing the foreign F.C.C.R.'s. Courts are capable of enforcing those rules but choose not to. This is counter-intuitive to the purpose of Article VIII § 2 (b) that aims at regulating the monetary relations between member states and the need to ensure mutual respect of monetary sovereignty as a governing principle of public international law.

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[155] Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929); P.B. Carter, *Transnational Recognition and Enforcement of Foreign Public Laws*, 48 C.L.J. 417, 423 (1989). For more detailed discussion on the foreign revenue doctrine see Brenda Mallinak, *The Revenue Rule: A Common Law Doctrine for the Twenty-First Century*,16 DUKE J. COMP. & INT'L L. 79 (2006).

[156] John S. Williams, *Enforcement of Foreign Exchange Control Regulations in Domestic Courts*, 70 AM. J. INT'L L. 101, 105 (1976); A.W.B. & Berrein, *supra* note 41, at 70; Kripis, *supra* note 133, at 284; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. § 822 cmt. (1987).

[157] Mosconi, *supra* note 120, at 134; Carter, *supra* note 155, at 423.

[158] Kripis, *supra* note 133, at 284.

IV. Suggested Approach

In this part, I will discuss the choice of law approach that would best govern the current law on foreign currency debts in a manner that is both clear and predictable without sacrificing the need for individual justice. As mentioned in Part II, none of the positive or negative choice of law indicators alone is capable of providing a clear basis for explaining the current state of the law. This drove me to suggest a hybrid approach that combines the party autonomy choice of law rule and the mandatory rule approach. I believe that a balance must be struck between parties' needs to choose the law and the currency of their contracts and the need to enforce all F.C.C.R.'s in accordance with the IMF Agreement's aim of a stable international monetary system.[159]

I suggest that courts apply the party autonomy choice of law rule to determine all issues relating to foreign currency debts as a general rule. This means that determining whether a certain currency is the currency of account or currency of payment should be done according to the *lex contractus*. The same law will be used in defining the species of the currency used or in constructing and determining the legality of any gold or index clauses. The same solution should be followed with conversion rules if the court is not capable of issuing its judgment in a foreign currency. This would eliminate the discrepancies among the conversion rules followed by the courts because they will apply the conversion rule provided by the *lex contractus*. If the *lex contractus* does not provide a conversion rule then the court should look for the conversion rule that corresponds to the parties' expectations. As previously explained, conversion rules used by the courts are not meant to be procedural rules but instead are meant to be used to achieve substantive justice.[160] The lack of uniformity would be eliminated by leaving the substantive issue of conversion to the law that governs all other substantive issues related to the foreign currency debt, the *lex contractus*.

At the same time, Article VIII(2)(b) should be interpreted as a mandatory rule within the forum's law that mandates the unenforceability of any contract that violates an F.C.C.R. whether domestic or foreign. This rule should be enforced to ensure that all issues relating to the currency as an element of a state's monetary system should be resolved according to that state's law irrespective of the parties' choice of law. For example, the definition of what constitutes U.S. dollars should be made according to American federal law. However, this does not mean that Article VIII(2)(b) should be used as a choice of law rule that uses the currency of contract as a

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[159] Philip J. McConnaughay, *Reviving the Public Law Taboo in International Conflict of Laws*, 35 STAN. J. INT'L L. 255, 290 (1999).

[160] *See* Patrick Kinsch, *Principale D' Égalité et Conflit de Lois*, TRAV. COM. FRA. DR. INT. PRIVÉ 117, 130 (2002-2004); RESTATEMENT (FIRST) ON CONFLICT OF LAWS § 1-7 (1934).

connecting factor because it states that the court is to apply the F.C.C.R.'s of other member states if the contract in question "involve the currency of any member." Therefore, if a contract affects or involves the currency of any member state, then, that should be a sufficient basis for applying that member state's F.C.C.R.

Suppose that an Egyptian car dealer reached an agreement with an American car manufacturer to export hybrid cars to Egypt, with the Egyptian buyer agreeing to pay for the cars in U.S. dollars. In this case, the court should look at the details of the method of payment to determine whether the Egyptian pound was involved in the transaction. If the Egyptian buyer was supposed to pay for the cars using U.S dollars deposited in his Egyptian bank account, or by converting Egyptian pounds into U.S. dollars, then the contract must not violate the Egyptian F.C.C.R. In the first case, the Egyptian seller is transferring overseas U.S. dollars held in his bank account in Egypt, which affects the Egyptian balance of payments and Egyptian monetary system. In this situation, U.S. dollar holdings in Egypt will decrease; as so, the transaction should be regulated according to the Egyptian F.C.C.R. to maintain the stability of the Egyptian monetary system. In the second situation, the payment occurs after converting the Egyptian pounds into U.S. dollars. Once again, this transaction affects the Egyptian balance of payments and the Egyptian monetary system. In both cases, if the parties did not respect the Egyptian F.C.C.R., then Egypt's U.S. dollar holdings will fluctuate beyond Egypt's control and the exchange rate between the Egyptian pound and the U.S. dollar will be left for the individuals to decide rather than the Egyptian Central Bank. Here, Article VIII(2)(b) mandates that the Egyptian F.C.C.R. should be respected by the parties.

In other words, the phrase "involve the currency of any member state" should be interpreted as a requirement for a substantial relationship between the contract in question and the F.C.C.R. of any member state. This should not be a novelty for the courts because, as previously mentioned, this was used with the public policy defense. The only difference is that I suggest extending this view to treat F.C.C.R.'s as mandatory rules. The substantial relationship should be based on the possible effects that the contract has on the monetary system of any member state. This suggestion will help us clear out the current law on foreign currency debts for several reasons.

First, my suggestion makes use of the party autonomy as the basic choice of law rule for all legal issues related to foreign currency debts. This means that the parties' choice of law will be respected and will not be ignored unless necessary. Second, this approach allows the courts to apply F.C.C.R.'s, whether domestic or foreign, through a choice of law rule that will be predictable and consistent because parties will know beforehand which F.C.C.R. applies to their contract. It would also avoid any under-regulation resulting from evasion of F.C.C.R.'s through forum shopping.

V. CONCLUSION

In this article, I demonstrated that the law on foreign currency debts is currently divided into four separate choices of law issues governed by four different choices of law doctrines. This is caused by the inappropriate use of the choice of law doctrines as the courts tried to achieve substantive justice in every individual case involving foreign currency. The result of this is the vagueness of the rules resolving choice of law issues in foreign currency debts while distorting the choice of law doctrines in the process. I suggest an alternative, which is the use of a single choice of law: the party autonomy choice of law rule that should be applied unless that will violate a mandatory rule of an IMF member state.