

What Commercial Lawyers Should Know About the Euro (with Sample Clauses)

by Marsha E. Simms

Marsha E. Simms is a partner in Weil, Gotshal & Manges LLP, New York City. She is a member of the American Bar Association, the National Bar Association, the Metropolitan Black Bar Association, and the Board of Directors of the American Arbitration Association. A complete set of the course materials from which this outline was drawn may be obtained from ALI-ABA. Call 1-800-CLE-NEWS, ext. 7000, and ask for SD71.

“BBA” refers to the British Bankers Association; “EC Treaty” or “Treaty of Rome,” to the Treaty Establishing the European Economic Community; “ECB,” to the European Central Bank; “ECU,” to European Currency Unit; “EMU,” to European Economic and Monetary Union; “ESCB,” to the European System of Central Banks “EU,” to the European Union; “EU Council,” to the Council of Ministers of the European Union; “FIBOR,” to the Deutsche Mark Frankfurt InterBank Offered Rate; “ICC,” to the International Chamber of Commerce; “IPMA,” to the International Primary Market Association; “ISDA,” to the International Swaps and Derivatives Association, Inc.; “LISBOR,” to the Portuguese Escudo Lisbon InterBank Offered Rate; the “Maastricht Treaty,” to the 1992 Treaty on European Union; “PIBOR,” to the French Franc Paris InterBank Offered Rate; “RIBOR,” to the Italian Lira Rome InterBank Offered Rate; and “UCP 500,” to Uniform Customs and Practice for Documentary Credits.

A. Introduction

1. The euro is a single currency adopted by certain EU member countries. To understand the euro, a commercial lawyer needs a basic knowledge of the EU.
2. Although usually thought of in the singular sense, the EU actually consists of three different European communities that were separately created by different treaties, but which together form the EU.
 - a. The different treaties that created the three distinct European communities that together form the EU are:
 - i. The European Coal and Steel Community Treaty (Paris 1951);
 - ii. The European Atomic Energy Community Treaty (Rome 1957); and
 - iii. The Treaty Establishing the European Economic Community (Rome 1957) (all three treaties have since been amended from time to time).
 - b. The most important treaty for U.S. attorneys, because of its central role in the European plan for economic integration referred to as EMU, is the EC Treaty, as amended. The EC Treaty was signed in Rome on March 25, 1957, and has since been amended by the 1986 Single European Act, the 1992 Treaty on European Union (commonly referred to as the “Maastricht Treaty”), and most recently by the 1997 Treaty of Amsterdam.

c. The EU forms a large common market comprising 350 million people for the free movement of goods, capital, labor, and technology among EU members. The right of free movement without customs duties only applies to goods that originate within the EU member countries or that have lawfully entered the EU and are said to be in free circulation. The EU has also established a common import tariff with the rest of the world. The activities of the EU are conducted by the EU Council, a Commission, a Parliament, and a Court of Justice. The EU Council is composed of one representative from each of the EU member countries. The EU legislation process is initiated by the EU Commission (a larger body than the EU Council, but also composed of national representatives), which drafts proposals that the EU Council then has the power to adopt into law.

d. The current members of the EU are: Austria; Belgium; Denmark; Finland; France; Germany; Greece; Ireland; Italy; Luxembourg; the Netherlands; Portugal; Spain; Sweden; and the United Kingdom.

e. Of the current 15 EU members, Denmark, Sweden, and the United Kingdom chose not to join the single currency at this time. Furthermore, Greece was not allowed to join at this time because it was found not to meet the requisite economic criteria. EU members wishing to participate in the euro have to first satisfy certain convergence criteria relating to inflation rates, interest rates, public debt, budget deficits, and exchange rates. The convergence criteria are set forth in the EC Treaty, as amended by the Maastricht Treaty.

3. The introduction of the euro is important not only within the EU, but for any entity anywhere in the world that engages in transactions involving a currency of an EU member country, regardless of whether that country is one of the 11 current euro participants (since there remains the possibility that the four remaining EU members may join the euro in the foreseeable future). Additionally, EU membership could expand in the future, increasing the number of countries whose currencies could potentially qualify to participate in the euro.

4. This outline will briefly describe the EMU and the euro, will provide further information on issues commercial lawyers should be aware of relating to the euro, and will provide drafting tips for multi-currency credit agreements.

B. Background: The European Economic and Monetary Union

1. The EC Treaty provides for the achievement of EMU in three stages, thus making EMU not a single event but a process.

a. The first stage began on July 1, 1990, and involved the coordination of economic policies, such as the removal of currency exchange controls among EU members and the establishment of a mechanism by which to maintain exchange rates within certain limits as valued against the Deutsche mark.

b. The second stage began on January 1, 1994, and basically embodied a convergence period in which prospective euro-participating countries attempted to meet the criteria required to participate in the third stage of EMU. On May 2, 1998, the EU Council determined which EU countries qualified to participate in the initial implementation of the euro.

c. The third, and last, of the EMU stages began on January 1, 1999, and involves the introduction of a single currency within certain EU countries. This third stage will be discussed in greater detail following a brief introduction of the two regulations forming the substantive part of the EMU framework.

2. The EU Council has enacted two main regulations under Article 189 of the EC Treaty. These two regulations form

the substantive part of the legal framework for EMU. Under Article 189, Regulations adopted by the EU Council are “directly applicable in all member states.” Which means that the regulations immediately bind all persons, business entities, and governments of the EU member countries upon their adoption of the regulations by the EU Council, without any need for national implementation statutes. Also, when applicable, the regulations are the controlling law in legal disputes falling under the jurisdiction of an EU member country despite contrary national law.

a. Council Regulation No. 1103/97. The EU Council adopted Regulation No. 1103/97 on June 17, 1997. This regulation, commonly referred to as the “Article 235 Regulation” because it was adopted under Article 235 of the EC Treaty as amended by the 1992 Maastricht Treaty, contains provisions regarding the introduction of the euro in EU member states; e.g., “euro” as the name for the new single currency, the ECU’s replacement by the euro at a one-to-one rate, and general conversion and rounding procedures regarding national currencies and the euro. Most importantly, this regulation provides the legal foundation for establishing continuity of contract in all of the EU member countries. The Article 235 Regulation applies to all members of the EU regardless of whether they are current participants of the euro.

b. Council Regulation No. 974/98. The EU Council adopted Regulation No. 974/98 on May 3, 1998. This regulation, commonly referred to as the “Article 109(4) Regulation” because it was adopted under Article 109(4) of the EC Treaty, as amended by the 1992 Maastricht Treaty, contains provisions regarding currency conversions, payment of outstanding accounts in euros and redenomination of securities during the post-January 1, 1999, transitional period, netting of monetary obligations, and completion of the EMU process after January 1, 2002, with the entry into circulation of euro notes and coins. The Article 109(4) Regulation applies only to euro-participating countries.

C. The Implementation of the Euro

1. On January 1, 1999, under the Article 109(4) Regulation, the euro officially became the currency of the 11 EU countries that are the original participants. During the “conversion weekend” beginning on January 1, the currencies of the 11 participating countries were converted into the euro at exchange rates that were irrevocably established by the EU Council

a. The EU Council irrevocably set the exchange rates for the 11 participating currencies upon a proposal from the Commission of the European Communities and after consultation with the European Central Bank.

b. The established rates are one euro equals: 13.7603 Austrian schillings; 40.3399 Belgian francs; 5.94573 Finnish markka; 6.55957 French francs; 1.95583 Deutsche marks; .787564 Irish pounds; 1936.27 Italian lira; 40.3399 Luxembourg francs; 2.20371 Dutch guilders; 200.482 Portuguese escudos; and 166.386 Spanish pesetas.

c. Starting also on January 1, the ECB, established on June 1, 1998, effectively replaced the national central banks of the euro-participating countries, and began directing the monetary policy of the euro countries, including the money supply and the official interest rate for the euro. The ECB is responsible for defining the monetary policy of the euro-participating countries. However, the ECB’s decisions will be carried out in a decentralized manner through the national central banks of the euro-participating countries. The ECB together with the central banks form the ESCB.

d. Although many technical and market mishaps had been feared during the conversion weekend as a result of the conversions and the initiation of euro trading, the conversion weekend was widely viewed as having occurred smoothly given the scope of the task.

2. The currencies of the euro-participating countries will continue to exist as “expressions” of the euro for a transitional

period of three years dating from January 1, 1999, to December 31, 2001. The national currencies of the participating countries may continue to be used during this period, but can be substituted with the euro.

a. Throughout the transitional period, there is no legal obligation to either pay or not pay an obligation by crediting the account of the payee in euros under a contract entered into before 1999. This tenet is enacted in the Article 109(4) Regulation and is commonly referred to as the “no compulsion, no prohibition” principle.

“[A]ny amount denominated either in the euro unit or in the national currency unit of a given participating Member State and payable within that Member State by crediting an account of the creditor, can be paid by the debtor either in the euro unit or in that national currency unit. The amount shall be credited to the account of the creditor in the denomination of his account, with any conversion being effected at the conversion rates.” Article 109(4) Regulation, Article 8(3).

b. A financial institution within a euro-participating country that receives payment for an account-holder in either the institution’s national currency or in euros must credit the payment in the currency unit in which the account is denominated by using the official EU conversion rate. Although the Article 109(4) Regulation obligates banks to convert between the euro and national currencies, the regulation does not address the question of whether a fee may be charged for such conversions made during the transitional period. However, the EC Commission has issued guidelines, which banks have accepted, that state that account-holders will not have to pay for such currency conversions.

c. During the transitional period, payors remain free to choose whether to pay in euros, just as account holders remain free to choose whether to maintain accounts denominated in either euros or in the national currency of the participating country in which the account is located. However, the Article 109(4) Regulation allows parties to contract otherwise. Although no party may unilaterally obligate another party to either use or not use the euro during the transitional period, parties may reach a mutual agreement over the use of the euro. Thus, the “no prohibition, no compulsion” principle means that in practice there is a distinction between contracts formed without specific reference as to whether the euro must/must not be used, and contracts formed giving such specific instruction. In addition, it should be noted that payors may credit accounts only either in euros or in the contractually designated national currency, and not in any other currency that the payor unilaterally chooses. It should be kept in mind, furthermore, that entities may be compelled commercially (i.e., without having agreed to by contract) to pay in euros during the transitional period if other businesses—such as suppliers—convert to using the euro, or if lenders require borrowers to borrow in euros or to provide financial statements in euros as opposed to a constituent currency. There is thus the potential for a snowball effect as the number of private sector entities that adopt the euro during the transitional period grows.

d. As the conversion did not include the substitution of physical currency notes and coins, the euro can only be used for non-cash transactions during the transitional period. According to the European Commission’s reading of Article 8 of the Article 109(4) Regulation, such permissible non-cash methods of payment include checks, travellers’ checks, electronic bank transfers, and credit cards. Also, as will be discussed below under continuity of contract concerns, certain states of the United States have enacted euro-related legislation. These state statutes are consistent with EU law with regard to permissible euro methods of payment.

3. Under the Article 109(4) Regulation, on January 1, 2002, the ECB and the national central banks of the participating countries will begin issuing euro notes and coins across the participating countries. Up until July 1, 2002, both euros and local currencies will be legal tender, and dual pricing will be legally required (prices will have to be shown in both euros and the relevant local currency). Furthermore, although euro-participating countries are free to shorten this physical