WERE "IT" TO HAPPEN: CONTRACT CONTINUITY UNDER EURO REGIME CHANGE

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ABSTRACT

One way or another, the European Monetary Union ("EMU") is apt to endure. The prospect of continuation under the precise contours of the regime as we presently find it, however, is anything but certain. Hence many investors and other actual or prospective contract parties are likely to remain skittish until matters grow clearer.

This skittishness, importantly, can itself hamper the prospect of expeditious European recovery. Addressing particular sources of ongoing uncertainty about EMU prospects can itself therefore aid in the project of recovery. This Essay accordingly aims to impose structure upon one particular, and indeed particularly complex, source of uncertainty now damaging EMU prospects. That is the matter of how best to defend, legally speaking, continuity of contract in the event of some basic change in the current Euro regime.

The hope is that sizing up and breaking down this question into its constituent parts might accomplish at least three related aims. One is to render the hypothetical problems raised by the question more tractable than they would otherwise be. Another is to facilitate the development of provisional plans of approach to such problems in the event they should present themselves. Finally, yet another is to afford confidence to the markets by enabling contingency planning of the sort just suggested, thereby lessening the likelihood of self-fulfilling 'run'-like activity on European debt instruments.

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1. INTRODUCTION: ADDRESSING THE HYPOTHETICAL TO KEEP IT HYPOTHETICAL

One way or another, the European Monetary Union ("EMU") is apt to endure.[1] The sunk costs, future stakes, and prospective price of failure are simply too high to permit disunion to become truly thinkable to most current members. The prospect of continuation under the precise contours of the regime as we presently find it, however, is anything but certain.[2] Hence, many investors and other actual or prospective contract parties are likely to remain skittish until matters grow clearer.

This skittishness, importantly, can itself hamper the prospect of full and expeditious European recovery. Addressing particular sources of ongoing uncertainty about EMU prospects can itself therefore aid in the project of recovery. In that light, I hope here to impose a bit of structure upon one particular, and indeed particularly complex, source of uncertainty now damaging EMU prospects. That is the matter of how best to defend, legally speaking, continuity of contract in the event of some basic change in the current Euro regime.

My hope is that sizing up and breaking down this question into its constituent parts might accomplish at least three related aims. One is to render the hypothetical problems raised by the question at least somewhat more tractable than they appear presently to be. Another is to facilitate the development of provisional plans of

[1] Much has been written over the past several years about the possibility, desirability, and undesirability of partial or full EMU dissolution. In the interest of brevity, I shall cite only my own two most recent interventions in the discussion. *See* Robert Hockett, *Save Europe's Marriage with a Trial Separation*, BLOOMBERG NEWS (June 12, 2012, 6:30 PM), http://www.bloomberg.com/news/2012-06-12/save-europe-s-marriage-with-a-trial-separation.html (suggesting that a possible solution to save the eurozone might be to spend some time apart and experiment with other currencies and central banks until all parties reach a sufficient level of maturity to be in a relationship); Robert Hockett, *Five Angry Elephants*, BENZINGA FINANCIAL NEWS (Mar. 14, 2012, 5:19 PM), http://www.benzinga.com/general/topics/12/03/2424391/five-angry-elephants (arguing that unless and until global distributive and currency dysfunctions are addressed, Europe and the global economy at large are at great risk of failure).

[2] My own guess would be that a temporary two-tiered Euro arrangement will prove most workable and attractive in the near future. *See* Hockett, *Save Europe's Marriage with a Trial Separation*, *supra* note 1.

approach to such problems in the event they should ultimately indeed present themselves. Finally, yet another is to afford confidence to the markets by enabling contingency planning of the sort just suggested, thereby lessening the likelihood of self-fulfilling 'run'-like activity on European debt instruments.

The project is indeed complex. It also turns out, however, to be more or less tractable. The principal challenge is in deciding how best to order the presentation with a view to rendering the analysis as immediately graspable by intuition as possible. What has come to seem best to me in this connection is to structure the presentation principally by reference to three fundamental 'dimensions,' or 'layers,' of complexity. Additional sources of complexity, seemingly less 'fundamental' even if numerous and important, can then be folded-in in a more or less ad hoc manner at minimal frustration to intuition.

That, then, is the plan I adopt for what follows. Section 2 lays out the advertised 'fundamental layers.' Section 3 then notes several additional layers of complexity that are less fundamental and accordingly best dealt with in ad hoc fashion. Section 4 then analyzes the contract continuity question across layers by reference to several non-fanciful hypothetical situations in which contract continuity would be implicated.

Section 5 briefly addresses an additional complexity that some might believe to be introduced by 1997 Amendments made to the New York General Obligations Law, to which many Euro-denominated financial contracts are subject. Section 6 then concludes and looks forward. An Appendix reduces the analyses of Sections 4 and 5 to readily intuited 'flowchart' form.

2. LAYERS OF FUNDAMENTAL COMPLEXITY

We begin with the first two layers of fundamental complexity, which probably deserve most attention because they are least immediately familiar. First, there appear to be two distinct regime-change ("Regime Change") scenarios to consider—viz., partial and full dissolution of the EMU. Second, there appear to be two contractual performance-impediment ("Performance Impediment") scenarios to consider—viz., those that give rise to colorable *impracticability* excuses of performance on the one hand, and those that give rise to colorable *impossibility* excuses of performance on the other hand.

These various *Regime Change* and *Performance Impediment* scenarios are cross-cutting, precisely because they are situated on distinct 'dimensions.' Each alternative upon one dimension, in other words, can be paired with either alternative on the other dimension. Hence there are four possible combinations of combined *Regime Change* and *Performance Impediment* scenarios. I'll assign italicized Roman numerals *I* and *II* to the *Change* scenarios and italicized alphabet letters *A* and *B* to the *Impediment* scenarios. Our possible combinations then will be *IA*, *IB*, *IIA*, and *IIB*.

Turning next to the third layer of fundamental complexity, which comprises various "Venue" scenarios, as I'll call them: this one enters the picture in virtue of the existence of multiple jurisdictions in which a contract action might be brought in response to some breach stemming from *Scenarios IA*, *IB*, *IIA*, or *IIB*.

Happily, as it turns out, this multiplicity can itself be more or less safely reduced, like those in connection with *Regime Change* and *Performance Impediment*, to a factor of two. For the principal distinction that matters turns out to be that between courts of a nation that has left the EMU, on the one hand, and all other courts on the other hand.[3] I'll accordingly employ italicized Hindu-Arabic numerals for tracking purposes in this case and distinguish between what I'll call scenarios "*1*" and "*2*" along this *Venue* dimension of complexity—*1* for suits brought in courts of a particular nation that has exited the EMU, and *2* for suits brought elsewhere.

Summing up, all of the foregoing entails that we now have eight possible combinations of *Regime Change*, *Performance Impediment*, and *Venue* scenarios to consider: *IA1*, *IA2*, *IB1*, *IB2*, *IIA1*, *IIA2*, *IIB1*, and *IIB2*.

3. ADDITIONAL LAYERS OF COMPLEXITY

As mentioned in the Introduction, there are, alas, several more complexities that arise in connection with all of this. One, for example, is occasioned by variation in respect of the new currency

[3] This turns out to be so, in turn, because the courts of a nation that has left the EMU will ignore the distinction between Impediment Scenarios *A* and *B*, while other courts for their part will either follow courts of the former sort, or resort to more or less identical doctrines—some version of *impracticability* or *impossibility* doctrine—in connection with each such Impediment Scenario.

regime—fixed?, adjustably pegged?, floating?,—that a nation exiting the EMU might adopt.[4] And these of course bear upon all sorts of eventualities that might affect contract performance and thus implicate our Contract Continuity problem.

But since (a) three dimensions—and thus eight combinations!—already are plenty to track, while (b) the same dimensions suffice more or less to accommodate the basic structure of our analysis, and (c) the additional complexities seem a bit less 'fundamental' in any event, I'll simply fold those in where they turn out to be salient.

Before now turning to the analysis, it might be helpful first quickly to summarize the proverbial "bottom line." Unfortunately that is not easy to do in prose without quickly becoming incomprehensible, at least prior to running through the analysis itself. What I shall do instead, then, is simply to direct your attention to a flowchart I append to the end, which in a compact manner summarizes all that is about to follow.

And now off to the races.

4. ANALYSIS ACROSS LAYERS

Please recall first that there are two *Regime Change* scenarios to consider:

> I. *Regime Change Scenario I* (Exit by One or More EMU Members): One or more countries exits EMU. Others remain. (EMU, in other words, persists, but has lost at least one of its erstwhile members.)
>
> II. *Regime Change Scenario II* (Dissolution): EMU dissolves altogether.

Now begin with *Regime Change Scenario I* (Exit by One or More EMU Members): How might contractual continuity come to be implicated? Here is what would seem a prototypical

[4] A *fixed exchange rate* regime establishes specific relative valuations, or narrow bands of the same, among participating currencies. Monetary authorities are then obliged to maintain these valuations—typically by trading in foreign currency markets so as to affect relative demand for, hence the relative prices of, relevant currencies. An *adjustable peg* regime is one pursuant to which fixed exchange rates are periodically adjusted pursuant to consensual decision-making by relevant monetary authorities. Finally, a *floating exchange rate* regime simply permits decentralized trading activity on the part of private market actors to determine the relative values of currencies.

hypothetical—"the Hypothetical." I'll lay it out by reference first to a particular change ("the Change") that amounts to an instance of the *Regime Change I* scenario, then to a typical plaintiff ("the Plaintiff") and defendant ("the Defendant"), whose contractual relation might be affected by the change.

4.1. First Hypothetical

4.1.1. The Change

Assume first that—oh, I don't know—*Greece* exits the EMU. It replaces the Euro with, say, a new or revived national currency, the NeoDrachma ("NeoD"). It stipulates some initial NeoD/Euro exchange rate and formally redenominates all pre-existing contracts bearing some nexus to Greece—e.g., Greek sovereign bonds, loans to Greek nationals, etc.—in NeoD. Call this "the Change". Something like this Change would seem to be requisite to contractual continuity's being so much as implicated under *Regime Change Scenario I*.

Next, note that Greece might adopt any of several policies with respect to the post-*Change* NeoD/Euro exchange rate. (So here's another layer of complexity, but I'm not numbering or lettering, just folding it in so as to avoid an unwieldy number of 'fundamental dimensions'):

First, Greece might undertake to maintain the initially stipulated exchange rate indefinitely, effectively *pegging* the NeoD to the Euro. This seems unlikely unless Greece intends that the peg be adjustable, more on which prospect below. For adopting a *nonadjustable peg* would allow Greece, at most, one devaluation relative to the Euro—namely, the one conducted via the initially stipulated exchange rate. And presumably a wish for sufficient monetary policy autonomy as to permit repeated periodic de- and/or revaluations would be among those considerations prompting *the Change* in the first place.

A second prospect seems nearly as unlikely: That would be Greece's aiming to permit a *free float* of its currency on the foreign exchange ("ForEx") markets. This seems unlikely in light of the new NeoD's likely vulnerability, at least early on, to speculative attack on global markets.

More likely, then, Greece will aim to operate with, third, an *adjustable peg*, or fourth, a *managed float* on the ForEx markets. Either policy will presumably be conducted by its central bank—

the Bank of Greece, or "BG" (which is not to be confused with the Australian singing group of the 1970s).

Now, if Greece maintains a nonadjustable peg—again, unlikely—it will surely have to employ strict capital controls as well. Some slightly more relaxed form of capital control or regulation, variably strict depending on events in the global capital and ForEx markets, also will presumably be necessary in connection with an adjustable peg or a managed float. Since adjustable peg or managed float seem more likely, per the considerations adduced just above, it seems reasonable to conclude that there will be at least some degree of capital control exercised by Greece under the new regime.

In any event, which of these strategies is selected, and how successfully it is implemented if it be something other than free float, will certainly bear upon subsequent possible litigation, in manners to be noted below.

4.1.2. The Plaintiff and Defendant

Next, per our Hypothetical, we'll assume that—oh, I don't know—a *German* national is owed a contractual debt by the Greek Treasury or by a Greek national. The contract denominates the debt in Euro, and the German national prefers to be paid in Euro per the terms of the original contract.

In such case, if the Greek Treasury or our Greek national has traded in Euros for NeoD at the initially stipulated exchange rate, if that rate has not since changed, and if the Bank of Greece retains Euro reserves and is willing to exchange Euro for Drachma with the Greek Treasury or Greek national for purposes of facilitating transactions between the latter and Germans, then we need have no contractual continuity problem. The Greek Treasury or Greek national might simply purchase Euro from the BG with NeoD and pay the German national in Euro. On the other hand . . .

If and only if one of the following occur, however, the Greek Treasury or our Greek national might well encounter difficulty in performing on the contract with Euros rather than NeoD, even if they wish to do so. The legal significance that the difficulty carries will ride upon which actually occurs. As for the latter, as noted above, there seem to be two basic possibilities—two *Performance Impediment* scenarios—to consider:

4.1.2.1. Impediment Scenario A (Colorable Impracticability)

We assume that Greece has allowed the NeoD to float, either freely or in managed fashion, or it maintains an adjustable peg which has indeed now been adjusted. Assume either way that the consequence is that the NeoD now is worth much less relative to Euro than it was at the time of the Change.

We'll assume that the Greek Treasury or Greek national may still purchase Euro from Bank of Greece or on the ForEx market—no capital controls sufficiently onerous as to prevent or prohibit this—but at very high NeoD cost. This will invite—though not guarantee, as we'll see—invocation of the *commercial impracticability* excuse of contractual performance by our Greek defendant should the German national sue for payment in Euro, per terms of the contract, in court—particularly in non-Greek court.[5]

4.1.2.2. Impediment Scenario B (Colorable Impossibility)

We shall assume that Greece maintains strict or adjustable peg, or manages float, and to facilitate pursuit of that policy also imposes capital controls. Controls are such, in turn, as to prevent ready purchase of Euro with NeoD.

If such purchase is simply rendered more difficult than it otherwise would have been, but is not rendered illegal or otherwise literally impossible, then again we are looking at a prospective *impracticability* excuse of performance, as in *Impediment Scenario A* just above. If, on the other hand, capital controls are such as actually to render purchase of Euro with NeoD illegal or literally impossible, then this will invite—though not guarantee, as we'll see—invocation of *impossibility* excuse of contractual performance should German national demand payment in Euro, per terms of the contract, in court—particularly non-Greek court.[6]

All right. Finally, proceeding to our final dimension of variation within the context of this Hypothetical, assume that our German plaintiff sues our Greek defendant on the contract, seeking payment in Euros, not NeoD. There are then two more scenarios—*Venue* scenarios—to consider:

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[5] As we will see below, in Greek court the defendant is not likely to be found even to be in breech if s/he pays in NeoD, though this isn't quite certain.

[6] *See* Hockett, *Save Europe's Marriage with a Trial Separation*, *supra* note 1; *see also* text accompanying note 2, *supra*.

4.1.2.3. Venue Scenario 1 (Action Brought in Greek Court)

Let us assume that the contract action is brought in Greek court. In this case the redenomination is likely to be fully recognized, inasmuch as Greek courts apply Greek law. Obligations accordingly held dischargeable in NeoD, presumably in amounts determined by the legislated exchange rate. Court holds that Greek defendant may pay German plaintiff in NeoD. (Note that the difference between *Impediment Scenarios A* and *B* is accordingly irrelevant here. Combinations *IA1* and *IB1* effectively collapse into one.)

Presumably, however, plaintiff now will hope to appeal to some higher court within Greek, EU, or global legal systems, perhaps challenging the legislation itself on constitutional or cognate treaty grounds insofar as it impairs preexisting contractual obligations. (More on this prospect later.)

4.1.2.4. Venue Scenario 2 (Action Brought in Non-Greek Court)

Now we assume that the contract action is brought in a non-Greek—e.g., a New York court. In this case the court will embark upon a multi-step analysis:

4.1.2.4.1. Lex Monetae

First, analysis will commence with an attempt to determine the *lex monetae*—the law of the sovereign that issues the currency named in the contract. The reason for this is that that law, per the *state theory of money* that all nations (including the United States) appear to uphold, will determine *what counts* as tender in discharge of an obligation denominated in the currency issued by that sovereign. And this is so *notwithstanding any depreciation* on the part of some *newly issued* currency relative to whichever currency it replaces. It is likewise so notwithstanding any other body of law named in the contract (i.e., any *law of the contract*, per *ii*, below). In other words, the *lex monetae*, effectively implicated straightaway by the contract's naming a currency at all, supervenes upon any *additional lex* named in the contract.

A potentially vexing question can arise here, however, depending on whether Greece and the EU/EMU agree or disagree on the terms of Greece's exit from the EMU. Hence we have yet another layer of complexity here, but again I am simply folding this one in to avoid an unwieldy number of 'fundamental dimensions' pursuant to which I structure our analysis.

So, first, were Greece to leave the EMU pursuant to some formal agreement upon all terms of which Greece and the EU/EMU were in accord, the answer to the *lex monetae* question would be straightforward. The Greek legislation would be given full effect in the foreign (non-Greek) court just as in the domestic (Greek) court. In such case we would accordingly be faced with a situation indistinguishable from that of *Venue Scenario 1*, above. The contract obligation would be dischargeable in NeoD, unless Greek and EU/EMU law themselves were challengeable on constitutional or international legal grounds sounding in human rights and contract-impairment.

If, by contrast, Greece were to exit the EMU on terms *not* agreed by the two authorities (Greece on the one hand, EU/EMU on the other), then our *lex monetae* question would seemingly be unanswerable. For there would appear, then to be no determinate reply to the "which money?" question. That is because the EU/EMU (then including Greece) was and remains the issuer of that currency which is named in the contract, while Greece is the issuer of that currency into which the contract now has been putatively redenominated by Greek legislative fiat.

In other words, because "which currency?" is precisely the question here, and because two authorities each of which has a colorable claim to sovereignty over the question at issue would be in disagreement, we would not be able to determine what counts as tender by reference to *the* law of *the* country that issues *the* currency.[7] Hence we would move on to . . .

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[7] It is perhaps worth noting here that this problem seems to be simply a straightforward entailment of that ambiguity which afflicts the concept of 'sovereignty' itself in the context of a 'union' or 'federation' of still putatively 'sovereign' states. EU and EMU members retain some degree of sovereignty, of course, yet also cede certain classic *incidents* of sovereignty, in a manner not unlike that in which U.S. states were understood to have done in the early years of the American republic prior to the Civil War.

Conundrums stemming from disagreement between states and their union over which party bears sovereignty over some particular subject, such as currency, do not always lend themselves to straightforward answers in such cases. (That is one of the reasons that eighteenth century British lawyers argued that colonial American claims on behalf of 'divided sovereignty'—the "King in Parliament" being the sovereign of England, the "King in the House of Burgesses [in the person of the Royal Governor]" being the sovereign of Virginia, etc.—

4.1.2.4.2. Law of the Contract

Next, if there is disagreement between Greece and the EMU over the terms of Greece's exit, hence no determinate *lex monetae*, we fall back to the so-called *law of the contract*, if such there be. That is, if the contract states which law shall govern its own interpretation and application, proceed to analyze the case under that law. (Many financial contracts of course stipulate that the law of the State of New York shall govern.)

If the law in question is that of Greece, then we are again back to *Venue Scenario 1*, above. The foreign court will decide as the Greek court would have done. If the law is not that of Greece, then we proceed to *iv*, below, to apply the apposite jurisdiction's impracticability or impossibility doctrines, depending on whether we're faced with *Impediment Scenario A* or *B*. Finally, if the contract does not name *any* particular body of law as governing—that is, if there is no law of the contract—then we fall back to . . .

4.1.2.4.3. Conflicts of Law Analysis

If there is no determinate *lex monetae* per *i* above, and the contract does not specify any governing body of background law—any law of the contract—per *ii* above, then we apply the *conflicts* rules of jurisdiction in which the court entertaining the suit sits to determine which law governs. Once that is determined, we proceed in accordance with *ii*, just above. That is, if Greek law is found applicable, we're back to *Venue Scenario 1* above, and otherwise we proceed to *iv*, below.

4.1.2.4.4. Impracticability and Impossibility Doctrine

Finally, if Greek law turns out not to be applicable law, our Greek defendant will likely argue excuse from performance on the contract in Euro as distinguished from NeoD, per some variant of either the *impracticability* doctrine, in the case of *Impediment Scenario A*, or the *impossibility* doctrine, in the case of *Impediment Scenario B*.

As it happens, impracticability and impossibility doctrines look quite similar from jurisdiction to jurisdiction. I'll focus on New York law, however, because so many financial contracts name it as

constituted logical absurdities. 'No *imperium in imperio*,' the 'unitary sovereign' advocates cried. Maybe they were right?)

the governing law. In effect, then, we have two scenario combinations to consider here—*IA2* and *IB2*.

I'll now run through the analysis in both, still staying with our present Hypothetical. The bottom line is that our Greek defendant would be unlikely to prevail on an impracticability defense if faced with *Impediment Scenario A*, but might do better with an impossibility defense were s/he faced with *Impediment Scenario B*. Impracticability and impossibility analyses, then, run as follows.

> **iv.1. *Scenario IA2*:** Impracticability Doctrine in Non-Greek Court Under *Change Scenario I* (Greek exit of EMU) and *Impediment Scenario A* (dramatic depreciation of Neo D relative to Euro):

Contractual impracticability doctrine under New York Law follows Section 261 of the Second Restatement of Contracts and Section 2–615 of the Uniform Commercial Code ("UCC"). Restatement Section 261 states:

> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.[8]

The UCC provision is similar, though it refers by its terms to "sellers" who are parties to "commercial" contracts.[9] Captioned "Excuse by Failure of Presupposed Conditions", Section 2–615 requires a breaching seller who would be excused from performing to show (1) some contingency that (2) renders performance impracticable while (3) the nonoccurrence of the contingency was "a basic assumption upon which the contract was made."[10]

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8 RESTATEMENT (SECOND) OF CONTRACTS § 261 (1981). *See also In re Dayton Seaside Associates No. 2, L.P.*, 257 B.R. 123, 139 (Bankr. S.D.N.Y. 2000) (quoting Section 261 of the Second Restatement of Contracts); *In re Martin Paint Stores*, 199 B.R. 258, 265, 29 Bankr. Ct. Dec. (CCR) 647 (Bankr. S.D.N.Y. 1996), aff'd, 207 B.R. 57 (S.D.N.Y. 1997) (referencing discharge by supervening impracticability as provided for by § 261 of the Second Restatement of Contracts).

9 Official Comment 9, however, notes that the 'reason' of the section could well apply to non-commercial contracts as well. *See* N.Y. U.C.C. § 2–615 (1961).

10 N.Y. U.C.C. § 2–615 (1961).

Under both the Restatement and UCC provisions, the event or contingency in question must have been unforeseen, not reasonably foreseeable, and beyond the control of the breaching party.[11] The breaching party also must not have "caused" the event or contingency.[12] It must also be the case that nothing in the contract indicates that the breaching party assumed the risk of such event or contingency.[13] The event or contingency must also "alter the essential nature of the agreement."[14]

Much of this language is of course a bit on the less-than-altogether-helpful side. What sorts of impracticability-causing event or contingency would be "unforeseeable," would "alter the essential nature of the agreement," would be "basically" assumed in the contract not to occur, and not be a risk "assumed" by the party seeking excuse are not immediately obvious on the basis of these words and phrases alone. Hence much rides upon how courts interpret and apply the operative terms in the specific factual contexts of particular cases.

In that light, three observations seem most important for our purpose (which I take, per our conversation, to be *preservation* of contractual continuity).

First, increased cost of performance, standing alone, does not ordinarily serve as a basis for the impracticability excuse.[15] Rather,

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[11] *See, e.g.*, Cliffstar Corp. v. Riverbend Products, Inc., 750 F. Supp. 81, 84–85 (W.D.N.Y. 1990) (discussing the standard set forth by Section 2–615 of the Second Restatement of Contracts as consisting of several questions, including whether the event causing the breach of a contract was foreseeable at the time the contract was made and whether such event was due to factors beyond the breaching party's control).

[12] *Id.*; *see also* Allen v. City of Yonkers, 803 F. Supp. 679, 709–710 (S.D.N.Y. 1992) ("The party asserting a defense of impracticability has the burden of demonstrating that the event . . . made performance impracticable and that event was not the result of that party's actions or inactions.").

[13] *See, e.g.*, Dayton Seaside Associates, 257 B.R. at 139 (analyzing the "assumption of risk" in the context of Section 2–615 of the Second Restatement of Contracts in New York).

[14] *See, e.g.*, Asphalt Intern., Inc. v. Enterprise Shipping Corp., S.A., 667 F.2d 261, 266 (2d Cir. 1981) (asserting a party's excusal to perform a contractual duty on the grounds of commercial impracticability hinges on several factors including whether the intervening event "altered the essential nature of the charter party agreement").

[15] *See* N.Y. U.C.C. § 2–615 (1961) comment 4; *see also* Canusa Corp. v. A & R Lobosco, Inc., 986 F. Supp. 723, 731 n.6 (E.D.N.Y. 1997) (elaborating that Section 2–615 of the Second Restatement of Contracts does not excuse a party's duty to perform on account of increased costs incurred by such performance).

the increased cost must stem from an unforeseen, unforeseeable, risk-unassumed contingency that alters the "essential nature" of the performance.[16] Where, as per our Hypothetical, the performance in question is simply to pay Euros, *the Change* that sets our case in motion would not seem to affect any "essential nature" thereof. Perhaps an end to the Euro altogether, per *Regime Change Scenario II*, considered below, would be otherwise. But even there, it seems doubtful, as we shall see.

Second, there have, of course, been multiple occasions in the past upon which currencies have been changed—during the American Civil War; in the aftermath of the First World War and the Russian Revolution, during the 1930s; in the aftermath of the Second World War; and following the breakup of the former Soviet Union and Soviet bloc.[17] Unsurprisingly, each of these events occasioned litigation sounding in contract and predicated on breaches that defendants sought to excuse by reference to impracticability.[18] In virtually no such cases, including cases in which a new currency was considerably (if not indeed dramatically) less valuable than that which it replaced, have American courts excused performance.[19]

[16] *See Canusa Corp.*, 986 F. Supp. at 731 n.6; *see also* Moyer v. City of Little Falls, 510 N.Y.S.2d 813, 814–15 (Sup. 1986) (finding excusal of performance of contractual duty was justified due to an unforeseeable factor outside of breaching party's control); American Trad. & Production Corp. v. Shell Int. Marine Ltd., 343 F. Supp. 91, 95 (S.D.N.Y. 1971) (discussing the commercial impracticability standard set forth in the Second Restatement of Contracts and in the Uniform Commercial Code).

[17] *See* Niall Lenihan, *The Legal Implications of the European Monetary Union under U.S. and New York Law*, *at* xlv through lxxvii (European Commission Economic Paper No. 126, 1998), *available at* http://ec.europa.eu/economy_finance/publications/publication11220_en.pdf (last visited Oct. 2, 2012) (providing an impressively exhaustive discussion of the many cases referenced here).

[18] *See id.*

[19] All such cases but one concerned the Confederate dollar, while the other case involved a long-term contract with price explicitly determined by reference to an index that turned out seriously to underestimate inflation. *See* Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53, 70–78 (W.D. Pa. 1980). It perhaps bears noting, however, that these were all cases in which *lex monetae* supported plaintiffs as distinguished from the Scenario here under consideration, in which *lex monetae* is unhelpful owing to disagreement between Greece and the EU/EMU over the terms of Greece's exit. The distinction does not seem to me to make a difference, but perhaps it could be seized upon by a creative defendant's lawyer.

Third, and perhaps most importantly of all, New York courts do not appear as of yet to have applied the doctrine of impracticability outside the context of *sale-of-goods contracts* governed by Article II of the UCC. In all other circumstances, notwithstanding UCC Sec. 2–615 comment 9 cited *supra*, note 9, performances that are not impossible, even if impracticable, must be performed, else damages be paid.[20] This takes us to . . .

iv.2. *Scenario IB2*: Impossibility Doctrine in Non-Greek Court Under *Change Scenario I* (Greek exit of EMU) and *Impediment Scenario A* (depreciation of NeoD relative to Euro):

Contractual impossibility doctrine under New York Law is a common law doctrine, by and large identical to impossibility doctrine under the laws of other U.S. states as well as those of other nations whose legal systems partake of the British common law tradition.

Impossibility excuses a party's performance under a contract in only a very narrowly circumscribed set of circumstances—circumstances that are but rarely found by New York courts to obtain.[21] An *Act of God*—or, next best thing, of government—must intervene in such a way as to render performance either *literally*

It also probably bears noting that some esteemed authorities of the past have argued that collapse of a currency—as one could, I suppose, imagine happening to the NeoD—might under some circumstances warrant a finding of impracticability even if courts thus far have declined so to find. *See, e.g.*, ARTHUR LINTON CORBIN, 6 CORBIN ON CONTRACTS § 1360 (1962); Evsey S. Rashba, *Debts in Collapsed Foreign Currencies*, 54 YALE L. J. 1, 18–30 (1944). Lenihan, for his part begs to differ with Corbin and Rashba. *See* Lenihan *supra* note 17, at xcviii–xcix. My colleague Bob Hillman (a New York contract law authority), on the other hand, seems somewhat more sympathetic to the Corbin line. I'll soon consult with another colleague, Bob Summers (of White & Summers) on the UCC, to get his take as well.

[20] See GLEN BANKS, NEW YORK CONTRACT LAW Sec. 20:12 (2006) on this point. Expected performance will be excused where contingencies frustrate a party's ability to obtain supplies to execute a contract. Also, where delay or failure of performance results from governmental regulation.

[21] *See, e.g.*, Lagarenne v. Ingber, 710 N.Y.S.2d 425 (3d Dep't 2000) (holding that for performance to be excused on grounds of impossibility, the impossibility must be occasioned by an unanticipated event, which results in the destruction of the subject matter or means of performance such that performance becomes objectively impossible).

impossible—typically through destruction of the subject matter of the contract—or literally *illegal*.[22]

As with impracticability, discussed above, so with impossibility, then, economic hardship alone does not count.[23] Not even bankruptcy does.[24] *Impossibility* really means impossibility—or illegality.

For impossibility to be found, it must also be the case that the contract has not expressly allocated to either party the risk of that event which has putatively rendered performance impossible.[25] Relatedly, the event must not have been foreseeable to the party invoking the doctrine.[26] Nor can the impossibility in question be idiosyncratic to the party invoking it—rather, it must be 'objective,' such that no other party, either, would have been capable of rendering performance after the event in question occurred.[27]

As noted above, performance can be counted impossible if rendered illegal by law.[28] But the law in question must of course

[22] *See, e.g.*, Bank of New York v. Tri Polyta Finance B.V., No. 01Civ.9104(LTS)(DFE), 2003 WL 1960587 (S.D.N.Y. Apr. 25, 2003) (rejecting defendants' allegation that the economic collapse in Asia and Indonesia had rendered their performance of a contract with the plaintiff impossible, and holding that lack of funds, "even to the extent of insolvency or bankruptcy," can never excuse contractual performance). *In re* Regency Holdings (Cayman), Inc., No. 00 CV 8115(HB), 2001 WL 1033429 (S.D.N.Y. Sept. 7, 2001).

[23] *See, e.g.*, Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd., 86 F. Supp. 2d 244, 259 (S.D.N.Y. 2000) (stating the "absolutely clear" rule followed in New York that financial hardship allegedly caused by governmental policy does not excuse a party from the performance of its contractual obligations).

[24] *See, e.g.*, Barclays Business Credit, Inc., v. Inter Urban Broadcasting of Cincinnati, Inc., No. 90 Civ. 2272 (MJL), 1991 WL 258751 (S.D.N.Y. Nov. 27, 1991).

[25] *See, e.g.*, United States v. General Douglas MacArthur Senior Village, Inc., 508 F.2d 377, 381 (2d Cir. 1974) (holding that the impossibility doctrine comes into play if a contract fails to allocate the risk of an intervening occurrence to either party).

[26] *See, e.g.*, Inter-Power of New York, Inc. v. Niagara Mohawk Power Corp., 617 N.Y.S.2d 562, 563–5 (N.Y. App. Div. 1994) (stating that a plaintiff has no claim for impossibility who had notice of an intervening event and could have provided for that event in the contract).

[27] *See, e.g.*, Beagle v. Parillo, 498 N.Y.S.2d 177, 178–79 (N.Y. App. Div. 1986) (concluding that inability of performance is not a defense if inability is personal to the performer and not inherent in the task); United States v. Wegematic Corp., 360 F.2d 674, 676 (2d Cir. 1966) (emphasizing that inability to perform is an objective, not a subjective, standard).

[28] *See, e.g.*, Millgard Corp. v. E.E. Cruz/Nab/Fronier-Kemper, No. 99 Civ. 2952(LBS), 2004 WL 1900359, at *3 (S.D.N.Y. August 24, 2004) (declaring that

have been promulgated after the contract was agreed to[29] and generally must not have been foreseen by or foreseeable to the party invoking impossibility on the new law's basis.[30]

And again, mere hardship worked by the law does not suffice; the law must literally render illegal ("objectively impossible") the performance that would be excused.[31] Nor will merely temporary illegality warrant a finding of impossibility—the illegality in question must be of indefinite duration.[32]

Bringing these considerations to bear upon the circumstances laid out per *Impediment Scenario B*, we can see that an impossibility defense by our Greek defendant *might* be possible. Whether it would be would depend on the nature of the capital controls imposed by the Greek government per that Scenario.

Were Greece, for example, to prohibit purchase of foreign exchange—including now Euro—by Greek nationals altogether, we would seem to have a textbook case of *Act of God* [government]-wrought impossibility. All then would ride upon whether the contract provided for this particular risk, or if not, then whether the risk was in any event reasonably foreseeable by the party invoking impossibility—our Greek defendant.

Were the answer in both cases negative, then our German plaintiff would likely have to challenge the Greek legislation itself, on some constitutional or treaty-based theory of contract

contract performance is impossible if it would violate city law); *see also* RESTATEMENT (FIRST) OF CONTRACTS § 457 (1932).

29 *See, e.g.*, Scanlan v. Devon Systems, Inc., No. 89 CIV 1634 LMM, 2000 WL 218389, at *2 (S.D.N.Y. Feb. 24, 2000) (mentioning that the impossibility doctrine is triggered when a previously legal agreement becomes illegal).

30 *See, e.g.*, Sagittarius Broadcasting Corp. v. Evergreen Media Corp., 641 N.Y.S.2d 267, 269 (N.Y. App. Div. 1996) (noting that change of law rendering contract performance impossible must have been unforeseen by invoking party); Montgomery-Otsego-Schoharie Solid Waste Management Authority v. County of Otsego, 671 N.Y.S.2d 545, 546–48 (N.Y. App. Div. 1998) (observing that impossibility defense is unavailable when the change in law rendering contract performance impossible was foreseeable).

31 *See, e.g.*, Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd., 86 F. Supp. 2d 244, 259 (S.D.N.Y. 2000) (stating that financial difficulty even to the point of insolvency does not meet the standard for an impossibility defense, even where caused by governmental policy).

32 *See, e.g.*, *Scanlan* 2000 WL 218389, at *2 (declaring that where impossibility of performance is only temporary, impossibility suspends performance but does not remove it entirely).

impairment, rather than our Greek defendant. In essence, we would be back to *Venue Scenario 1*, above.

If, on the other hand, Greece under the new regime employed some less onerous form of capital controls, rendering the purchase of Euro by our defendant more difficult and more expensive but not literally illegal or impossible, the story would be different. Our Greek defendant would remain liable on the contract and performance would not be excused. Again, then, all now will ride on that proverbial 'devil' who resides in the 'details'—the Greek legislation that institutes what we've been calling *the Change*.

And that closes discussion of the four possible scenario combinations—*IA1*, *IA2*, *IB1*, *IB2*—under *Regime Change Scenario I*, in which one or more nations leave the EMU, with the EMU nevertheless continuing. Time now has come to consider a dissolution of the EMU altogether. That is *Regime Change Scenario II*.

Analysis under *Regime Change Scenario II*, as we shall see, is considerably simpler than that under *Regime Change Scenario I*. First, how might contractual continuity come to be implicated?

Here is what would seem the prototypical Hypothetical. I'll again lay things out by reference to a change, then a plaintiff and defendant whose contractual relation is affected by the change. I'll keep things as close to our first Hypothetical as possible in order to facilitate focus on the one variation introduced here—variation in the precise form of the *Regime Change* that occurs.

4.2. *Second Hypothetical*

4.2.1. *The Change*

Let us assume first that the EMU simply dissolves, by mutual agreement of all parties presently party to that Union. Assume that Greece replaces the Euro with, say, a new national currency, the NeoD. It stipulates some NeoD/Euro exchange rate and formally redenominates all pre-existing contracts bearing some nexus to Greece—e.g., Greek sovereign bonds, loans to Greek nationals, etc.—in NeoD. Call this "the Change." Something like this *Change* would seem to be requisite to contractual continuity's being so much as implicated under *Regime Change Scenario II*.

Next, note that, in contrast to the story in *Regime Change Scenario 1*, in this scenario, Greece probably need not adopt any particular policy with respect to the post-*Change* NeoD/Euro exchange rate, for the Euro will simply cease to exist. The one possible exception would be the circumstance in which the terms of the EMU's dissolution were such as to 'phase out' the Euro over some period, analogously to the way in which the Euro was 'phased in' in the first instance.

Were that to occur, analysis here during the phase-out would be more or less identical to that under *Regime Change Scenario I*, above. I shall therefore incorporate that analysis by reference here for any phase-out period. Then, once we're past any phase-out period, we have the following.

Greece will presumably adopt some policy concerning the NeoD's relation to other currencies in the world, even if not, under this scenario, to the now non-existent Euro. There are of course several possibilities.

First, Greece might undertake to *peg* the NeoD to some other currency—say, oh, I don't know—a *NeuDeutscheMark*—to keep it credible. This seems unlikely unless Greece intends that the peg be adjustable, more on which prospect below. For adopting a *nonadjustable peg* would deny Greece sufficient monetary policy autonomy as to permit repeated periodic de- and/or revaluations, which would presumably be among those considerations prompting the Change here in the first place.

A second prospect seems nearly as unlikely. That would be Greece's aiming to permit a *free float* of its currency on the ForEx markets. This seems unlikely in light of the new NeoD's likely vulnerability, at least early on, to speculative attack on the ForEx markets.

More likely, then, Greece will aim to operate with either third, an *adjustable peg*, or fourth, a *managed float* on the ForEx markets. Either policy will presumably be conducted by its central bank—the Bank of Greece, or "BG" (which is still not to be confused with the Australian singing group of the 1970s).

Now, if Greece maintains a non-adjustable peg—again, unlikely—it will surely have to employ capital controls as well. Some form of capital control or regulation, albeit variably strict depending on events in the global capital and ForEx markets, also will presumably be necessary in connection with an adjustable peg or a managed float.

Which of these strategies is selected, and how successfully it is implemented if it be something other than free float, will bear upon subsequent litigation in manners to be noted below.

4.2.2. The Plaintiff and Defendant

Next, per our Hypothetical, we'll assume that—oh, I don't know—a *German* national is owed a contractual debt by the Greek Treasury or a Greek national. The contract denominates the debt in Euro, and the German national understands that this is no longer possible. Our plaintiff might nevertheless come to be aggrieved, in a manner that implicates law, under various conceivable circumstances.

If one of the following occurs, the Greek Treasury or our Greek national might well encounter difficulty in performing on the contract in a manner satisfactory to the German plaintiff, even if they wish to do so; the legal significance that the difficulty carries depends on which one actually occurs.

4.2.2.1. Impediment Scenario A (Colorable Lex Monetae or Impracticability Defense)

We assume Greece has allowed the NeoD to float, either freely or in managed fashion, or it maintains an adjustable peg which has indeed now been adjusted. Assume either way that the consequence is that NeoD now is worth much less relative to Euro than it was at the time of *the Change*. In other words, its value is now much vitiated by effective inflation of the NeoD itself.

Our German plaintiff, however, insists on payment at the original NeoD/Euro exchange rate at the time of *the Change*, with the current 'shadow Euro' value determined by, say, reference to a weighted average of the values of all other erstwhile Euro-currencies. This will invite invocation of the *lex monetae* doctrine, as well, perhaps, of the *commercial impracticability* excuse of contractual performance by our Greek defendant should the German plaintiff demand payment at the original exchange rate in non-Greek court.

4.2.2.2. Impediment Scenario B (Colorable Impossibility Defense)

We shall assume that Greece maintains a strict or adjustable peg, or manages a float, and to facilitate pursuit of that policy also imposes capital controls. The controls are such, in turn, as to prevent ready payment of foreign nationals with NeoD. If such payment is simply rendered more difficult than it otherwise would have been, but is not rendered illegal or otherwise literally impossible, then again we are looking at prospective *lex monetae* or impracticability excuse of performance, as in *Impediment Scenario A*.

If, on the other hand, capital controls are such as actually to render payment with NeoD illegal or impossible, then this will invite invocation of *impossibility* excuse of contractual performance should German national demand payment in NeoD, per legislatively redenominated terms of the contract, in non-Greek court. Finally, our German plaintiff sues our Greek defendant on the contract, seeking payment in NeoD at the original exchange rate. There are then two more sub-scenarios to consider.

4.2.2.3. Venue Scenario 1 (Action Brought in Greek Court)

Assume that the contract action is brought in Greek (domestic) court. In this case the redenomination is again going to be recognized, inasmuch as Greek courts apply Greek law. The only question will be whether the defendant may depart from the originally legislated exchange rate, which in turn will depend on what the legislation itself has to say here. If the legislation stipulates that the original exchange rate remains applicable (which seems unlikely if Greek government aims to maintain adjustability of currency relative to others), and defendant encounters difficulty paying in consequence, then analysis will proceed along lines sketched in *Venue Scenario 2*, below.

If, on the other hand, legislation provides for payment in NeoD, period, with no reference to any particular relative value thereof, then defendant will prevail under *lex monetae*. Presumably, however, plaintiff will now aim to appeal to some higher court within Greek, EU or global legal systems, perhaps challenging the legislation itself on constitutional or cognate treaty grounds insofar as it impairs preexisting contractual obligations. It would seem, however, that plaintiff will not likely prevail in such case, in view of the weight all nations appear to place upon *lex monetae*.

4.2.2.4. Venue Scenario 2 (Action brought in Non-Greek Court)

Now assume that the contract action is brought in non-Greek (foreign), e.g., New York court: now the court will embark upon a multi-step analysis. First it will determine the *lex monetae*—the law of the sovereign that issues the currency named in the contract. For that law, again under the *state theory of money* that all nations (including the United States) appear to uphold, determines *what* *counts* as tender in discharge of an obligation denominated in the currency issued by that sovereign. And this is so notwithstanding any depreciation on the part of some newly issued currency relative to whatever currency it replaces and notwithstanding any other body of law named in the contract (i.e., any *law of the contract*, per *v*, below).

The only question, then, would be how inflation, per our Hypothetical, would affect defendant's obligation, and this in turn would ride, as in *Venue Scenario 1* just above, on what the Greek legislation itself had to say about the matter. If the Greek legislation said nothing about retention of an initial exchange rate for redenomination purposes, plaintiff would again be out of luck, as envisaged in *1*, just above. The only recourse then would be constitutional-like challenge to the legislation itself.

On the other hand, if the Greek legislation did provide for revaluation of redenominated sums in a manner that continued to reflect the initial exchange rate stipulated in the legislation, then defendant would wish to appeal to impracticability or impossibility doctrine as discussed above. That would raise the question of which jurisdiction's such doctrine was applicable. Hence we would turn to . . .

4.2.2.4.1. Law of the Contract

First we determine the so-called *law of the contract*, if such there be. That is, if the contract states which law shall govern its own interpretation and application, we proceed to analyze the impracticability or impossibility question under that law. (Many financial contracts of course stipulate that the law of the State of New York shall govern.)

If the law in question is that of Greece, then we are again back to *Venue Scenario 1*, above. If the law is not that of Greece, then we proceed to *vii*, below, to apply the apposite jurisdiction's impracticability or impossibility doctrines, depending on whether we're faced with *Impediment Scenario A* or *B*. Finally, if the contract does not name any particular body of law as governing—that is, if there is no law of the contract—then we fall back to . . .

4.2.2.4.2. Conflicts of Law Analysis

If there is no governing body of background law per *v* above, then apply the *conflicts* rules of jurisdiction in which the court entertaining the suit sits to determine which law governs. Once that is determined, proceed in accordance with *v*, above. That is, if Greek law is found applicable, we're back to *1* above, and otherwise we proceed to *vii*, below.

4.2.2.4.3. Impracticability or Impossibility Defenses

Finally, if Greek law turns out not to be applicable law apart from defining the currency, and that law in turn, per its redenomination provision, appears to suggest that redenomination occurs strictly in keeping with the first-stated exchange rate between the new NeoD and the old Euro, and the NeoD in the meanwhile has significantly dropped in value, our Greek defendant might argue excuse from performance per some variant of either the *impracticability* doctrine, in the case of *Impediment Scenario A*, or the *impossibility* doctrine, in the case of *Impediment Scenario B*. Analysis will then proceed as laid out above in connection with each doctrine.

5. A SPECIAL CASE? THE NEW YORK GENERAL OBLIGATIONS LAW

Ah, but wait. What about the 1997 Amendments to the New York General Obligations Law? As the reader likely knows, New York amended its general obligations law in 1997 to *ensure* continuity of contract after the Euro, pursuant to the EMU's coming into being, replaced the European Currency Unit ("ECU").[33] That was an important measure to take, because many contracts—particularly derivative and other financial contracts—are either entered into in the State of New York, name New York law as the law of the contract, or both.

In essence, the 1997 Amendments provide that if a subject or medium of payment of a contract, security, or financial instrument is the pre-Euro ECU, the Euro will count as a commercially reasonable substitute and substantial equivalent. The Euro accordingly may be used to determine the value of the ECU at the time of payment, or may be tendered, at an exchange rate specified in or calculable in accordance with regulations adopted by the Council of the European Union.

[33] *See* S. Memo. In Supp 220–5049, Reg. Sess., at 2299 (N.Y. 1997) (codified at N.Y. GEN. OBLIG. LAW § 5–1601–1604 (McKinney 1999)) (detailing New York law guaranteeing continuity of contract following the replacement of the ECU with the Euro).

None of this would seem to change the analysis provided above. There are two reasons for this. The first, narrower reason is that the amendment to the General Obligations law refers by terms to contracts denominated in ECU, providing in essence that the Euro now is, for all commercially practical intents and purposes, the ECU. It says nothing about, nor does it appear in any way to contemplate, any prospective retreat from the Euro (or ECU) to distinct national currencies.

The second, broader reason is that the amendment to the General Obligations law appears to have been meant simply to codify and make plain in one place something that already would have been legally true—namely, that per the *lex monetae* of the EMU, which New York and all other jurisdictions already would have accepted per the *state theory of money* that predominates across the world, the ECU has now been officially replaced by the Euro. The amendment accordingly added nothing of substance, but merely declared in an up-front, statutory fashion what was already true as a matter of common law.

6. CONCLUSION: KEEPING IT UNREAL

I hope I have managed to render more tractable that complex, multilayered problem that could be occasioned by what has become, alas, more than a mere abstract possibility.[34] While I do not believe fundamental EMU regime change to be likely—desirable as I believe at least one temporary change to that regime would be—I do think it helpful to think through in advance what legal consequences would be apt to follow were such change to occur.

Contingency planning of this sort not only assures more orderly, less panicked responses in the event that the contemplated eventuality does occur; it also, in forestalling panic, actually lessens the likelihood of the eventuality itself. For as we know well from hundreds of years of financial history, financial and money markets are one realm in which prophecies, dire or exuberant, are apt to prove self-fulfilling.

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[34] The reader is hereby reminded that the Appendix immediately following reduces all of the analysis to a conveniently tractable 'flowchart' form.

APPENDIX: FLOW CHART SUMMARY

(Read Top to Bottom, then Left to Right)

Regime Change I: Exit by One or More Economic and Monetary Union Members ("EMU")—Country Greece.
Hypothetical: Contract in Euros, Non-Greek Party Prefers Payment in Euros.

Impediment *A*: New Greek Currency depreciates. Greek Defendant pays in new Greek currency.		**Impediment *B*:** Cap Controls Prevent Euro Purchase. Greek Defendant unable to pay in Euro.	
Venue *1*: Suit in Greek Court.	**Venue *2*:** Suit in NY Court.	**Venue *1*:** Suit in Greek Court.	**Venue 2:** Suit in NY Court.
Defendant Prevails.[35]	Seek ***Lex Monetae***.	Defendant prevails.	Seek ***Lex Monetae***.
	If Greece/EMU split amicably, ***Lex Monetae*** is Greek. And… If Greek, Defendant prevails.		If Greece/EMU split amicably, ***Lex Monetae*** is Greek. And… If Greek, Defendant prevails.
	If split is not amicable, There's no ***Lex Monetae***.		If split is not amicable, no ***Lex Monetae***.
	If no ***Lex Monetae***, seek **Law of Contract:** If Greek, Defendant prevails. If not Greek, go to bottom line.		If no ***Lex Monetae***, seek **Law of Contract** If Greek, Defendant prevails. If not Greek, to bottom line.
	If no Law of Contract, **Conflicts Analysis.** If Greek, Defendant prevails:		If no Law of Contract, **Conflicts Analysis.** If Greek, Defendant prevails:
Bottom Line:	If not Greek, Defendant loses: **Impracticability** Claim.		If not Greek, Defendant wins: **Impossibility** Claim.

[35] Note that at any point herein at which Greece prevails, the plaintiff may nonetheless challenge new Greek legislation itself on constitutional or treaty-based grounds for impairment of contract. That might be difficult in view of *lex monetae*, but . . . .

Regime Change II: Dissolution of Economic and Monetary Union
Hypothetical: Contract in Euros, Non-Greek Party Prefers Payment in Greek Currency at Initial Exchange Rates.

Impediment *A*: New Greek Currency depreciates: Greek Defendant prefers payment at current rate.		**Impediment *B*:** Cap Controls Prevent Payout: Greek Defendant is unable to pay at all.	
Venue 1: Suit in Greek Court.	**Venue 2:** Suit in NY Court.	**Venue *1*:** Suit in Greek Court.	**Venue 2:** Suit in NY Court.
If Greek Legislation Does not Guarantee Exchange Rate:	Seek ***Lex Monetae;***	Defendant prevails.	Seek ***Lex Monetae:***
Defendant prevails.[36]	***Lex Monetae*** is Greek.		***Lex Monetae*** is Greek.
If Greek Legislation Guarantees Exchange Rate Employ **Impracticability** Analysis per above.	Hence Venue 1 analysis. ←		Defendant prevails.

[36] Note again that at any point herein at which Greece prevails, the plaintiff may nonetheless challenge new Greek legislation itself on constitutional or treaty-based grounds for impairment of contract. That might be difficult in view of *lex monetae*, but . . . .