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I. Introduction

ties' limitation of liability provisions that are stated in gold based terms. Since gold has been demonetized, these limitations have no agreed upon monetary value.

Legislative bodies, domestic and international courts, and scholars have generally failed to separate certain issues relating to gold based conventions. These issues concern: (1) the selection of a unit of account; and (2) maintenance of value considerations in the face of inflation. Furthermore, there exists an overriding concern whether there should be limitation of liability in some gold-based conventions.

Proposals advanced by this Article present some of the methods of renegotiation used in redefining the appropriate limits of liability. This Article concludes that a market price interpretation of the gold clause applied on an ad hoc basis would presently serve as the most useful remedy.

II. VALUE MAINTENANCE IN THE FACE OF INFLATION

Value is most commonly undermined by inflation, which "inevitably leads to a reduction in the purchasing power (or real value) of any fixed amount of money over time." Maintaining the value of nominally-fixed liability limitations in international conventions presents a problem because if there is inflation, the real value of these limits will decline over time. This consideration, however, is entirely separate from the issue of whether liability should be limited in international conventions. If there were no limitations of liability, value considerations would be moot. In the absence of limitation of liability, actual losses could be offset to a degree in an inflationary economy by insurance or other methods of risk allocation. Obviously, proposals that address maintenance of value problems do not address the fundamental issue of whether there should be any limits of liability in international conventions.


2. See infra text accompanying notes 77-113.


The value of money depends on the service it performs for its user. Money can be a means of payment, measure of value, and a store of value.\(^5\) Public confidence in the value of money governs its intrinsic worth. The psychological acceptance of the value of a $10.00 gold piece is subject to different interpretations. Metallism postulates that the weight and quality of precious metal determines the value of a coin rather than the face value of the coin. Nominalism presumes that the value of money is always its face value. The use of nonconvertible paper money ultimately doomed the metallist approach. Despite this development, holders of nonconvertible paper currency experienced a psychological hallowness. Paper is merely paper unless it can be redeemed or exchanged for something valuable. Gold as a universal precious metal eventually became the standard by which value was maintained.

The causes of inflation or its potential remedies will not be examined here.\(^6\) This analysis will instead focus on some methods used to minimize inflation's damaging effects on a particular transaction. Without an agreed upon stabilizing factor, any party to a currency transaction runs the risk of loss. To counter this risk, ideally, a unit of account should take into consideration price increases over time. With varying degrees of success, parties have constructed clauses with a unique definition of value and a method for its maintenance.

A "multiple currency clause" may simply contain a list of currencies in which repayment may be made. Such a clause, more accurately called an "optional currency clause," places the risk of exchange rate fluctuation on the debtor. Parties with superior bargaining positions, by requiring optional currency clauses, have the ability to speculate and demand repayment in the currency which has most appreciated in value.

When parties have nearly equal bargaining positions neither party has the strength to impose the risk of currency loss and fairness considerations become more important. The unit of account clause also becomes correspondingly more complex. Devised by international financiers, composite units of account, popularly known as "currency cocktails," contain a preformulated blend of several currencies. The European Composite Unit (Eurco), comprised of nine separate currency units, is one such currency cocktail. Because Eurco's value is tied to the daily fluctuation in exchange rates,

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5. K. ROSENN, supra note 3, at 36.
6. K. ROSENN, supra note 3, at 7-12.
"[w]hen most of the reference currencies move in the same direction against a reference currency, the Eurco-denominated security becomes unduly advantageous for either borrowers or lenders." More sophisticated formulas can produce a more stable unit of account. Yet, "[e]xperience indicates that the more complex a maintenance-of-value arrangement becomes, the less likely it is to gain wide market acceptance." Human nature cannot easily accept that which it cannot readily understand. And if eventually accepted, complex formulas may even breed an over confidence in their alleged accuracy. One commentator aptly observed:

[I]t is also questionable whether the unit of account should be the instrument with which to resolve the problem of declining real value. It would appear more logical to approach the problem of fixed limits of liability directly because substitution or manipulation of the unit of account may introduce undesirable side-effects.9

Valorism is an economic approach that directly deals with the value of money. Valorists strive to develop new ways of assuring that currency maintains the same purchasing power over time. One authority in the field of law and economics has characterized valorists as "the modern heirs of the metallists."10 Even though these two schools of thought have a great deal in common, a significant difference also exists. Metallists identify money's value with the weight and quality of hard asset hedges such as gold and silver. But valorists conceive of value in the much broader context of the worth of goods and services in relation to each other. Price indexes are constructed to measure money's purchasing power11 as to goods and services. Countries with chronic inflation, such as Argentina, Brazil and Israel, have enacted an "intricate web of monetary correction legislation"12 to literally legislate maintenance of value stability. Valorists deal with maintenance of value problems in a short sighted way. The remedial act of increasing nominal price levels to keep pace with inflation creates an inflationary expectation which then fuels the inflation which the corrective act seeks to mitigate.13 Maintenance of value consider-

7. Id. at 278.
10. K. ROSENN, supra note 3, at 58; see also supra text accompanying notes 3-6.
11. K. ROSENN, supra note 3, at 58.
12. Id. at 58.
13. Id. at 15.
lations should not be divorced from the causes of inflation. Even though "[e]conomists disagree about the causes of inflation," inflation, in a broad way, is a manifestation of a maladjusted economy. Compensating for this maladjustment is precisely the focus of value maintenance. Even though "[t]he toothpaste of gold standard 'discipline' cannot be put back in the tube," fiscal responsibility is an essential component in the construction of an effective maintenance of value device. Fiscal responsibility is one way to stabilize an economy, and, of course, stability is the goal of value maintenance.

III. PURPOSE OF GOLD CLAUSE LIMITATIONS IN INTERNATIONAL LIABILITY CONVENTIONS

One method of appreciating a gold value limitation function is to look at a typical provision. For instance, the Warsaw Convention signed at Warsaw on October 12, 1929 contains a typical gold clause limitation which states in its article 22 that "[t]he sums mentioned in francs . . . shall be deemed to refer to a currency unit consisting of sixty-five and a half milligrammes of gold of millesimal fineness nine hundred." The mathematical precision of the preceding formula is actually quite illusory since gold is now demonetized.

The rationale for tying liability to gold in international conventions was really quite pragmatic. Once arriving upon the limitation sum, the convention's delegates required a uniform, relatively stable unit as a measure of value. Furthermore, gold was appealing because of its universality. A review of the travaux preparatoires of the Warsaw Convention confirms the preceding analysis. Mr. Pittard, the Swiss delegate, remarked that the focus should be on an international value: "it's all the same to me, but let's take a gold value." Gold was selected in 1929 because it was the then existing international unit of account free from the tamperings of any one nation. Despite all the thoughtful discussions in hindsight, the delegates were not as thorough as they could have been, since most of the delegates were "law-
yers who were not trained in the solution of precarious economic and monetary world problems."\textsuperscript{19} The convention delegates thought they found a solution, but had they? Now, "[t]here is no longer an international monetary arrangement linked to gold, nor is there an official gold price that will produce uniformity with respect to the limitations of liability provisions."\textsuperscript{20}

IV. THE RISE AND FALL OF THE GOLD STANDARD

The value of a unit of account of national currency was basically defined in terms of gold or silver or both. Essentially, supply and demand served as functions that determined the value of these precious metals. Gold, due to its scarcity, gained widespread acceptance in the late nineteenth century as more nations demonetized silver. Adoption of the gold standard by most of the civilized world resulted in a system of fixed currency exchange rates based on the free redeemability of gold and a fairly uniform world gold price. "The basic rule of the gold standard is that the government should generate the quantity of money that will keep the price of gold constant by committing itself to buying and selling gold in an unlimited quantity at a fixed price."\textsuperscript{21} World War I and the resultant inflation precipitated the suspension of free convertibility. In reality, the "gold standard theory had little empirical basis,"\textsuperscript{22} because it did not take into account actual economic conditions. Gold, as mighty as it was, could not harness social and economic ills such as inflation, deflation, high unemployment, and political unrest. International monetary reform was needed, with gold still playing a vital role in the establishment of a new system of currency stabilization.

In 1944, the Bretton Woods Conference produced a multilateral treaty that established the International Monetary Fund [hereinafter IMF]. The IMF Articles of Agreement, the "magna charta of international monetary law," established a system whereby gold became the common denominator of currencies through the par value system.\textsuperscript{23} Legal recognition was also given to gold as a commodity.\textsuperscript{24}

\begin{itemize}
  \item \textsuperscript{19} Asser, \textit{supra} note 16, at 656 (statement by Mr. Berger describing a liability convention).
  \item \textsuperscript{20} K. ROSENN, \textit{supra} note 3, at 270.
  \item \textsuperscript{21} Stein, \textit{supra} note 15, at 2F, col. 3.
  \item \textsuperscript{22} K. ROSENN, \textit{supra} note 3, at 50. For a detailed historical analysis of the value of money, see Chapter 3.
  \item \textsuperscript{23} \textit{Id.} at 51.
  \item \textsuperscript{24} Barlow, \textit{supra} note 18, at 6.
\end{itemize}
The IMF's resources, which came from its membership, produced a stabilizing effect. A nation experiencing a short-term balance of payment problem could borrow from the fund. "Even though gold was the 'ultimate' reserve asset," the U.S. dollar was the key currency in IMF transactions. Only the dollar was convertible into gold, putting the world "on a dollar standard." In the two decades following the formation of the IMF, the gold reserves of the United States dramatically shrunk, and its debt outdistanced its reserve stockpile.

The Two-Tiered Gold System resulted from an overwhelming private demand for gold as a commodity. In response to this demand, gold had both an official price among governments and a free market price. "[T]he two-tiered system was intended to insulate the official and the private markets on the premise that there was no need to increase the existing total stock held by monetary authorities." This development merely hastened the inescapable eventuality. On August 15, 1971, the United States terminated the practice of buying and selling gold freely at a fixed official price. The demonetization of gold was made complete on April 1, 1978, when the official price of gold was abolished by the Second Amendment to the IMF's articles.

V. THE GOLD CLAUSE AFTER DEMONETIZATION

The elimination of an official gold price completely confused the interpretation of gold clauses in international conventions. At least one court had held the limitation of liability provisions in such a convention to be prospectively unenforceable. This legal interpretation by the prestigious U.S. Court of Appeals for the Second Circuit, in essence, nullified the convention because there was no longer a unit of conversion to set the liability limit. However, the U.S. Supreme Court in Trans World Airlines v. Franklin Mint Corp., specifically rejected this declaration regarding the future unenforceability of the Warsaw Convention.

25. K. ROSEN, supra note 3, at 53.
26. Id.
29. See Treaties cited supra note 1.
With the demonetization of gold, a legal void existed in gold based conventions. In response, academics offered different ways to fill the lacuna.

A. Scholarly Comments

A school of thought emerged advocating conversion on the basis of the free market price of gold. Members of this group included Jeanpretre, Heller, Mendelsohn, Cheng, Tobolewski, Mankiewicz and Edwards. The rationale supporting their position differs. Heller has stated that "[t]he purpose of the provisions of Article 22 of the Warsaw Convention which links the limits of liability to the value of gold should be considered a gold value clause, adopted in order to ensure that persons entitled to claim . . . can obtain compensation up to maximum amounts." Mendelsohn, in a similar manner, proposed that value be established "by the more meaningful price . . . in the free world monetary market." Others in the aforesaid group either hold untenable positions or their analyses are incomplete. As an example, Tobolewski prematurely concluded that the free market price of gold reflects world inflation. The free market approach concerns itself with maintenance of value and effecting the supposed intent of the drafters and not necessarily with the agreed liability limits in the convention which may, in due course, become inadequate for reasons such as inflation. Obviously, the danger with the free market approach is unauthorized treaty revision.

Despite the abolition of the official price in 1978, many scholars still argue in support of it. Asser's view represents the fundamental rationale for this position. The last official price provides a "measure of stability in an environment of fluctuating exchange." His "purpose/function" analysis flows from the legislative histories of the respective conventions in which the delegates expressed concern over stability. Yet, the official price approach is logically unsuitable because its basis, the official price of gold, has been abolished.

32. Barlow, supra note 18, at 15.
35. See Barlow, supra note 18, at 16-17 nn.90-98.
36. Asser, Martin, Miller and Arcari are several of the advocates for the official price of gold. For a more detailed analysis, see Barlow, supra note 18, at 17-19.
38. Id. at 663-64.
A third position favors the Special Drawing Rights (SDR) because it has presently taken gold's former role as a universal exchange value. In advocating the SDR, one commentator has suggested that the "[c]hoice of an appropriate unit of account . . . remains incumbent upon the courts in order to effectuate the intention of the signatories." A counter argument is that the SDR is a stranger to the treaty that is based on a gold value. "The treaty is . . . a law made by the proper authority, and the courts of justice have no right to annul or disregard any of its provisions . . . . It is their duty to interpret it and administer it according to its terms." 

B. Judicial Reactions

Judicial interpretations of the gold clause in conventions have reached divergent conclusions. Some courts have supported the market price of gold approach. Other courts have justified conversion on the basis of the last official price of gold. Decisions to effectuate
conversion have even reflected judicial preference for the current
French franc and the SDR.

Numerous tribunals throughout the world have addressed this
issue, and some decisional patterns have emerged. Even though there
may be a need for uniformity in world decision-making as to matters
of universal concern, there still is no international "stare decisis."

Additionally, foreign decisions need to be carefully scrutinized.
Martin rightly warns that a "judgement [sic] may reflect legal ideas
used in foreign legal systems and essential to the proper understand-
ing of the judgement [sic] but alien to those of the reader in another
jurisdiction." Nations may do the same thing but for different rea-
sons. Obviously, similar decisions do not in themselves represent an
international body of case law, but these patterns may signal the
emergence of customary international law.

Based on a sample of twenty-two decisions, courts have been
almost evenly split in choosing either a market price or official price
analysis. More recent decisions have relied on the SDR in construct-
ing a solution to the gold conversion problem.

World judicial opinions, in most respects, reflect courts’ reliance
upon the previously explicated views of academicians. An in-depth
case-by-case analysis of representative world decisions would be more
misleading than informative since such judgments are peculiarly re-
sponsive to local legal systems.

Yet, in broad terms, two fundamental rationales have emerged as
the bases for world judicial opinion. One line of authority empha-

Iberia, Lineas Aéreas de España, S.A. (an English translation is set forth at page 6 of the
Appendix to the Brief (BA6)).
cited in Brief, supra note 42 (an English translation is set forth at BA2).
of Vienna, Aus., Kislinger v. Austrian Airtransport (an English translation is set forth at
BA12); Judgment of June 17, 1983, Ct. of App. of Linz, Aus., Rendezvous-Boutique-
Parfumerie Friedrich und Albine Breitinger GMBH v. Austrian Airlines (an English transla-
tion is set forth at BA22); Judgment of May 30, 1981, Supreme Ct., Neth., State of the Nether-
lands v. Giants Shipping Corp. (an English translation is set forth at JA72)).
47. Id.
48. See supra notes 42-45.
49. Martin, supra note 46, at 248.
50. Id. at 246-47.
51. See generally Martin, supra note 46. This argument is convincingly presented by
Martin. But, for an expert analysis of some earlier caselaw that takes into account the varia-
tions in national laws, see K. ROSENN, supra note 3, at 269-73.
sizes international harmony in the application of a uniform liability limit by selecting the SDR as the conversion factor. The other line of cases supports the concept of providing injured plaintiffs with fair compensation. Thus, courts frequently find themselves making a policy choice between just compensation and the enforcement of a liability limitation.

Regardless of the methodology employed to make the provisions of a gold based convention work, is maintenance of value a judicial responsibility? One must consider whether damage limitations are desirable especially when the underlying purpose of uniformity can no longer be served. Perhaps courts should construe these limits as narrowly as possible to do as little damage as possible to general liability concepts. On the other hand, "when the judge makes his choice in how to fill the lacuna . . . it is not the task of the judge to provide for . . . [the decline in purchasing power], but it is up to the legislative body of the treaty and/or the national legislator to intervene." But what if the legislative voice is silent? As a practical effect, any judicial choice of a conversion factor will necessarily effect maintenance of value.

C. The Franklin Mint Case

Apparently, without clear legislative guidance, the United States Supreme Court decided in Franklin Mint that the conversion factor for gold based conventions should be the last official price of gold. The Court adopted this standard because it "manifested the parties' intention." This important policy choice resulted from a shipper's suit against an airline for cargo loss. The Court was faced with deter-

52. For judgments which follow this rationale, see Brief, supra note 42 (citing Judgment of June 21, 1983, Commercial Ct. of App. of Vienna, Aus., Kislinger v. Austrian Airtransport (an English translation is set forth at BA12); Judgment of May 30, 1981, Supreme Ct., Neth., State of the Netherlands v. Giants Shipping Corp. (an English translation is set forth at JA71)).


54. See infra notes 60-70 and accompanying text which discusses how the U.S. has approached this issue.

55. K. ROSENN, supra note 3, at 272.


57. See Comment, supra note 40, at 596.

58. Id. at 596-97.
mining the application of the liability limitation in the gold based Warsaw Convention, which was originally conceived in 1929 to protect a fledgling airline industry and to provide plaintiffs with compensation.\(^{59}\) When the issue came before the court in 1983, the industry’s vulnerability was no longer as great as it was in 1929. The Convention’s interpretation became unsure and the purpose of its liability limitation became even more questionable. Legitimate doubts arise concerning the sensibility for plaintiffs to forego full recovery. The task of resolving such an issue most appropriately belongs to the legislature.

Unfortunately, no clear policy was ever defined because the U.S. Senate has consistently failed to ratify any change to the original Warsaw Convention. For example, the legislative debate to the Montreal Aviation Protocols\(^ {60}\) demonstrates not only dissatisfaction with the concept of an increase in liability, but also reaction against the failure to provide a sufficient increase.\(^ {61}\) In the face of legislative inaction, *Franklin Mint* provided the judiciary an opportunity to inquire into the reasonableness of the liability limitations. The Court, however, failed to maximize its opportunity to direct action on this issue.

At both the trial court and appellate court levels,\(^ {62}\) the shipper recovered under the Warsaw Convention’s Article Twenty-Two limitation based upon the last official price of gold. The court of appeals, however, declared that the repeal of the Par Value Modification Act,\(^ {63}\) which set an official price of gold in the United States, to be “an explicit abandonment of the previously established unit of conversion.”\(^ {64}\) The court then held the Convention’s liability limits to be prospectively unenforceable because “[s]ubstitution of a new term [of conversion] is a political question, unfit for judicial resolution.”\(^ {65}\)

Judge Winter’s ruling may not be optimal from a legislative standpoint, in that it leaves a difficult issue unresolved, but it does force the legislature to act. If more courts on a world wide basis reached this conclusion, nations would act on their collective respon-
sibility of sensibly amending the Convention instead of individually finding piecemeal solutions.

In contrast to the lower appellate court, the United States Supreme Court held the repeal of the Par Value Modification Act to be unrelated to the conversion requirements of the gold based Warsaw Convention. Instead, the repeal was to give formal effect to a new international monetary system. The majority was really concerned with setting a stable, predictable and internationally uniform limit on liability. Through interpretative magic, the Justices resurrected a conversion factor previously abolished. In so doing, a policy choice was made through an act of judicial legislation. Constructing a limit on liability was viewed by the Court to be more important than considering the adequacy of this limit or the maintenance of its real value.

Justice Stevens, in his dissent, also ignored the maintenance of value issue, noting that "[t]he rate at which a domestic currency exchanges for gold was and is the only 'conversion' permitted or anticipated by the Convention. That figure is the liability limitation of the Warsaw Convention." Stevens' market price analysis appears logically sounder because it is based on the Convention's own standard of value and requires no rescission or reformation of the Convention itself. Coincidentally, gold, as a commodity, is somewhat more responsive to the economic climate and may thus provide a more adequate recovery than an inflexible sum, which can lose real value over time.

The Congressional Record of 1983 suggests that U.S. foreign policy was directed toward limiting the actual damages of each plaintiff and the type of conduct of the carrier. By selecting the last official price of gold as the conversion factor, the Supreme Court mistakenly believed it was maintaining the status quo on the basis that "[t]he political branches, which hold the authority to repudiate the Warsaw Convention, have given no indication that they wish to do so." This decision, however, undercuts the U.S. foreign policy goal to increase the Convention's liability limits. Additionally, the legislative and judicial branches maintained inconsistent positions in the eyes of the world which further weakened U.S. policy in this area. The Second Circuit opinion, rendering the Convention prospectively unenforce-

67. Id.
68. Id. at 275 (Stevens, J., dissenting) (emphasis added).
able, would have served U.S. interests better since that decision would have forced the legislature to act.

The Franklin Mint decision is an example of how a national court has grappled with the issue of liability limitations in gold based conventions after the demonetization of gold. Courts have either not recognized the distinct issues of limitation of liability/maintenance of value, made a value judgment of one over the other, or felt compelled to abstain from choosing believing this determination is within the legislative province.

D. National Legislation

Lifting an unfair burden from their local courts, some nations have squarely faced the problem of finding a conversion factor to gold based conventions by enacting domestic legislation. These legislative bodies recognized that “[s]ubstitution of a new term [of conversion] is a political question, unfit for judicial resolution.” The task of substituting a conversion factor in an international agreement is essentially a treaty making function that properly belongs to the executive and legislative branches. The making or revision of treaties is within the domain of “diplomacy and legislation . . . not . . . the administration of the laws.” In some cases, previous judicial decisions were statutorily overturned. Few countries where treaties are not superior to subsequent statute have remedied the conversion factor dilemma by legislation. The Canadian, South African, and Italian laws are typical, because a formula, based on the SDR, is fixed for conversion purposes. No statute focuses particularly on the maintenance of value problem. The SDR is simply the preferred unit of account.

71. See, e.g., Canada: Currency and Exchange Act (Carriage by Air Act Gold Franc Conversion Regulations), 117 Can. Gaz. 431 (1983). For references to legislation passed by Denmark, Finland, the Federal Republic of Germany, Israel, New Zealand, Norway, United Kingdom and the Netherlands, see Barlow, supra note 18, at 3 n.13.
72. Franklin Mint Corp. v. Trans World Airlines, 690 F.2d 303, 311 (2d Cir. 1982).
74. Legislative choices for the SDR overturned decisions in Italy (market), Canada (official) and Sweden (market). See supra notes 42-43.
75. For instance, in the United States, treaties always override state laws but treaties and federal laws are of equal rank. When a conflict exists between a federal law and treaty, “the last expression of the sovereign will control.” Chae Chan Ping v. United States (The Chinese Exclusion Case), 130 U.S. 581, 600 (1889).
76. See supra note 71.
VI. PROPOSALS

A. ISSUE RECOGNITION

As stated earlier, issue recognition by legislative bodies and both domestic and international courts, and scholars is imperative. These interrelated issues concern: (1) the selection of a unit of account; (2) liability limitations in agreements; and (3) maintenance of value considerations in the face of inflation. The purpose and function of each of these issues must be closely examined before a workable solution can be drawn. 77

B. MARKET PRICE INTERPRETATION OF GOLD CLAUSE

Politics may present a formidable barrier to the domestic or international resolution of monetary issues. A government may implicitly acknowledge the importance of maintaining value while refusing, for various political reasons, to directly address the issue through indexation or other monetary correction legislation. Under such circumstances, to maintain value, a market price interpretation of the gold clause would be the best hedge against inflation. Precious metals such as gold are a "safe haven" in inflationary times or during political unrest. 78 While not precise, the free market price of gold may, at least, fairly represent the economic climate. 79

Any fixed price, such as the last official price of gold, itself quickly becomes an unreasonable limitation that subtly defeats the purpose of liability limitations in international agreements. Under the gold-based Warsaw Convention, for a forty-four pound suitcase, the liability limit was $189 in 1929, $330 in 1934, $359 in 1972 and $400 in 1974. In terms of purchasing power, $330 in 1934 was equivalent to $399 in 1929, $1,031 in 1972 and $1,215 in 1974. 80 When the convention was approved in 1929, five years before U.S. ratification in

77. Asser's purpose and function analysis in interpreting the minutes of hearings or debates should be especially utilized by those engaged in this examination.
79. For a graph comparing the gold price index to the U.S. Consumer Price Index, see SUBCOMM. ON MONETARY AND FISCAL POLICY, 97th Cong., 1st Sess., The Gold Standard: Its History and Record Against Inflation 18 (Jt. Comm. Print 1981) (The study was prepared by R. Jastram, a professor in the School of Business Administration, University of California, Berkeley.).
80. 1940 THE WORLD ALMANAC AND BOOK OF FACTS 606.
1934, the American delegate envisioned a gold based liability limit of $189, which was subsequently increased several times. However, the injured plaintiff was still victimized by the decline in purchase power. Mendelsohn, a free market supporter, concentrates on "the policy embodied in the [liability] Conventions which was designed to protect potential victims from the effects of inflation." Relying on the price of a commodity in a volatile market admittedly is not a suitably stable measure. But, in unstable times, "[i]f world-wide inflation continues, the real value of these international liability limitations may . . . [b]e better protected if tied to the free market price of gold rather than to the SDR." This consideration is even more important because commercial aviation is no longer an infant industry that needs highly protective liability limits to insure its development and survival.

C. The IMF's SDR: An Imperfect Solution

The international community has placed much hope in the SDR as gold's ultimate successor. In 1969, the IMF created the SDR to replace gold and foreign currency in the international money reserve markets. In practice, IMF banks exchange SDRs for other convertible currencies as though they were lines of credit against which reserves are borrowed for use in central banks.

Methods of calculating SDRs periodically change. Currently they are calculated in reference to the U.S. dollar, the Deutschemark, the French franc, the Japanese yen and the British pound sterling. The amount of any one of the five currencies in one SDR is a function of the percentage weights assigned to each currency. To illustrate, the dollar value of one SDR is calculated by adding the dollar value of each currency included in the "currency basket," based on the daily market exchange rate. This formulation does not insure absolute stability in currency conversion. "The composite valuation of the SDR does not guarantee that the SDR will be more stable than an individual currency," basically because of the unpredictability of ex-

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82. Mendelsohn, supra note 34, at 127.
83. K. ROSENN, supra note 3, at 280.
84. The use of the SDR resulted in considerable relief for the besieged U.S. dollar.
85. Initially, SDRs were valued in terms of gold. This valuation changed with the Second Amendment to the IMF Articles of Agreement, which broke the link between gold and the SDR.
86. See Ward, supra note 3, at 3.
87. Id.
88. Id. (citing Eaker, Special Drawing Rights and the Pricing of Oil, 1 J. WORLD TRADE L. 23 (1979)).
change rate fluctuations. But this currency composite makes stability more likely since the variations within the basket in some measure counter each other. SDRs tend to be less prone to fluctuation than the free market price of gold which at times falls prey to speculators. Additionally reassuring is “the fact that the SDR...[is] administered by an international organization [which] is of special importance because it ensures a certain measure of continuity and uniformity of interpretation...[and] would produce a flexibility of response through an established decision making process.” Uniformity and flexibility are indeed desirable characteristics of the SDR.

International acceptance has been manifested in recent conventions that have incorporated the SDR as the appropriate value clause to replace the tarnished gold clause. The advantage of an SDR based liability convention is that it provides a measure of certainty regarding the extent of potential liability unlike a gold free market based convention where values could radically change on a daily basis. Additionally, as a unit of account, the SDR can be readily converted into the applicable national currency. Regrettably, the SDR by itself has no inherent ability to maintain real value. In an inflationary economy, over time, as the SDR’s component currencies’ purchase power decreases, the SDR’s real value will similarly diminish. Still “[s]ubstitution of the SDR for gold as a maintenance-of-value device in international conventions would appear to be a step in the right direction.”

D. SDR as the New World Unit of Account

Neither the SDR or gold, at its official price, can maintain real value. Real value considerations should not cloud the fact that the world monetary system requires a unit of account. The SDR has performed that function remarkably well because (1) it is universally recognized, (2) relatively stable and (3) assures a conversion of equal value upon transfer of currencies. International agreement on a unit

89. See Ward, supra note 3, at 4.
90. Asser, supra note 16, at 668.
92. Ward, supra note 3, at 5.
93. K. RoseNN, supra note 3, at 280.
94. See supra text accompanying notes 81 & 92.
95. See generally supra notes 84-94 and accompanying text.
of account in due time can develop into agreement on a maintenance of value technique like indexation.

Critics see no value in constructing an index for international purposes when indices have hardly succeeded on a national scale. From descriptions of remedy to malady, "there is little agreement among economists about the desirability of adopting comprehensive indexation." 96 Adopting an index presumes that the difficult task of constructing one has been completed. Problems to be resolved include (1) varying rates of inflation among countries, (2) varying consumption patterns of goods and services which makes the selection of price scales difficult and (3) determining the length of intervals for periodic adjustment. 97

Indexation is an incomplete remedy since it raises more questions than it can capably answer. And its potential success depends upon two unknown factors: multinational cooperation and international economic understanding.


International interest, sufficiently generated, may encourage the development of a single article maintenance of value treaty, if that approach appears desirable. The goals of uniformity and stability of value may sufficiently induce nations to explore the relatively untested areas of law and economics. 98

In the early seventies as a solution to gold clause interpretation, UNIDROIT proposed a one article treaty that would impose an official rate to promote uniformity. 99 This proposal has become moot since the demonetization of gold, but the concept of establishing an international standard for maintenance of value purposes is a good one.

Even now gold clause interpretation is far from settled. "The muddle can only be cleared up by effective international legisla-

96. K. ROSENN, supra note 3, at 375.
98. See generally K. ROSENN, supra note 3, which is an authoritative work, standing relatively alone, in a field that is yet to be developed. See especially the author's bibliography which is a comprehensive selection of source materials.
99. Comment, Legal Problems in Compensation Under the Gold Clauses of Private International Law Agreements, 63 GEO. L.J. 817 n.1 (1975) (citing Arcari, Gold Clauses in International Conventions, Int'l Inst. for the Unification of Private Law, study LVII, doc. 1/Rev. § 3 n.3 (1973)).
In one sweep, a convention may designate the SDR as the new unit of account. In conjunction with this act, some kind of maintenance of value technique like indexation could also be implemented.

Instead of creating some complex indexation scheme, international dialogue more realistically could result in an approximate value approach. To construct a precise maintenance of value mechanism that could completely account for the complexity of world economic matters is a mind-boggling if not an impossible task, but an imprecise attempt to maintain value is more desirable than not attempting it at all. One international agreement has a built in automatic increase provision that is activated at certain intervals, after entry into force, without the need of having an amendment conference. A periodic increase provision in an international agreement may not be a panacea, but it is a stopgap measure to the erosion of real value produced by inflation.

F. National Legislation

In the absence of international cooperation, national legislation has addressed the dilemma of finding a suitable unit of account. More specifically, countries have dealt with the maintenance of value issue with varying success. Inevitably, hard policy choices are made concerning the importance of limitations on value and how effectively these limitations are to be protected. Difficult choices may be made concerning the protection of an infant industry over the relative worth of a human life.

The goal of world uniformity may seem possible in a slowly moving country-by-country assault on maintenance of value considerations. Perhaps the existence of too many national differences in culture and economics defeats the justification for a world approach. Successful ideas become assimilated and the continuing practice of nations may serve as the basis for customary international law.

100. Martin, supra note 46, at 249.
101. See Ward, supra note 3. See generally, K. Rosenn, supra note 3, chs. 1, 2, 4, & 8.
103. Ward, supra note 3, at 16.
104. See supra note 71 and accompanying text.
106. Id. at 247-50.
G. Insurance

Reliance upon insurance can be a realistic solution to the risk of losing real value over time. The remedial nature of insurance, in most cases, does not lose its strength, unlike legislation which may eventually lose context, because risk calculations upon which it is based continuously change in response to new conditions. Successful past experience with multivarious insurable interests has given insurers the statistical expertise and sufficient broad base of financial resources to develop, at least on a trial basis, a maintenance of value insurance plan.

Theoretically, risk of loss should be borne by the party that is in a better position to assume it. Government sponsorship\(^\text{108}\) of a maintenance of value insurance program should be studied, and if feasible, implemented. Objectives of governmental sponsorship would include "use of insurance . . . to meet a problem of economic security,"\(^\text{109}\) provision for "insurance that cannot be offered privately,"\(^\text{110}\) and "encouragement to private insurers through governmental reinsurance."\(^\text{111}\)

A related point involves providing indexed insurance coverage to consumers as a maintenance of value device. Not surprisingly, there are many difficulties associated with indexing insurance;\(^\text{112}\) foremost of which is "the actuarial unsoundness of creating indexed insurance without correspondingly indexed supporting financial instruments."\(^\text{113}\)

VII. Conclusion

The touch of gold in international conventions has lost its reassuring gleam. Gold, for a time, served as both a unit of account and a method of value maintenance with questionable success.\(^\text{114}\) Yet, who could deny the psychological reassurance associated with gold, until it

\(^\text{108. R. Keeton, Basic Text on Insurance Law 570-83 (1971).}\)
\(^\text{109. Id. at 572. States, such as Florida, have been hospitable to the development of insurance. "In response to the obvious success of Lloyd's and to the projected enormous increase in capital needs for the international insurance market over the years, the Florida legislature enacted enabling legislation which permits private parties to form and operate insurance exchanges." O'Naughton, The Insurance Exchange Of The Americas Inc., Dade Bar Bulletin, Nov. 1985, at 1, col. 1. The potential of insurance is as unlimited as the imagination.}\)
\(^\text{110. R. Keeton, supra note 108, at 576.}\)
\(^\text{111. Id.}\)
\(^\text{112. For a detailed analysis, see K. Rosen, supra note 3, at 200-07.}\)
\(^\text{113. Id. at 200.}\)
\(^\text{114. See supra note 81 and accompanying text.}\)
became just another commodity subject to speculation. No one can fully explain the doubling of the gold price from 1978 to 1980 or its subsequent collapse.\textsuperscript{115} Despite such drastic market fluctuations, a market price interpretation of the gold clause partially takes on the issue of value maintenance in the absence of treaty renegotiation to determine the appropriate limits to liability in gold based conventions.

The SDR has proven to be an effective unit of account. World reliance on the SDR as an international unit of account may eventually lead to multinational cooperation in developing a maintenance of value technique like indexation. Yet, gold's successor as a maintenance of value device cannot be a substitute for "stabilizing monetary policy."\textsuperscript{116} In the wake of sound economic policy, "[w]e can have money that is better than gold."\textsuperscript{117}


\textsuperscript{116} Stein, \textit{supra} note 15, at 2F, col. 4.

\textsuperscript{117} \textit{Id.}