JUDGMENTS IN FOREIGN CURRENCIES

Historical Background

The rule that English courts, and *mutatis mutandis* the courts of countries which have inherited the common law of England, can only give judgment in their own currencies, was once thought to be a fundamental principle beyond argument.

In *Schorsch Meier GmbH* v. *Hennin*[1] Lord Denning M.R. pointed out that as early as 1605 English courts had held in *Rastell* v. *Draper*[2] that:

> "The debt ought to be demanded by a name known, and the judges are not apprised of Flemish money; and also when the plaintiff has his judgment, he cannot have execution by such name, for the sheriff cannot know how to levy the money in Flemish".

His Lordship went on to say:

> "From that time forward it has always been accepted that an English court can only give judgment in sterling. Judges and textbook writers have treated it as a self-evident proposition. No advocate has ever submitted the contrary"[3]

Lord Denning himself in 1961 said in *Re United Railways of Havana and Regla Warehouses Limited:*[4] "And if there is one thing clear in our law, it is that the claim must be made in sterling and the judgment given in sterling".

Almost as equally well-established was the accompanying rule that a debt in foreign currency should be converted into English currency as at the date on which the debt was payable, or in the case of damages arising from breach of contract or tort, as at the date that the breach of contract occurred or the damages in relation to which compensation was claimed were suffered. This principle, known as the "breach-date" rule was of relatively more recent origin. The rule was first laid down authoritatively by the Court of Appeal in *Di Ferdinando* v. *Simon, Smits & Company Limited*[5] in relation to damages for breach of contract, was affirmed by the House of Lords in *SS Celia* v. *SS Volturno*[6] in relation to damages for tort and again reaffirmed by the House of Lords in *Re United Railways*

1 [1975] Q.B. 416 at p. 423.
2 (1605) Yelv. 80. But see *Bagshaw* v. *Playn* (1595) 1 Cro. Eliz. 536 where judgment was given for 47 Flemish pounds.
3 At p. 424.
4 [1961] A.C. 1061 at pp. 1068, 1069. See also Dicey & Morris, *The Conflict of Laws,* 9th ed. (1973) Rule 174(1); Cheshire, *Private International Law,* 9th ed. (1974) p. 704; Nygh, *Conflict of Laws in Australia,* 2nd ed. (1971) p. 392.
5 [1920] 3 K.B. 409.
6 [1921] 2 A.C. 544.

of Havana and Regla Warehouses Limited[7] in relation to a liquidated contract debt. The Privy Council accepted the principle in *Syndic in bankruptcy of Khoury* v. *Khayat*[8] on appeal from Palestine. The rule was extended as late as 1970 by the Court of Appeal to cover a claim for expenses incurred in salvage. In the *Teh Hu,*[9] it was held that salvage costs incurred in foreign currency should be converted as at the date when the salvage services were rendered.

However there were exceptions to the breach-date rule. In *Re Dawson, deceased, Union Fidelity Trust Company Limited* v. *Perpetual Trustee Company Limited,*[10] Street J. (as he then was) of the New South Wales Supreme Court sitting in Equity held that the breach-date rule was not applicable to a claim for restitution against a defaulting trustee. Accordingly he held that a trustee, who by his default had caused the trust estate a loss of New Zealand £4,700 in 1939 when the currencies of Australia and New Zealand were at par, was obliged to make restitution in Australian currency at the rate of exchange prevailing in 1966.

Another exception was that the breach-date rule did not exclude recovery of damages caused by depreciation of the currency of account when such depreciation was reasonably foreseeable: *Aruna Mills Limited* v. *Dhanrajmal Gabindram.*[11]

The English courts also overcame some of the harshness of the rule in relation to claims for debt by holding in cases where the Exchange Control Act, 1947 in Section 6(1) prohibited the payment of a debt by a resident of the United Kingdom to or for the credit of a foreign resident without the permission of the Treasury, that the relevant date for conversion was not the due date of the debt, but the date upon which the debt could first lawfully be paid. Consequently, it was held in *Cummins* v. *London Bullion Company*[12] where a United States dollar debt payable to a United States resident fell due contractually just before the 1949 sterling devaluation, but Treasury permission was not given for the payment of that debt until after the devaluation, that the relevant date for conversion was the date of Treasury permission. This was followed by Megarry J. in *Re Hawkins deceased*[13] where his Lordship held that the relevant date for converting a debt payable to a United States resident in the administration of a deceased estate was the date of the making of the administration order rather than the date on which the debt originally fell due.

There are also several statutory provisions dealing with the conversion date. One of these is found in legislation providing for the

7 See *ibid.,* n.4.
8 [1943] A.C. 507.
9 [1970] P. 106.
10 [1966] 2 N.S.W.R. 211.
11 [1968] 1 Q.B. 655.
12 [1952] 1 K.B. 327.
13 [1972] 1 Ch. 714. In Australia Regulation 8(1) of the Banking (Foreign Exchange) Regulations, continued in force under the Banking Act 1974, prohibits the making of any payment to any person resident out of Australia without the permission of the Reserve Bank. Although there is no decision on this particular aspect it is assumed that *Cummins* v. *London Bullion Company Limited* would be followed in Australia.

enforcement of foreign judgments on a reciprocal basis: Foreign Judgments (Reciprocal Enforcement) Act 1933 (U.K.) Section 2(3), followed in Australia and New Zealand.[14] However, this legislation takes as the conversion point the date of the original judgment which is sought to be enforced. This is of course the date on which the judgment debt arose, and indeed, if enforcement of a foreign judgment were sought at common law, the same conversion date would apply: *East India Trading Company Incorporated* v. *Carmel Exporters and Importers Limited.*[15] Consequently, it is not really an exception to the breach-date rule.

Limitations imposed by international conventions such as the Warsaw Convention expressed in terms of gold francs, are to be converted into the currency of the forum at the time of the judgment, not of the accident or loss: Carriage by Air Act 1961 (U.K.) Schedule 1, Article 22(5); Civil Aviation (Carriers Liability) Act 1959 (Com) Section 23. But the very purpose of using gold francs is to guard against currency depreciation. The most prominent statutory departure from the breach-date rule is seen in recent maintenance enforcement legislation in Australia, New Zealand and the United Kingdom which all provide that the amount due under a foreign maintenance order shall be converted into local currency as at the date that the order becomes enforceable in the country of registration.[16]

It is obvious that the breach-date rule and the rule that English courts can only give judgment in sterling worked injustice once the pound sterling lost the stability which it had enjoyed during the period of British political and commerical supremacy. Successive substantial devaluations of the pound sterling from 1949 onwards meant that a creditor who had been promised payment in a foreign currency stronger than sterling could see his entitlement devalued. As F.A. Mann commented in 1968:

> "if A in New York was in September 1949 entitled to be paid $420 in New York by another New York resident under a contract governed by New York law and finds his debtor in England, he now cannot normally receive more than $240, for at the date of breach $420 was worth £100 which now produces $240."[17]

Since then the United States dollar itself has been devalued and other currencies, such as the pound sterling, have gyrated up and down on the international currency exchanges.

That the rules worked unfairly was appreciated by the courts.[18] But until 1974 the two rules, subject only to the limited exceptions stated above, appeared to be unchallengeable.

[14] See for details, Nygh, *Conflict of Laws,* 3rd ed. pp. 103-106; in Malaysia: Reciprocal Enforcement of Judgments Act 1958-59; and in Singapore: Reciprocal Enforcement of Foreign Judgments Act, Cap. 25, Singapore Statutes, Rev. Ed. 1970.

[15] [1952] 2 K.B. 439.

[16] See Australia: Family Law Regulations r. 171; New Zealand, Domestic Proceedings Act 1968 s. 75(1); and the United Kingdom: Maintenance Orders Act 1972 s. 16.

[17] "Specific Performance of Foreign Money Obligations" (1968) 31 M.L.R. 342.

[18] See the dissent of Lord Denning, M.R. in the *Teh Hu* [1970] P. 106 at 124, and the comments by Megarry J. in *Re Hawkins deceased* [1972] 1 Ch. 714 at 723, as well as the exceptions to the rule noted above.

CHANGES IN THE LOCAL CURRENCY AND BREACH-DATE RULES

The first challenge to the established position came appropriately from Lord Denning who as long ago as 1961 had queried the continued relevance of the rule that English courts could only give judgments in sterling in *Re United Railways of Havana and Regla Warehouses Limited.*[19] Lord Denning M.R. had more recently dissented in the *Teh Hu*[20] from the application of the breach-date rule to maritime law, arguing that whatever might be the authority of decisions of the House of Lords and the Privy Council in the general law of torts and contracts, an unjust and illogical rule should not be extended to maritime law merely for the sake of uniformity. That argument was rejected by the majority. Indeed, Salmon LJ. had said:

> "It is well settled that an English court cannot give judgment for the payment of an amount in foreign currency: …nor, in my view, can an arbitrator make an award in foreign currency except, perhaps, by agreement between the parties."[21]

The remarks in that case were *obiter* for the salvage agreement contemplated that the award should be expressed in sterling and the only issue was at what rate costs incurred in foreign currency should be converted to sterling.

In *Jugoslavenska Oceanska Plovidba* v. *Castle Investment Incorporated*,,[22] a dispute arose between a company incorporated in Panama under a charter party set out in standard form approved by the New York Produce Exchange in which the freight and expenses payable were expressed in United States dollars. The charter party provided for arbitration in London and the matter was dealt with by English arbitrators. The arbitrators directed in their award that the charterers should pay a sum expressed in United States dollars. The Court of Appeal unanimously held that there was nothing to prevent arbitrators when dealing with a contract expressed in a foreign currency from making their award in that currency. Indeed, Lord Denning went so far as to say that they should in such a case make their award in that currency. His Lordship distinguished arbitration from litigation on the basis that in arbitration enforcement was rarely necessary. Consequently, the problem of enforcing a judgment expressed in foreign currency — the principal reason given since 1605 for the rule — did not apply. His Lordship did however venture to suggest that even "this view of the court should be open for reconsideration".

His Lordship did not have to wait long for that opportunity. It arose the next year in *Schorsch Meier Gmbh* v. *Hennin.*[23] In that case the plaintiff, a company incorporated in the Federal Republic of Germany, sued the defendant, an individual resident in England, in England for the price expressed in Deutschmark of goods sold and delivered. Between the time that the debt fell due and the time action was commenced, the pound sterling had been severely devalued

[19] See *ibid.,* n. 4.
[20] [1970] P. 106.
[21] *Ibid.,* at p. 129.
[22] [1974] Q.B. 292.
[23] [1975] Q.B. 416.

as against the Deutschmark. If the plaintiff company had sued in sterling the application of the breach-date rule would have meant that in terms of Deutschmark this would have led to a loss of one-third of the value of the original debt. Since the United Kingdom had been a member of the European Economic Community since 1 January 1973, the plaintiff claimed a right under article 106 of the Treaty of Rome which provides for the freedom of currency movement between common market countries, to sue for payment in German marks notwithstanding the English domestic rule to the contrary. All members of the Court of Appeal Lord Denning M.R., Lawton LJ. and Foster J., held that the effect of article 106 was to supersede the English rule that an English court can only give judgment in sterling. However Lord Denning M.R., with whose reasoning Foster J. agreed, went further. He saw the reason for the traditional inability to order payment in foreign currency in the former practice of the common law courts and the traditional inability of equity to order specific performance of a contract to pay money. These difficulties having been overcome by recent developments in the practice and procedure of those courts, he applied the principle *Cessante ratione legis, cessat ipsa lex* and held that the court was at liberty to discard the rule itself. Lawton LJ. though in full sympathy with the argument that the traditional rule was no longer applicable in the present circumstances felt unable to go that far in view of the pronouncements of the House of Lords in *SS Celia* v. *SS Volturno*[24] and more recently in *Re United Railways of Havana and Regla Warehouses Limited.*[25]

Lord Denning was rapped over the fingers for his boldness by the House of Lords in *Miliangos* v. *George Frank (Textiles) Limited,*[26] but if he lost the battle he did win the war. In that case the plaintiff sued on a contract made in Switzerland expressed in Swiss currency. Switzerland is, of course, not a member of the European Economic Community and thus the invocation of article 106, of the Treaty of Rome was not possible in this case. The House by majority (Lords Wilberforce, Cross, Edmund-Davies and Fraser; Lord Simon dissenting) overruled its previous decision in *Re United Railways of Havana and Regla Warehouses Limited* and held that an English court could give judgment for a sum of money expressed in foreign currency. The House also abandoned the breach-date rule, substituting thereof the date of payment which, in the absence of a voluntary payment of the judgment debt, means the date when the plaintiff is given leave to levy execution for a sum expressed in sterling.[27] The reasons given by the majority of the House for the change were basically three-fold:[28]

1. The overcoming of procedural difficulties which previously prevented the giving of a judgment in foreign currency. Changes in the substantive and procedural law now permit courts to make orders for the delivery of foreign currency *in specie* or its sterling equivalent.

2. The changes in currency stability which have made changes in currency values between the date of breach and the date of pay-

[24] See *ibid.,* n. 6.
[25] See *ibid.,* n. 4.
[26] [1976] A.C. 443.
[27] *Per* Lord Cross at p. 498.
[28] See Lord Wilberforce at pp. 462-465.

ment the rule rather than the exception. Consequently, the application of the former rule led to injustice.

3. The acceptance in the field of arbitration that awards may be given in foreign currency.[29] In this way the original breach made by Lord Denning was elevated to the main rule.

Lord Wilberforce expressly confined the effect of his new rule to "foreign money obligations, sc. obligations of a money character to pay foreign currency arising under a contract whose proper law is that of a foreign country and when the money of account and payment is that of that country, or possibly of some other country but not of the United Kingdom".[30]

For the time being, this left intact the existing law, *viz.,* the "sterling-breach-date rule" (to adopt Lord Wilberforce's description) in relation to claims for non-liquidated damages for breaches of contract or for tort.[31] But it was obvious that a distinction between claims in debt and claims for damages could not be sustained. The House had refused to draw such a distinction in *Re United Railways,* and in *The Despina R,*[32] it embarked on the reverse process by distinguishing *The Volturno,*[33] and overruling *Di Ferdinando* v. *Simon, Smits and Company Limited.*[34]

On that occasion there were two separate appeals before their Lordships. In *The Despina R* the issues involved the assessment of damages arising out of a collision at sea off the Chinese coast between two Greek vessels. The House of Lords held that judgment should be given in United States dollars, the currency in which the expenses incurred by the plaintiff were ultimately met. The other appeal was *The Folias.* In that case the action was for a breach of contract in respect of damages to cargo shipped to Brazil by the French charterers of a Swedish vessel. The House held that the loss which the charterers had incurred should be expressed in French francs. The upshot of these decisions of the House of Lords is that in England at least the sterling-breach-date rule has been abrogated. English courts can now give judgment in foreign currency and conversion into sterling is not necessary until leave is given to execute the judgment given in the foreign currency. If payment in United Kingdom currency is tendered at any time before such leave is granted, the payment must be the equivalent of the judgment debt as at the time of actual payment.[35]

Although the new rule can be fairly simply stated, it still raises difficulties of application. It is best to examine them under the several types of action which can arise:

1. Action for debt

[29] Citing *Jugoslavenska Oceanska Plovidba* v. *Castle Investment Company Incorporated* [1974] Q.B. 292.
[30] At p. 467, see also *per* Lord Cross at p. 498, *per* Lord Edmund-Davies at p. 498 and *per* Lord Fraser at p. 503.
[31] See Lord Wilberforce at p. 468.
[32] [1978] 3 W.L.R. 804.
[33] See *ibid.,* n. 6.
[34] See *ibid.,* n. 5.
[35] *George Veflings Rederi A/S* v. *President of India* [1979] 1 W.L.R. 59.

2. Action for breach of contract
3. Action in tort
4. Other claims such as restitution in equity, or quasi-contract, bankruptcy, liquidation and claims against estates.

Action for debt

As stated earlier, the rule in *Miliangos* was rather narrowly stated: an action for a debt in foreign currency would only lie where the proper law of the contract coincided with the money of account and of payment. This of course had been the case in *Schorsch Meier* and *Miliangos.* It is clear now that the rule is too narrow. In *The Folias* the proper law of the contract was English. Lord Wilberforce did not see that as disposing of the currency question; he said: "if the proper law is English, the first step must be to see whether, expressly or by implication, the contract provides an answer to the currency question. This may lead to the selection of the 'currency of the contract'."[36] He referred with obvious approval to the notion of the "proper currency of the contract" coined by Lord Denning in *Jugoslavenska Oceanska Plovidba* v. *Castle Investment Company Incorporated*.[37]

How then is the proper currency of the contract to be determined? Lord Denning defined it as "the currency with which the payments under the contract have the closest and most real connection."[38] In currency contracts a distinction must be drawn between money of account and money of payment. Dixon J. (as he then was) in the decision of the High Court of Australia in *Bonython* v. *Commonwealth*[39] described the "money of account" as the currency which is used in the contract "as the means of measuring an obligation or debt" as opposed to the "money of payment" which can be defined as "the means or instrument of discharging the obligation, the legal tender or representative money by which it is paid". In *Bonython* the question was whether a reference to pounds sterling in bonds issued by the Queensland Government in 1895 and payable upon maturity in London in 1945 used the currency of Queensland (subsequently the currency of the Commonwealth of Australia) as the means of liability or "money of account" or the currency of the United Kingdom which certainly was the money of payment.

When the money of account and the money of payment coincide, there would be little doubt that this was the "proper currency of contract", even though it might differ from the proper law of the contract. Thus if in *Miliangos* the proper law of the contract had been English, but the debt had been expressed in Swiss francs and was payable in Swiss francs, the result would have been the same.[40]

[36] *Ibid.,* n. 32, at p. 812.
[37] See *ibid.,* n. 29 at p. 298.
[38] *Cf.* the definition of the "proper law of the contract" accepted since the decision of the Privy Council on appeal from Australia in *Bonython* v. *Commonwealth of Australia* [1951] A.C. 201 at 219.
[39] (1948) 75 C.L.R. 589 at 621.
[40] See *Federal Commerce and Navigation Company Limited* v. *Tradex Export S.A.* [1977] Q.B. 324.

Would it be possible to use foreign currency in a contract which was purely domestic *i.e.,* between local parties concerning the sale locally of goods situated there? In *Multiservice Book Binding Limited* v. *Marden,*[41] Browne-Wilkinson J. upheld a provision in an English mortgage relating to property in London between parties resident in England whereby the payment of instalments under the mortgage was linked to the value of Swiss francs. He held that this form of indexation of obligations was not contrary to public policy. The case is of course not directly on the point for the money of payment was clearly pounds sterling and Swiss francs were used primarily as a means of indexation. The parties could equally well have used gold or the fluctuation of the cost of living in London. But the parties would have achieved the same effect had they expressed the principal and interest under the mortgage in terms of Swiss francs. It would appear illogical to prohibit directly something which can be done indirectly, subject always of course to the effect of any relevant foreign exchange laws.

What if the money of account and the money of payment differ? An example of this was seen in *Woodhouse A.C. Israel Cocoa Limited* v. *Nigerian Produce Marketing Company Limited*[42] where the price of the goods was stated in Nigerian pounds but the parties afterwards agreed that payment could be made in sterling. Should the action lie in sterling (which would raise the issue once again of the date of conversion), or could the plaintiff sue in Nigerian pounds (which would leave the means of measuring the obligation in tact until payment was actually made)? Despite the reference made by Lord Denning to the proper currency of a contract as the currency which has the closest connection with the payments under the contract, it is submitted that, if the new principle is to work according to its purpose, the money of account should normally be the currency of the contract. The effect of *Miliangos* is that the plaintiff can sue in the money of account, which is the means of measuring the obligation under the contract. The defendant has the contractual right to discharge the debt by paying the equivalent of the contractual sum in the money of payment as at the date of payment. If no payment is made voluntarily but judgment is given, then the debt is converted as at the date when leave to enforce the judgment is given. The other solution, that is to say, that the plaintiff can only sue in the money of payment, means that the value of the debt would have to be converted at the latest as at the date of issue of the writ which would once again raise the injustice which *Miliangos* sought to overcome. In *George Veflings Rederi A/S* v. *President of India*[43] a charter party was governed by English law and provided for the freight and damages to be paid in United States dollars. Payment of the freight was to be made in London in "British external sterling". No mention was made of payment of demurrage charges. The question arose what the rate of exchange should be in relation to demurrage. The Court of Appeal held that freight was different from demurrage and that in relation to demurrage the United States dollar was both the money of account and of payment. The Court inferred this from the fact that no

[41] [1979] Ch. 84.
[42] [1971] 2 Q.B. 23.
[43] [1979] 1 W.L.R. 59.

express provision was made in the contract for the demurrage to be paid in sterling. A much simpler way of arriving at the same conclusion is to hold that, unless the contract expressly provides the money of account should be converted into the money of payment at a specified rate, the money of account is the "proper currency of the contract" in which the claim could be brought. This was the conclusion reached by Goff J. in *B.P. Exploration Co.* v. *Hunt (No. 2).*[44]

The only exception would exist where the parties had agreed in the contract that the debt expressed in the money of account should be converted at a fixed rate of exchange into the money of payment.[45] In such a case the action should lie in the money of payment converted at the contractual rate.

In most cases the money of account will be clearly identifiable because it is the money in which the price of goods or services is expressed. If the contract provides that the rental, sale price or freight shall be X U.S. dollars, that is the money of account even though the contract is governed by the law of England and payment can be made in countries other than the United States.[46]

Assuming then that the proper currency of the contract in an action for debt will be the same, in almost all cases, as the money of account, the rules for determining what is the money of account will apply in cases of uncertainty such as when the contract refers to dollars or francs which could be the currencies of several countries involved in the transaction. In determining what is the money of account, the court must consider not only the place of payment of the debt, but also the place of residence and the place of business of the parties involved, the nature of their business, the purposes of their transactions, the history of their relationship before and after the date of their contract and anything else which could conceivably be relevant.[47]

In *Barclays Bank International Limited* v. *Levin Brothers (Bradford) Limited* ,[48] Mocatta J. allowed an action to be brought in United States dollars in respect of bills of exchange payable at an English bank whose currency was in United States dollars. His Lordship saw no serious objection in Section 72(4) of the Bills of Exchange Act 1882 (U.K.) which provides that a foreign bill payable in the United Kingdom in a foreign currency shall, in the absence of a stipulation to the contrary, be calculated at the rate of exchange for sight drafts at the place of payment on the date the bill is payable. Mocatta J. limited this provision to the case where the acceptor of a bill wished to exercise his option to pay at the maturity date the appropriate sum in sterling but did not apply where the acceptor failed to pay at the maturity date and had to be sued. His Lordship refused to follow the decision of the Privy Council in *Khoury* v.

[44] [1979] 1 W.L.R. 783 at 841.
[45] See *Marrache* v. *Ashton* [1943] A.C. 311.
[46] See *Barclays Bank International Limited* v. *Levin Brothers (Bradford) Limited* [1977] 1 Q.B. 270, *George Veftings Rederi A/S* v. *President of India* [1979] 1 WL.R. 59.
[47] See *Goldsbrough Mort & Company Limited* v. *Hall* [1948] V.L.R. 145.
[48] [1977] 1 Q.B. 270.

Khayat[49] which had interpreted an identical provision in the Palestine Bills of Exchange Ordinance 1929 to the opposite effect. His Lordship was of course free to do so in the light of more recent decisions in the House of Lords by which he was bound. In Australia where a similar provision exists in Section 77 (d) of the Bills of Exchange Act 1909 and possibly in other Commonwealth countries that option may not be open. The High Court in *Viro* v. *The Queen,*[50] held that Australian courts are bound by the decisions of the Privy Council in *pari materia* unless the High Court itself departs from it. In the absence of a High Court decision to the contrary, it would seem that in Australia bills of exchange expressed in foreign currency can only be sued upon in the Australian dollar equivalent as at the date of maturity.

Action for breach of contract

An action for damages for breach of contract raises a somewhat different question as illustrated by *The Folias.*[51] In that case a claim was brought by the French charterers of a Swedish ship in respect of a spoiled cargo of onions shipped from Spain to Brazil. The cargo was spoiled because the ship's refrigeration had failed. The charter party was governed by English law but the hire was payable in United States dollars. The charterers had settled the claim of the receivers of the onions in Brazilian cruzeiros which they had purchased with French francs, their normal business currency. On the arbitration of the claim the owners admitted their liability to the charterers for the breach of the contract, but claimed that payment for the loss should be made in cruzeiros. The value of that currency had fallen sharply as against the French francs since the charterers had settled the claim against them. Lord Wilberforce, after referring to Lord Denning's comments on the "proper currency of the contract" continued:

> "but there may be cases in which, although obligations under the contract are to be met in a specified currency, or currencies, the right conclusion may be that there is no intention shown that damages for breach of contract should be given in that currency or currencies. I do not think that Lord Denning M.R. was intending to exclude such cases. Indeed, in the present case he said 1978 2 W.L.R. 887, 892, in words which I would adopt 'the plaintiff should be compensated for the expense or loss in the currency which most truly expresses his loss'. In the present case the fact that United States dollars have been named as the currency in which payments in respect of hire and other contractual payments are to be made, provides no necessary or indeed plausible reason why damages for breach of the contract should be paid in that currency. The terms of other contracts may lead to a similar conclusion."[52]

Thus a new concept emerges, "the currency of loss", which is not necessarily identical with the currency of the contract. It can be loosely defined as the currency in which it was reasonable to con-

[49] [1943] A.C. 507.
[50] (1977) 18 A.L.R. 257.
[51] *Ibid.,* n. 32.
[52] At p. 812.

template that the plaintiff would ultimately bear or feel the loss. That could be, but need not be, the currency in which the expenses of making good the deficiency was incurred immediately, in this case Brazilian cruzeiros. In the present case the House took the view that it was more reasonable to contemplate that the charterers being a French company would use French francs to purchase the cruzeiros to settle cargo claims arising under the bills of lading. Of course, there may be express or implied provision in the contract that claims arising out of that contract should be settled in a particular currency. Otherwise it is a question of fact in each case whether the currency of loss is the "immediate loss currency", the "ultimate loss currency" or the currency of the contract. It is not necessary to use one single currency; it is possible for a claim to be assessed partly in sterling and partly in U.S. dollars.[53]

Action for damages in tort

Here one can only speak of the "currency of loss". In *The Despina R,*[54] two Greek ships had collided off the Chinese coast as a result of which one of them was damaged. Temporary repairs were effected in Shanghai and paid for in Chinese yuan, further repairs were carried in Yokohama and paid for in yen and finally permanent repairs were carried out in Los Angeles and paid for in United States dollars. The owner of the ship was a Liberian company with its head office in Greece. The ship was managed by a managing agent in New York. All payments were ultimately met out of a bank account kept by the agents in New York and the necessary non-United States currency was bought with dollars out of this account. The House held that the "currency of loss" in this case was dollars because that was the currency in which the plaintiff normally conducted his business and which he used to purchase the sums of money required in other currencies. The test is therefore somewhat similar to that used in relation to damages for breach of contract where no provision is expressed or implied in that contract.

The question, however, of reasonable contemplation does not arise here. Rather it is a question for the plaintiff to establish to the satisfaction of the court that he does conduct his business in the currency he claims as his currency of loss. That is of course not the same as the currency of the plaintiff's nationality. It is quite possible that an individual or corporation, say of Kuwaiti nationality, should use United States dollars as the currency of his business. When a business operates on more than one account in different countries, it will be necessary to sheet a particular transaction home to a particular account. Again, as in *B.P. Exploration Co.* v. *Hunt (No. 2),* it is possible to assess damages in more than one currency.

Other claims

(a) *Restitution*

Lord Wilberforce in *Miliangos* referred with obvious approval to *In Re Dawson deceased,*[55] where, as has been stated earlier, the New

[53] See *B.P. Exploration Co.* v. *Hunt (No. 2)* [1979] 1 W.L.R. 783 at 844.
[54] See *ibid.,* n. 32.
[55] [1966] 2 N.S.W.R. 211.

South Wales Supreme Court in Equity ordered a trustee to make restitution of misappropriated trust funds at the rate of exchange prevailing at the date of restitution and not at the date of the breach of trust. Street J. (as he then was) held that the purpose of equity was to make restitution *i.e.,* to give the plaintiff back as closely as possible what he had actually lost.

In *The Despina R*[56] Lord Wilberforce extended the equitable principle of restitution to claims at common law in tort and contract in order to justify the rule that damages for loss can be awarded in the "currency of loss". It would appear therefore that the foresight of Street J. has been vindicated and that it would now be possible in a similar case to order restitution in the actual currency in which the funds were misappropriated, in that case New Zealand pounds. In actions for restitution based on quasi-contract, the principles to be applied are similar to those for breach of contract treating the transaction between the parties as the "contract".[57]

(b) *Bankruptcy and liquidation*

The proof of debts in bankruptcy and liquidation proceedings has given rise to some difficulties. In *Miliangos* Lords Wilberforce and Cross[58] expressed the view that the proper date for conversion was the date of admission to proof by the liquidator or official trustee. However, in *In Re Dynamics Corporation*[59] Oliver J. treated those remarks as *obiter dicta,* declined to follow them and held that the proper date was the date of making the order for the winding up of the company (or by analogy, the date of the sequestration order in bankruptcy). He stressed the need in liquidation and bankruptcy proceedings to treat all the creditors equally. This meant that the debts had to be assessed at the same date. This, in his view, would not be the case if different debts were converted at different dates depending on the date of admission to proof. The same argument would also apply to the payment of debts and legacies in the administration of a deceased estate.[60]

It is also interesting to note that Oliver J. suggested[61] that if a judgment creditor was unsuccessful in levying execution and brought liquidation or bankruptcy proceedings subsequently the date of conversion should be the date of the sequestration or winding up order and the judgment creditor should not be bound by the conversion of the foreign currency debt he would have been compelled to make for the purpose of obtaining leave to enforce the judgment in pursuance of Practice Direction (Judgments in Foreign Currency).[62]

THE NECESSITY TO BRING ACTION IN FOREIGN CURRENCIES

In the earlier cases the language of some of the judges would seem to indicate that the court should give judgment in the proper

[56] See *ibid.,* n. 32.
[57] See *B.P. Exploration Co.* v. *Hunt (No. 2)* [1979] 1 W.L.R. 783 at 841.
[58] *Ibid.,* n. 26 at pp. 467 and 497 respectively.
[59] [1976] 1 W.L.R. 757.
[60] See the decision of Megarry J. in *Re Hawkins deceased* [1972] 1 Ch. 714.
[61] At p. 774.
[62] [1976] 1 W.L.R. 83, para. 11.

currency whether the plaintiff so desired or not. In *Jugoslavenska Oceanska Plovidba* v. *Castle Investment Company Incorporated,* Lord Denning M.R. said, for instance:

> "In my opinion English arbitrators have authority, jurisdiction and power to make an award for payment of an amount in foreign currency. They can do this and I would add, should do this, whenever the money of account and the money of payment is in one single foreign currency."[63]

However, in *Schorsch Meier GmbH* v. *Hennin* [64] Lord Denning spoke purely in facultative terms of the courts having power to give judgment in a foreign currency. There was no hint in that judgment that they should do so even if the plaintiff brought his claim in sterling.

In *Miliangos,* Lord Wilberforce said that the claim "must be specifically for foreign currency."[65] But from the context it would seem that His Lordship meant that if a plaintiff wishes to recover his loss in a foreign currency the claim must be made in that currency. He did not mean to exclude the possibility of the plaintiff bringing the claim in sterling.[66]

The plaintiff therefore has a choice, except perhaps in arbitration, between claiming in sterling or in the proper currency. This choice can be important in the situation where sterling has risen against the proper currency. Indeed, in the past twelve months the international position of sterling has markedly improved from the dismal situation which prevailed in 1974-1978.

If the plaintiff does exercise a choice to claim in sterling what should be the date of conversion? It is submitted that in such a case it should be the date the claim is made. The breach-date rule is now totally discredited and it has nothing to recommend it. If the loss was incurred in foreign currency and the plaintiff chooses not to claim in that currency, the last possible date for restitution would have been the date on which the loss is formally claimed in sterling.

ENFORCEMENT OF A JUDGMENT IN FOREIGN CURRENCY

The argument raised since 1605 against the making of judgments expressed in foreign currency has always been that such a judgment cannot be enforced in England "for the sheriff cannot known how to levy the money in Flemish."[67]

Lord Denning in *Schorsch Meier GmbH* v. *Hennin* suggested the following solution:

> "The time has now come when we should say that when the currency of a contract is a foreign currency — that is to say, when the money of account and the money of payment is a foreign currency — the English courts have power to give judgment in that foreign currency; they can make an order in the form: 'It is adjudged this day that the defendant do pay to the plaintiff' so much in foreign currency (being the currency of the contract) 'or the sterling equivalent at the time of payment'.

[63] See *ibid.,* n. 29.
[64] See *ibid.,* n. 23.
[65] See *ibid.,* n. 26 at p. 468.
[66] See the comments of Mocatta J. in *Barclay's International* v. *Levin Brothers* [1977] 1 Q.B. 270 at p. 280.
[67] *Rastell* v. *Draper* (1605) Yelv. 80.

> If the defendant does not honour the judgment, the plaintiff can apply for leave to enforce it. He should file an affidavit showing the rate of exchange at the date of the application and give the amount of the debt converted into sterling at that date. Then leave will be given to enforce payment of that sum."[68]

In *Miliangos,*[69] Lord Wilberforce said that he could find no reason in principle why such orders could not be made. In *Barclay's International* v. *Levin Brothers* Mocatta J. directed "that the plaintiff should have judgment for U.S. dollars 92,548.70 and, if he so desires, the equivalent thereof in sterling at the date of payment of this judgment or of its enforcement."[70]

Could execution be levied in terms of foreign currency? In *The Halcyon The Great,*[71] Brandon J. in an admiralty action *in rem* brought by the mortgagee of a ship in respect of a mortgage expressed in United States dollars directed that the Admiralty Marshall sell the ship for a price in United States dollars and that, until further notice, the proceeds be placed in a special dollar account at the Bank of England without prior conversion into sterling. The reasoning which led him to conclude the Marshall could sell the ship in dollars were admittedly based on aspects of Admiralty practice, but his conclusions as to payment into court were of general application. It is nevertheless submitted that whenever leave is granted to levy execution against specific property with an international market such as ships, large diamonds, gold, etc., the court can direct that the goods be sold in the currency of the judgment. It would appear from the decision in *The Halcyon* that payment into court whether as a result of a sale or voluntarily by a judgment debtor may, with the leave of the court, be made in a foreign currency. However, *Practice Direction (Judgments in Foreign Currency)*[72] does not appear to require the prior leave of the court but only Treasury consent whenever necessary.

The question of enforcement of an arbitral award in foreign currency was discussed in *Jugoslavenska Oceanska Plovidba* v. *Castle Investment Company Incorporated.* Lord Denning M.R. said:

> "The next question is the manner of enforcing such an award. It would, no doubt, be possible to bring an action on the award and seek a judgment from the courts in sterling. In that case the rate of exchange would be taken at the date of the award. But another way is to seek the leave of the court under Section 26 of the Arbitration Act 1950, which says: 'An award on an arbitration agreement may, by leave of the High Court or a judge thereof, be enforced in the same manner as a judgment or order to the same effect, and where leave is so given, judgment may be entered in terms of the award.' If the words 'to the same effect', are read as meaning 'in the same terms', there would be some difficulty in applying this section to an award in a foreign currency. But I do not think they mean 'in the same terms'. They only mean that the judgment or order must have 'the same effect'. If the sum awarded is converted into sterling at the rate of exchange at the date of the award, it does have the same effect. The proper course is for

[68] See *ibid.,* n. 23 at p. 425. For the forms required see *Practice Direction* [1976] 1 W.L.R. 83.
[69] See *ibid.,* n. 26 at p. 463.
[70] See *Practice Director* above para. 9 for the appropriate formula now used
[71] [1975] 1 W.L.R. 515.
[72] [1976] 1 W.L.R. 83, para. 7.

> the applicant to file an affidavit showing the rate of exchange at the date of the award and giving also the amount of the award converted into sterling. Then leave will be given to enforce payment of that sum."[73]

It would seem however, following the decision of the House of Lords in *Miliangos* that both in a common law action on the award or in a Section 26 type of enforcement the judgment could be entered in the foreign currency. Conversion could be postponed until the date of payment or leave to enforce, and as we have seen, in certain cases until an even later stage.

AUSTRALIAN POSITION

Australian courts have until recently followed the traditional breach-date rule.[74] More recently Starke J. in *Bando Trading Company Limited* v. *Registrar of Titles*[75] upheld the refusal of the Victorian Registrar of Titles to register a mortgage expressed in United States dollars on the ground that foreign currency could not be regarded as "money" in the forum. In terms of the relevant Victorian regulations that decision may still be correct, although in *The Halcyon the Great*[76] Brandon J. held that the word "money" when used in a statutory instrument in its ordinary and natural meaning "includes money in foreign currency as well as money in sterling". This was accepted by Lord Wilberforce in *Miliangos*[77] as a clear indication that U.S. dollars may be regarded as "money". In *Watson* v. *Lee*[78] Stephen J. expressed the view that words such as "money", "currency" and "coinage" should not, without more, be confined in their meaning to the money of any particular nation. Nor is there any reason of public policy to prevent parties from making reference to other than Australian legal tender to calculate the rental in a lease or the principal in a mortgage.[79]

An interesting issue did arise in *Chief Collector of Taxes Papua-New Guinea* v. *T.A. Field Pty. Limited.*[80] The Chief Collector had obtained a judgment for arrears of tax in Papua-New Guinea. The judgment was expressed in kina, a currency introduced in the Territory before its independence by virtue of authority conferred by Australian law. At that time the kina was freely interchangeable with the Australian dollar which still remained legal tender in the Territory, but the kina was not legal tender in Australia. The plaintiff successfully obtained the registration of the judgment in New South Wales under the Service and Execution of Process Act 1901-1974 (Com) which was at the time still applicable to Papua-New Guinea. A writ

[73] See *ibid.,* n. 29 at pp. 299, 300. S. 26 of the United Kingdom Arbitration Act 1950 has its counterpart in most parts of the former British Empire *e.g.* in Australia s. 14(1) Arbitration Act 1902 (NSW); s. 35 Arbitration Act 1973 (QLD); and in New Zealand: s. 12 of the Arbitration Amendment Act 1938.
[74] *Re Pearce* (1933) 6 A.B.C. 126; *Re Tillam Boehme & Tickle Pty. Limited* [1932] V.L.R. 146, with the notable exception of *Re Dawson deceased* [1966] 2 N.S.W.R. 211, already referred to.
[75] [1975] V.R. 353.
[76] See *ibid.,* n.71.
[77] See *ibid.,* n. 26 at p. 464.
[78] (1979) 26 A.L.R. 461, 481 and 482.
[79] *Stanwell Park Hotel Company Limited* v. *Leslie* (1952) 85 C.L.R. 189 followed in *Multiservice Book Binding Limited* v. *Marden* [1979] Ch. 84.
[80] (1975) 49 A.L.J.R. 351.

of prohibition taken out in the High Court to stay the registration of the judgment on the ground that it was expressed in a foreign currency failed, but the High Court rested its decision on the narrow ground that the kina was not in a strict sense a foreign currency but a currency authorised by Australian law and on the imperative language of the Act itself. Subsequently, in enforcement proceedings in New South Wales in the same case,[81] Taylor CJ. at Common Law in the Supreme Court of New South Wales held that he could issue a writ of execution on the judgment by relying on the inherent power of the court to convert the judgment debt expressed in kina into Australian dollars for the purposes of the writ.

This decision indicates that the problems involved in giving judgment expressed in foreign currency are not insuperable and that Australian courts have the power and the ability to overcome them. In an era of floating currencies and frequent devaluation this new policy is realistic.

THE EFFECT OF EXCHANGE CONTROL LEGISLATION

Finally, consideration should be given to the impact of exchange control legislation. In *Miliangos* [82] Lord Wilberforce merely expressed the expectation that practitioners could work out a suitable solution.

Section 6(1) of the Exchange Control Act 1947 (U.K.) prohibits the payment of a debt by a resident of the United Kingdom to or for the credit of a foreign resident without the permission of the Treasury either in the United Kingdom or abroad. Regulation 8(1) of the Banking (Foreign Exchange) Regulations which are sustained by the Banking Act 1974 (Com) in Australia prohibits the making of any payment to any person resident out of Australia without the permission of the Reserve Bank. The constitutional validity of this Regulation was recently upheld by the High Court in *Watson* v. *Lee.*[83]

It is clear on the authorities that unless a contract is entered into with the purpose, or inevitable consequence, of evading the regulations, as in *Sykes* v. *Stratton,*[84] the validity of a contract or transaction and its enforceability is not affected because a payment thereunder requires Treasury or Reserve Bank consent.[85] Furthermore, in Australia it has been held that Reserve Bank permission is not required if payment is to be made outside Australia out of funds held abroad.[86] It is not the sale of goods or services which requires Treasury or Bank consent, but the consequential payment of money in Australia out of Australian funds to a non-resident, whether that payment takes place voluntarily or by order of a court. It is otherwise when the subject of the con-

[81] *T.A. Field Pty. Ltd.* v. *Chief Collector of Taxes of Papua-New Guinea* [1975] 2 N.S.W.L.R. 101.
[82] See *ibid.,* n. 26 at p,469.
[83] (1979) 26 A.L.R. 461.
[84] [1972] 1 N.S.W.L.R. 145.
[85] *Keenco* v. *South Australia and Territory Air Services Limited* (1974) 23 F.L.R. 155.
[86] *T.M. Duche and Sons (U.K.) Limited* v. *Wallworth Industries (Aust.) Pty. Limited* (1962) 62 S.R. (NSW) 165, at 177 *per* Herron J.; *Keenco* v. *South Australia and Territory Air Services Limited.*

tract are shares in an Australian corporation or other Australian securities. In that case the contract itself will require prior permission.[87]

Consequently, there is nothing to prevent a court from entering judgment in either local or foreign currency in favour of a non-resident. As Sangster J. said in *Keenco* v. *South Australia and Territory Air Services Limited:*

> "The proposition that an Australian court could not, or should not, proceed to hear a foreigner's case if payment in Australia of the judgment debt would require Bank authority, would, for example, mean that an American tourist could not sue an Australian motorist for damages for negligently running him down. I know of no such proposition in law."[88]

Bray C.J. in the same case said:

> "The court,... could undoubtedly direct the [judgment] debtor by a mandatory order to apply for the authority of the Bank."[89]

Certainly in none of the English cases referred to was the Foreign Exchange Control Act 1947 seen as a barrier to the making of a judgment in favour of a foreigner.

Of course the payment of money to a foreign resident before or after judgment will require consent. And if consent is refused that would excuse performance of the obligation; the court cannot direct a party to perform an illegal act.[90]

A payment into court of moneys claimed by a foreign plaintiff and the investment by the court of such moneys, whether in local or in foreign currency, would require Treasury or Bank consent.[91] These, however, are principles of enforcement which apply whether the judgment is made in local or in foreign currency. They do not affect the basic issue whether or not judgment should only be given in local currency. But the fact that judgment is given in a foreign currency before permission to pay is obtained, does mean that the plaintiffs right to receive that particular sum so expressed is not affected by any variation during the inevitable delay in processing the application for consent.

CONCLUSION

In the present era of currency instability contractual arrangements are frequently expressed in a particular currency because of its stability or international acceptance. As the recent history of the United States dollar shows, the two notions are not necessarily identical.

Where a party has promised to pay in United States dollars or Deutschmark or any other currency, justice demands that he be called upon to pay the debt in that currency and not offer the plaintiff a

[87] *Amid Pty. Limited* v. *Beck and Jones Pty. Limited* (1974) 24 F.L.R. 313 at 337, 338 *per* Jacobs J.
[88] See *ibid.,* n. 86 at p. 173.
[89] At p. 170.
[90] *T.M. Duche and Sons (U.K.) Limited* v. *Wallworth Industries (Ausl.) Pty. Limited* (1962) 62 S.R. (NSW) 165 at 171 *per* Owen J.
[91] See *The Halcyon The Great ibid.,* n. 71.

much lesser sum in the depreciated currency of the forum which more often than not will coincide with the debtor's residence. The same principle applies when in the case of losses incurred as the result of the defendant's breach of contract or tort, the plaintiff had to expend moneys in a foreign currency. Again the loss should be reimbursed in that currency and not at a depreciated rate. It is true, as Lord Simon pointed out in his forceful dissent in *Miliangos,* that devaluations and depreciations of currencies are not new phenomena. But amongst the great trading nations they were previously relatively rare occurrences which Treasurer would only embark upon when all else had failed as a last resort. Since 1971 the "floating" of currencies has become common place.

In Australia trade over the past few decades has diverted away considerably from its traditional British and European ties. Japan, the Peoples Republic of China and the countries of Asean have become important partners. Because of its tie to the United States dollar, the Australian dollar, although not a "floating currency" itself, has had its value adjusted on a daily basis with a steady depreciation overall against currencies such as the yen and Hong Kong and Singapore dollars. With an increasing demand for Australian energy resources, a revaluation against the United States dollar is not altogether impossible. In those circumstances the possibility of delivering judgment in the currency of the contract and the currency of loss even if it is not the Australian dollar would be a benefit to trade and commerce in the region. I have shown that the procedural difficulties of enforcing such judgments are not insuperable either in Australia, or one would infer from the similarity of background, in Singapore and Hong Kong. Foreign exchange control, where it applies, is not an insuperable barrier either In any event such controls operate regardless of the currency in which judgment is given.

The decision of the Privy Council in *Khoury* v. *Khayat*[92] that the rate of exchange to be applied to a promissory note is the maturity date, is binding on countries subject to its jurisdiction even though the appeal was from the Palestine.[93] This means that the decision, insofar as it relates to a part of law which is similar in all countries, is binding upon the State Supreme Courts in Australia (in the absence of a High Court decision to the contrary) and the courts of Singapore, and Malaysia and Hong Kong, notwithstanding any decision of the House of Lords to the contrary.[94] Although there is no doubt that the decision in *Khoury* v. *Khayat* was based on the assumption that the breach-date rule was part of the common law, the immediate decision was based on the interpretation of Section 72(4) of the Bills of Exchange Act 1882 (U.K.) which had become applicable to the Palestine in the Palestine Bills of Exchange Ordinance 1929. The ratio decidendi is expressed by Lord Wright in the following words:

> "In the case of bills of exchange (which include promissory notes) the English Bills of Exchange Act 1882, by Section 72(4), enacts that the amount of the foreign currency is to be translated into United Kingdom currency according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable."[95]

92 See *ibid.,* n.49.
93 *Viro* v. *The Queen* (1977) 18 A.L.R. 257 at 281 *per* Gibbs J.
94 *De Lasala* v. *De Lasala* [1979] 3 W.L.R. 390.
95 At p. 513.

Insofar as the bills of exchange legislation in Australia[96] the interpretation given by the Privy Council is still binding. But, it is submitted, the courts of Australia, Singapore, Malaysia and Hong Kong are free to re-consider the breach-date-sterling-rule generally and should do so.

P.E. NYGH *

[96] Bills of Exchange Act 1909 s.77(d); Singapore, Malaysia and Hong Kong contains the same provisions as s. 72(4) of the United Kingdom Act.

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