BUSINESS SESSION 3

TOPIC: JUDGMENTS IN FOREIGN CURRENCIES

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1. INTRODUCTION

The purpose of this paper is to provide a general introduction to some of the complexities which arise in transactions which involve the use of a currency other than that of the jurisdiction in which the claim is brought or a number of currencies. The freedom of moment of capital and the relative ease with which international trade is now conducted means that parties to a transaction may use any number of currencies with which to measure the benefits of that transaction or to measure the losses which they may suffer. It is no coincidence that many of the reported decisions on this topic involve cases of shipping and international trade law.

It is the movement in currencies, something very much more common since the 1970's, which affects the benefit or loss to be suffered as these two simple examples illustrate:-

1. A West German lends an Englishman 7,000 Deutsche marks in year one when the exchange rate is 1 pound to 7 Deutsche marks. The Englishman fails to repay the debt in year three by which time the exchange rate is 1 pound to 5 Deutsche marks. If the creditor can recover in Deutsche marks, or their equivalent, the Englishman will have to find 1,000 pounds in year one but 1,400 in year three. If the creditor is forced to accept settlement of his debt at the year one exchange rate, in sterling, he will lose 400 pounds.

2. If the creditor lends 7,000 Deutsche marks when the exchange rate is 1 pound to 5 Deutsche marks in year one and 1 pound to 7 Deutsche marks in year three the English debtor will only have to find 1,000 pounds to settle the same debt.

At its simplest, the issue in this subject is who should bear the risk of fluctuating exchange rates and what rules exist to establish how that risk should be allocated.

As far as the common law is concerned, the English courts have handed down the most significant decisions in this area so I make no apology for concentrating on England in tracing the changes which have taken place, changes which have, to a large extent, been followed in other jurisdictions.

2. CONCEPTS OF MONEY

One of the most striking facts behind the significant changes which have taken place over the last 15 years in this area is that the innovations have been brought about by judicial decisions rather than statutory reform. It is therefore necessary to look at a number of the principal concepts which underlie the decisions.

It is obvious that a lawyer's definition of money is different from that of an economist: the latter would include not only coins and notes but also bills of exchange, cheques and other negotiable instruments which are usually the subject of a separate corpus of law. To the lawyer, money is a chattel in possession and the right to issue, circulate and control money is a most jealously guarded prerogative of the nation state[1]. However, where foreign money (i.e. a currency which is not recognised as legal tender within a particular state) is used it is necessary to distinguish; (a) foreign money where it acts as a commodity; and (b) foreign money where it acts as money itself.

The best way of illustrating between these two concepts is the contrast between two decisions of the Supreme Court of the United States handed down at about the same time. Both cases arose following the disastrous collapse of the German currency in 1923.

(a) In the first case (Hicks v. Guiness)[2] during the First World War, the United States government seized the assets of German citizens who were deemed to be hostile resident aliens. American plaintiffs had claims against the German defendants which arose before the entry of the United States into the First World War. The defendants were sued for their failure to satisfy the claim. They were held liable to pay damages in US dollars, the claim being converted to US dollars at the date of the breach which preceded the disastrous collapse of the mark. The rationale was that the defendants would have had to have bought US dollars to satisfy the creditors and therefore the currency was acting as a commodity and not as money[3]:-

> "The debt was due to an American creditor and was to be paid in the United States. When the contract was broken by a failure to pay, the American firm had a

claim here, not for the debt, but, at its option, for damages in dollars. It could no longer be compelled to accept marks. It had a right to say to the debtors 'you are too late to perform what you have promised and we want the dollars to which we have a right by the law here in force'."

(b) In the second case (Deutsche Bank Filiale Nurnberg v. Humphrey[4]) a US citizen held a demand deposit with the German Bank which the German Bank failed to pay on demand. The value of the mark dropped sharply and the creditor, not unnaturally, sought application of the same date for conversion as in the previous case, i.e. the date of the breach. The court held that the obligation was governed by German law and hence the currency operated as money and not a commodity; conversion of the obligation to US dollars fell to be made at the date of the judgment[5]:-

> "We may assume that when the Bank failed to pay on demand its liability was fixed at a certain number of marks both by the terms of the contract and by German law. We also assume that it was fixed in marks only not at the extrinsic value these marks then had in commodities or in the currency of another country. On the contrary, we repeat, it was and continued to be a liability of marks alone and was open to satisfaction by the payment of that number of marks, at any time, with whatever interest might have accrued, however much the mark might have fallen in value as compared with other things".

Another distinction which has to be borne in mind in this area is the distinction between (a) money of account and (b) money of payment. Money of account is the currency in which an obligation is expressed; money of payment is the currency with which the obligation is to be discharged.

This seemingly confusing difference is brought out in the case of Woodhouse Limited v Nigerian Produce Limited[6]. In this case an English company and a Nigerian company entered into a contract for the sale by the Nigerian company of a quantity of cocoa, the price of which was calculated in Nigerian pounds payable in London. Fearing a devaluation of the British pound, the buyer sought to vary the contract to allow for payment in sterling. The Court of Appeal held that the money of account remained Nigerian pounds and that the English buyers were bound to find sufficient sterling to make up the contract in Nigerian pounds. In other words, the contract may have provided that the price was to be a certain number of Nigerian pounds per tonne (the money of account) but the contract went on to provide that payment had to be made to the seller in sterling (the money of payment).

It is also necessary to bear in mind the principle of "nominalism". This principle really means is that the law takes no real notice of the economic value of a currency. In other words, if the Australian dollar is subject to substantial devaluation, or is badly affected by inflation, the courts will not take either into account holding that the value of one dollar remains one dollar[7].

3. ECONOMIC BACKGROUND

The significant change which has occurred in the law on this subject has taken place against a radical economic changes. In my opinion, it is impossible to divorce examination of the legal changes from the economic background; indeed I would venture to suggest that the legal changes needed to happen if the law was to retain the confidence of the business community.

One of the most significant factors has been the virtual collapse of the post-war fixed exchange rate system. After the Second World War it was hoped that the maintenance of fixed exchange rates between currencies would help to foster the growth of international trade by ensuring some degree of continuity. Gold played a significant role in the creation of this system[8] but by 1971 it became clear that the maintenance of fixed exchange rates was no longer possible, particularly when the United States suspended the convertibility of its currency into gold. From 1971 onwards an increasing number of currencies were allowed to find their own level, particularly the more significant currencies used in international trade, the United States dollar and sterling. The abolition of gold as the principal reserve asset for international trade also saw the introduction of Special Drawing Rights (SDR) and the European Currency Unit (ECU).[9]

At the same time, the increasing sophistication of international banking and communications has enabled the development of continuous trading in currencies across the world. It should not be forgotten that these developments have also witnessed the introduction of certain mechanisms to take account of currency fluctuations, so that a wise international trader can try to protect himself against currency losses by the use of futures markets, international markets and currency swaps.

Just how well judges are equipped to deal with understanding economic issues is a moot point. In my own opinion, it is not an insuperable obstacle. Most of these issues affect the quantification of a claimant's loss; provided the claimant is prepared to lead the necessary evidence, there is no reason why the court cannot take proper account of this in reaching a decision, after all the principal function of the court is to do justice between the parties.

4. THE LAW BEFORE MILIANGOS V. GEORGE FRANK (TEXTILES) LIMITED

Up to now I have spoken of the changes without saying what they are. In order to appreciate their significance it is necessary to have some knowledge of the older law. The case which marks the change is a decision of the House of Lords in Miliangos v. George Frank Textiles Ltd.[10].

If one has sufficient interest and enthusiasm one can trace decisions of the English courts on questions of foreign currency back to the 17th century[11] but the major decisions upon this issue were delivered towards the end of the 19th and beginning of the 20th centuries.[12] One continuous thread which ran throughout all the decisions was the unshakeable conviction that an English court simply could not issue a judgment in any currency other than sterling. It is striking that there never seems to have been a particularly convincing reason offered as to why this was the case. The significance of this firmly held view was that if a foreign creditor e.g. a German sued an Englishman in Deutsche marks in an English court that court could not grant to the German creditor a judgment in Deutsche marks, it had to be issued in sterling, even if the German creditor was entitled to expect that his debtor would pay him in German currency.

Even if one accepted that a court was bound by its own currency the next question was, if there was an obligation to pay in a foreign currency, at what stage was it to be converted into sterling? Several numbers of solutions are obvious: the date of the judgment, or some earlier date, such as the date when the obligation to pay arose. It is fairly obvious that either solution has one major problem - should the currency of the creditor have moved the wrong way, the creditor will lose.

In the <u>SS Celia v SS Volturno</u>[13] two vessels collided in the Mediterranean; both vessels were held equally to blame. The Volturno was detained in order to carry out repairs; she was on hire to the Italian government with the result that the ship owners lost money during the off hire period. Their loss was suffered in lira. The House of Lords held that the claim for damages for negligence should be expressed in sterling, not at the date of judgment, but at the date upon which the loss occurred, i.e. the date of detention of the vessel. The theory appears to have been that as the claimant had suffered loss at the date of the casualty that was the time when his damages fell to be assessed and therefore the claim ought to be converted into sterling at that date.

In Di Fernando v Simon[14] the Court of Appeal reached a similar conclusion involving a case for breach of contract for the sale of goods. The case concerned a contract for the carriage of goods from England to Italy. The defendants failed to carry the goods and indeed converted them to their own use, the breach being committed on 10 February 1919. At the date of the breach the rate of exchange was 32 lira to the pound but by the judgment date the exchange rate had fallen to 62 lira to the pound. Not surprisingly, the plaintiff sought calculation of its damages at the date of the breach. The Court of Appeal upheld the view that the proper approach was to establish what the plaintiff lost by non delivery of the goods at the due date which was, in effect, the right to receive its damages in sterling as at that date.

As so the English courts applied what came to be known as the "breach date" rule for resolving the difficulty in cases concerning both tort and breach of contract, the commonest causes of action in most shipping and international trade cases.[15] It is interesting to note that some of the judicial dicta in these decisions expressly recognised that there would be adverse economic consequences arising from the fluctuating exchange rates which existed for some time after the First World War[16] but the rules remained in force for some time and indeed, in 1960, the House of Lords expressly upheld their application although, as Lord Reid noted, the rules could be "artificial" and "unjust".[17] The particular case (United

Railways of Havana and Regla Warehouses Ltd.)[18] involved a number of very complicated claims in the liquidation of an English company. A proof of debt was lodged in the liquidation relating to unpaid rentals upon rolling stock in Cuba. The debt was calculated in US dollars and it was held that the proper law governing the transaction was that of Pennsylvania. The issue was the date upon which the claim should be converted from US dollars into sterling. The House of Lords held that the conversion had to take place on the date at which the sums were owing in effect, upholding and extending the breach date rule.

It is clear that the House was still much influenced by the notion that the bar to claims in foreign currency was procedural i.e. that English courts simply could not issue judgments in any currency other than sterling, a view which, as I have said, was easy to state but not so easy to justify by reference to any compelling reason.

With characteristic robustness, and words which I suspect Lord Denning was to rue in later days, his Lordship said[19]:-

> "Sterling is the constant unit of value by which, in the eye of the law, everything is measured ... The question is whether the rule is still to apply when sterling loses the value which it once had. We have seen in recent years how it has depreciated. It has departed from the gold standard: the pound has been devalued; and there has been much inflation ... Our courts here must still treat sterling as if it were of the same value as before: for it is the basis upon which all our monetary transactions are

> founded ... Just as an English creditor in this country suffers from the depreciation of the pound, so also does a foreign creditor who comes to this country seeking payment in sterling".

On the question of personalities, it is also interesting to note that Senior Counsel involved in that case was a certain Mr Wilberforce QC, later Lord Wilberforce, who came to write the leading speech for the majority in the case of Miliangos[20].

The decision in the Havana Railways[21] case was the subject of much criticism. One of the leading academic writers on this subject, Professor F A Mann, commented[22]:-

> "It is submitted that such results are unworthy of a rational legal system and do a dis-service to the reputation of a great international trading community. Anyone who has lived through the 15 years of debates preceding the first signatures to the European convention on foreign money liabilities can testify to the incredulity at the existence and tenacious preservation of the breach-date rule in Britain".

5. THE BEGINNING OF THE CHANGE

However much the decision of the House of Lords may have been criticised one may be forgiven for thinking that the law was clear, if unpopular. However, in the years prior to the decision in Miliangos[23], there took place, particularly during the early 1970's, what can only be described as a gradual subversion of the previously existing law. Although the lower courts were quite clearly bound by previous decisions of the House of Lords, it is equally clear that the judges of the lower courts were distinctly unhappy with the law that they had to enforce. This judicial insurrection has been described in detail elsewhere.[24] One glaring anomaly arose followed a decision of the Court of Appeal in Jugoslavenska Oceanska Plovidba v Castle Investment Co Inc[25] in which the Court of Appeal established one important exception to the breach-date rule. The Court held that, under the Arbitration Act 1950, an arbitrator in England did have the power to issue an award in foreign currency and that such an award was enforceable within the United Kingdom by converting the judgment to sterling at the date of the award. It is quite clear from the judgments that the Court was conscious of the commercial and policy consequences of reaching a different conclusion. London was, and no doubt still is, a most significant centre for international arbitration, and it is quite clear that to hold that an arbitrator could not issue an award in any currency other than sterling would do much to undermine London's pre-eminent position. However, the very act of holding that an arbitrator did have the power to issue judgments in currencies other than sterling only heightened the distinction between the powers of arbitrators and the powers of (supposedly) superior courts. Not long after this decision the Court of Appeal continued on its crusade. In the case of Schorsch Meier GMBH v Henin[26] the Court of Appeal departed from the breach-date rule (which in this case would have worked considerable injustice upon the German creditor). The Court of Appeal relied upon Britain's accession to the European Economic Community and applied a particular article of the Treaty of Rome. It is quite clear that the article relied upon had nothing whatsoever to do with the matter at issue and, for European lawyers, must have caused some consternation as to what the English courts might have done if let loose on the remaining provisions of the Treaty of Rome.

6. THE CHANGE

It was quite clear that these cases, together with a number of others[27], indicated a clear judicial dissatisfaction and the matter came before the House of Lords in 1975 in the case of Miliangos.[28] The facts of the case were very simple. The plaintiff was a Swiss national who had entered into a contract for the sale of yarn to English purchasers. The contract was governed by Swiss law. The purchaser failed to pay for the goods. Bills of exchange were tendered but dishonoured. In 1972 the plaintiff raised two actions for the price of the goods, later consolidated, seeking payment of the price in Swiss francs, converted to sterling at the breach-date. The defendant alleged the goods were defective and lodged a counter claim but this was later abandoned when the action came to trial. After issuing the writ, the Court of Appeal handed down its decision in Schorsch Meier[29] in which it held that a creditor could obtain a judgment in a foreign currency. The plaintiff accordingly applied to amend its claim to Swiss francs. The judge at first instance felt himself to be in somewhat of an embarrassing position having to reconcile conflicting decisions of the Court of Appeal and the House of Lords on the very same subject. The Court of Appeal, not surprisingly, upheld its own decision when <u>Miliangos</u> came before it but, this time, the matter went to the House of Lords.

The leading speech for the majority of the members of the House of Lords (Lord Simon dissenting) was given by Lord Wilberforce. In my opinion, it is quite clear that the House of Lords was much influenced by the economic changes which had occurred:-[30]

> "The situation as regards currency stability has substantially changed even since 1961. Instead of the main world currencies being fixed and fairly stable in value ... many of them are now "floating" ... This is true of sterling. This means that, instead of a situation in which changes of relative value occurred between the "breach-date" and the date of judgment or payment being the exception, so that a rule which did not provide for this case could be generally fair, this situation is now the rule. So the search for a formula to deal with it becomes urgent in the interests of justice."

The facts of the case clearly indicated that the proper law was that of Switzerland and the money of payment and the money of account were the same i.e. Swiss francs. As Lord Wilberforce said, the creditor had bargained in Swiss francs and therefore he should be entitled to receive what he had bargained for, or as near as could be so achieved. In other words, any risks of a fluctuating exchange rate should not fall on the creditor but upon the debtor. It followed that the creditor was entitled to his judgment, in Britain, in Swiss francs.

7. FURTHER DEVELOPMENTS

The claim in Miliangos was for goods ordered and delivered and did not extend to breach of contract or tort. Lord Wilberforce indicated that the decisions on that subject might have to be reviewed. Two lower court decisions took up the challenge to extend the law in Miliangos but a decision of the House of Lords in two conjoined appeals ("The Despina R" and "The Folias")[31] put beyond doubt that the rules had changed for good.

I think it is worth looking at the two decisions, if only for the reason that they provide good illustrations of complexities which arise in cases involving shipping and international trade.

7.1 The Despina R

The claim in this case arose out of the collision between the Despina and the Eleftherotria. The latter was damaged and an agreement was reached that the owners of the Despina R should pay to the owners of the Eleftherotria 85% of all loss and damage suffered by them. The owner of the Eleftherotria was a Liberian company with its head office in Piraeus, Greece. The managing agents of the owners were based in New York and the bank account used by the agents for all payments in and out was operated in US dollars. The collision took place off Shanghai where the Despina R first called for repairs. She was then sent to Yokohama but, as the repairs could not be completed for some time, she was then sent to Los Angeles in the USA. Accordingly the owners of the Despina R had incurred expenditure in various currencies, but all purchased in US dollars. The issue was not only whether a judgment could be issued in a foreign currency but which currency or currencies in which to issue the judgment? There were three solutions:-

1. Sterling, calculated at the date of the loss (i.e. the Volturno[32] solution);

2. The currency of expenditure or loss i.e. the currency in which the loss was immediately incurred e.g. Japanese yen; or

3. The currency of the plaintiff, i.e. the currency in which the loss is effectively felt or borne by the plaintiff, having regard to the currency in which he generally operates or with which he has his closest connections. In this case such a currency was US dollars.

At first instance[33], Brandon J felt that the third solution was the most appropriate one but he felt constrained by previous decisions to apply the second solution.

Again it fell to Lord Wilberforce to deliver the leading speech. He recognised that since the decision of the House of Lords in Miliangos the Volturno[34] solution, for cases in tort, no longer applied. His Lordship took the view that the solution to be adopted was simply that which applied to cases governing the assessment of damages in tort i.e. restitutio in integrum and that of reasonable foreseeability of damages. His Lordship went on to say:-[35]

> "It appears to me that a plaintiff who normally conducts his business through a particular currency and who, when other currencies are immediately involved, uses his own currency to obtain those currencies, can reasonably say that the loss he sustains is to be measured not by the immediate currencies in which the loss first emerges but by the amount of his own currency, which in the normal course of operation he uses to obtain those currencies. This is the currency in which his loss is felt and is the currency which it is reasonably foreseeable he will have to spend."

Lord Wilberforce did recognise that such a rule could not be applied in every case and there may be circumstances in which a claimant cannot reasonably say that the loss he sustains should be measured in the amount of a currency in which he usually trades.

7.2 Folias

This case involved a claim for damages for breach of contract. The claim was brought by the French charterers of the vessel, Folias, which was owned by a Swedish company. The charterers shipped a quantity of onions to Rio De Janeiro. On receipt, the cargo was found to be damaged following a failure of refrigeration aboard the vessel. The charterers settled the claim with the cargo receiver in Brazilian cruzeiros, with the consent of the owner. The charter party was governed by English law and the currency of account, US dollars. The owners admitted liability but contended that the charterers should be reimbursed in Brazilian cruzeiros whilst the charterers claimed in French francs. The matter was heard before arbitrators who made their award in French francs, holding francs to be the most appropriate currency.

On the eventual appeal to the House of Lords, Lord Wilberforce propounded a similar approach to that he had set out in the Despina R. The first step is to examine whether the contract expressly or by implication provides a currency which covers all transactions arising under the contract. The currency of account in this case was US dollars but that related only to payments in respect of hire and other contractual payments and not breach of contract. If the contract fails to provide a currency then the court must establish the currency which "most truly expresses the plaintiff's loss". This is to be established by the principle of restitution and whether the parties could be said to have had this in reasonable contemplation.

The result of the decisions in Miliangos and the Despina and Folias was to reverse the breach day rule, allowing courts to issue judgments in currency other than sterling.

The changes which these decisions brought about extended well beyond the particular cases themselves. It is beyond the scope of this paper to examine all the consequences although I hope to give a limited introduction to some of the variations upon the theme. For those of you interested in the topic I strongly recommend both the Working Paper and final report of the English Law Commission.[36]

8. AUSTRALIA

Up to now this paper has dealt solely with the evolution of the various rules within England. The Australian courts followed the English authorities on the breach-date rule.[37] However, there are a number of cases[38], one of the most recent being a South Australian case[39], in which State Supreme Courts have taken up the new rules I have outlined above. Although some doubt was expressed on this issue in New South Wales[40] the balance of the reported judgments[41] support the Miliangos and the Despina principles. The High Court has noted[42] the change brought about by the Miliangos case but has not given an express judgment on this question.

9. THE UNITED STATES

It is interesting to note that the position in the United States is quite different in that the rule remains that the United States courts cannot issue a judgment in any denomination other than US dollars. The basis for this view may lie in the Coinage Act of 1792 or the view that courts cannot give judgment in any currency other than their own but the established law seems firmly entrenched. A court will order the conversion of a foreign money claim into US dollars but this may be done either at the date of the breach or the date of judgment. It would appear that Federal courts apply the judgment date rule but State courts (particularly New York) in certain jurisdictions apply the breach date rule.[43]

10. CANADA

Section 11 of the Currency and Exchange Act provides that judgments must be issued in Canadian dollars. This would appear to bar adoption of the Miliangos rules. Like Australia, the older authorities in Canada followed the pre-Miliangos decisions in England.[44] Some concern has been expressed[45] as to the continuing appropriateness of the rule and there is at least one reported case[46] in which a judgment in a foreign currency was issued but the preponderance of authority seems to be against any change.[47] The Law Commission of British Columbia has recommended legislation to change the existing law to enable judgments to be given in a foreign currency.[48]

Other Jurisdictions

The Miliangos principles have now expressly been adopted in Hong Kong[49], Papua New Guinea[50] and Scotland.[51]

Particular Consequences of the New Rules

11. INTEREST

The question of interest is particularly significant because it illustrates the need to recognise the economic framework within which foreign exchange transactions occur, the consequences of ignoring the framework and the difficulties of establishing such factors in the judicial process.

The right to demand interest by a creditor may be based upon the agreement of the debtor. For example, in a simple loan transaction the debtor may agree to pay interest on the outstanding debt at an agreed rate of interest until payment.[52] Subject to any power the court may have to review unconscionable bargains,[53] the court will normally give effect to the parties' agreement.

In the absence of such agreement most Australian courts have a discretion to award interest from a date determined by the court until judgment and at a rate prescribed by the court.[54] The court's discretion is wide enough to enable it to apply foreign interest rates, if it considers it appropriate to do so.

Once a judgment debt has been entered interest is payable thereon.[55]

These provisions are relatively simple to apply when there is no difference between the proper law governing the obligation to pay a sum of money and the law of the forum e.g. a claim for a payment under a contract governed by the law of South Australia litigated within the South Australian Supreme Court. However, in foreign money obligations, the foreign law may effect the right to demand interest. The right to recover interest on a contractual debt is governed by the proper law of the contract[56] and the same would appear to be the case where interest is sought as damages for breach of contract.[57] In reviewing foreign money obligations, the English Law Commission[58] suggested that, in the case of tort, the rule is that a plaintiff may only seek interest if he can show that he can claim it under the law of the country with the tort was committed and the law of the forum.

The problem is what rate of interest should be applied?

Take for example the facts in Miliangos. The Swiss creditor sued for his money in England and, in the absence of any rule to the contrary, if he was not paid he would entitled to interest at a rate prescribed within England. However, it should not be forgotten that the claim was in Swiss francs and the Swiss creditor is being compensated in interest for what he would have received had his debtor paid him on time. It would therefore seem more equitable that Swiss rates of interest should apply rather than English rates. In fact, it was this latter solutions which was adopted in the Miliangos case when it reappeared in the law reports after the decision of the House of Lords.[59]

It is hard to fault the logic of this decision but further complexities arise when more than one currency is being used. The difficulties are well illustrated in the case of Helmsing Schiffahrts GMBH and Co KG v Malta Dry Docks Corporation[60] The case involved the construction of two small ships by the Malta Drydocks Corporation for the plaintiffs, a German company. The price was calculated in Maltese pounds together with a sum for extras, repayable to the owners if not used. In an action by the shipowners for return of the unused extras money the Corporation counter claimed for certain other disbursements. The owners sought judgment applying English rates of interest, the defendant (the Corporation) claimed that Maltese rates should apply. The court decided that the correct rates of interest were the German commercial borrowing rates on the basis that the owners would have had to find the equivalent sum which they should have received, had the Corporation paid on time, within Germany. The result was an English judgment in Maltese currency, applying German rates of interest!

I think it is fair to say that this decision is open to some criticism and in the Pacific Colocotronis[61] the Court of Appeal expressed the view that the rate of interest applicable should be related to the currency. The claim related to the cost of transferring a cargo. The currency of payment was expressed to be US dollars, the contract concerned a London company and a foreign company. The trial judge granted the plaintiff judgment in US dollars but applied the sterling rate of interest. The Court of Appeal overturned this part of the judgment.

The question of interest highlights some of the problems adumbrated by Lord Simon in his eloquent dissent in the Miliangos[62] case. As the most consistent critics[63] of the new rules have pointed out, there is an inverse relationship between the interest rate in a country and the international strength of its currency. The weaker the currency is expected to be, the higher the domestic interest rate will have to be if investment is to be protected.

I am not convinced that interest rates provide a major hurdle. The solution rests in providing the court with sufficient evidence upon which it can reach a decision. Accordingly, interest rates should be one aspect of the plaintiff's responsibility of satisfying the court that it should be compensated by a judgment in a particular currency.

12. SET-OFF / COUNTERCLAIM

If a plaintiff is entitled to claim damages in a foreign currency the same principle must apply to the defendant who has a counterclaim or set-off. In claims involving one currency there is no difficulty: the court simply grants judgment for the balance owing by one party to another. The problem arises when each claim is expressed in a different currency. There are several options:-

1. Grant judgments to each claimant in their respective currencies and allow the respective parties to enforce their claims as they see fit or subject to conditions which require account to be taken of a competing judgments at the date of enforcement.

2. Select one currency at the date of judgment and convert all currencies into that currency.

3. Select some date other than the date of judgment for the conversion e.g. the date of breach of contract for the claimant with the larger amount. There is little authority which is directly in point. There is one Hong Kong case[64] which raised the question but the grounds for decision are not entirely clear.

At first instance, in the Despina R, Brandon J[65] did raise the question of set-off, illustrating the problem by reference to "both to blame" clauses in cases involving collisions and cases involving statutory limitation of liability. Should the currencies be different, Brandon J held that in the former case the lesser liability should be converted into the currency of the greater liability and set-off effected at the date of decision or agreement. Judgment should then be given for the amount by which the greater liability exceeds the lesser liability in the currency of the greater liability or its sterling equivalent at the date of payment. In the latter case where the tort feasor brings an action to limit his liability the date for conversion should be the date of decree of limitation. On the other hand, the Law Commission suggested[66] that each party should be entitled to its judgment but rules should be established to prevent one party enforcing its judgment without taking account of the other judgment. If that were not possible the Commission suggested the judgment should be given in the currency of the claimant whose claim on that basis was larger.

13. DAMAGES FOR EXCHANGE LOSSES

There is some authority for the proposition[67] that if a defendant is late in making a payment on the due date the creditor may be able to claim any loss he has suffered on account of a deterioration in the rate of exchange. The limiting factors are those rules which affect claims for breach of contract generally i.e. foreseeability and remoteness.

14. BREACH OF TRUST

Although cases of breach of trust are unlikely to arise in maritime matters it is worth noting that the general breach-date rule was held not to apply to cases of breach of trust. In a New South Wales decision[68] Street J held that a defaulting trustee was obliged to reimburse the trust in an amount calculated at the date restoration took place and not at the date of the breach of duty.

15. PERSONAL INJURIES

There is no reason in principle why, should a plaintiff suffer personal injuries at the hands of a wrongdoer, and experiences his loss in a foreign currency, he should not be able to recover in the currency in which he has felt the loss. Such a result was reached in Hoffman v Sofaer.[69] The plaintiff was an American citizen who suffered loss following negligent medical treatment while on holiday in England. The Courts had no difficulty in granting the plaintiff judgment in US dollars for past expenses but there was much argument as to the plaintiff's right to seek future loss of earnings in US dollars as opposed to sterling. With the exception of pain and suffering, the court reached the view that the plaintiff's loss of earning capacity and other similar future claims were all going to be experienced in US dollars and therefore that was the currency with which the plaintiff's loss was most closely linked.

16. RESTITUTION

The law of restitution gives rise to a number of particular problems. Claims for breach of contract and tort can be measured in the loss suffered by the plaintiff. On the other hand, restitution is normally measured by reference to the unjustified enrichment obtained by the defendant. In BP Exploration Co (Libya) Limited v Hunt (No 2)[70] Robert Goff J laid down a number of principles to be applied when dealing with foreign currency claims in restitution matters:-

1. Attention must be fixed upon the benefit which enures to the defendant rather than on the plaintiff's expenses.

2. Where the benefit is in money the award will normally take the form of an award for repayment of the money in the same currency.

3. Where the benefit is in services, the order should be the currency in which the defendant's benefit can be most appropriately valued.

4. Where there is a contract which provides a currency, the choice of that currency will be an important factor.

I have not dealt with a number of other issues which have arisen, particularly in the area of insolvency and enforcement but I commend the Law Commission Paper and Report for those interested.

17. CONCLUSION

Insofar as the new rules seek to do justice between parties, particularly when the risk of currency changes is placed upon the wrongdoer I think that they are a welcome development. The changes represent, in theoretical terms, a departure from the vested rights theory of private international law and a move towards the policy evaluation theory.

On a less abstract plane the challenge for the future rests upon the capacity of the judiciary to unravel what may be a very complicated set of facts and to reach a commercially just solution. This will involve an assessment of the techniques now available to international traders to guard against foreign currency losses. It remains to be seen just how easy a task that will be.

FOOTNOTES

1. In Australia, s.51(xii) Constitution of Australia.
2. (1925) 269 US 71
3. Note 2 at 80 per Holmes J.
4. (1926) 271 US 517
5. Note 4 at 519 per Holmes J.
6. [1971] 2QB 23
7. eg. Todorovic v. Waller (1981) 150 CLR 402
8. see W.M. Scammell: The Stability of the International Monetary System.
9. see The Political Economy of International Money: In Search of a New Order: ed. Loukas Tsoukalis
10. [1976] AC 443
11. Ward v. Ladswin (1626) Latch 77; Rastell v. Draper (1605) Yelv 80.
12. Manners v. Pearson & Son [1898] 1 Ch 581 is regarded as the beginning of the modern treatment of the issue.
13. [1921] 2AC 544
14. [1920] 2KB 704
15. see also Societe des Hotels Le Touquet Paris Plaze v. Cummings [1922] 1KB 451 and Madeleine Vionnet et Cie v. Wills [1940] 1KB 72.
16. note 13 at 549 per Lord Buckmaster.
17. United Railways of Havana and Regla Warehouses Limited [1961] AC 1007 at 1053.
18. note 17.
19. note 17 at 1069 - 70
20. note 10

21. note 17
22. F.A. Mann: The Legal Aspect of Money (3rd edition) at p371.
23. note 10
24. Daniel A. Lapres: Judicial Review of Rules of Law (1977) 55 Canadian Bar Review 132; JHC Morris: English Judgments in Foreign Currency: A "Procedural Revolution" 1977 41 Law and Contemporary Problems
25. [1974] 1QB 292
26. [1975] 1QB 416
27. The Teh Hu [1970] P106; The Halcyon the Great [1975] 1 WLR 515
28. note 10
29. note 26
30. note 10 at 463 F-G
31. [1979] AC 685
32. note 13
33. [1976] 1QB 396
34. note 13
35. note 31 at 697 F-H
36. The Law Commission Working Paper No. 80: Private International Law Foreign Money Liabilities; The Law Commission Report: Private International Law Foreign Money Liabilities: No. 124 (1983)
37. eg. A.H. McDonald Pty. Ltd. v. Wells (1931) 45 CLR 506; Moll v. Royal Packet Navigation Ltd. (1952) 52 SR (NSW) 87; Re: Tillam Boehme and Tickle Pty. Ltd. [1932] VLR 147

38. ANZ Banking Group Ltd. v. Cawood [1987] 1 QDR 131; Samex Lamberghini Tractors of Australia Pty. Ltd. v. Ian (No. 4218 of 1982); European Asian Bank Aktiengesellschaft v. Katsikalis (No. 2888 of 1986).
39. Foti v. Banque Nationale de Paris 1988
40. Johnio Nominees Pty. Ltd. v. Albury Wodonga (NSW) Corporation [1977] 1 NSWLR 43 per Moffitt JA at 56.
41. Maschinenfabrik Augsburg-Nuremburg Atkiengessellschaft v. Altikar Pty. Ltd. 1984 NSWLR 152; Mitsui Osk Lines v. Mineral Transporter [1983] 2 NSWLR 565; (rev'd on other grounds [1985] 2 ALL ER 935 (PC).
42. Chief Collector of Taxes PNG v. TA Field Pty. Ltd. (1975) 49 ALJR 351
43. On the position in the United States see: Foreign Currency Judgments: 1985 Report of the Committee on Foreign Comparative Law (1986) 18 New York University Journal of Law and Politics 791; The Need to Retreat from Inflexible Conversion Rules - An Equitable Approach to Judgments in Foreign Currency: Paul L. Lion (1982) 22 Santa Clara Law Review 871; The Legal Nature of Obligations Payable in Foreign Currencies: Paul Effres (1986) 11 North Carolina Journal of International Law and Commercial Regulation 445; Conversion of Judgments Measured in Foreign Currencies: Thomas J. Egan (1982) Washington and Lee Law Review 165
44. Royal Trust Co. v. Oak Bay [1934] 4 DLR 697
45. Batavia Times Publishing Co. v. Davis (1978) 20 OR (2d) 437
46. Sandy Frank Film Syndication Inc. v. CFQC Broadcasting Ltd. [1983] WWR 360

47. Airtemp Corp v. Chrysler Airtemp Canada Ltd. (1981) 31 OR (2d) 481; Royal Bank v. Paletta j (1983) 44 OR (2d) 29; Bedford v. Shaw (1981) 33 OR (2d) 766; AM Pac Forest Products Inc. v. Phoenix Doors Ltd. (1979) 14 BCLR 63; Press v. Serra (1985) 52 Nfld and PEIR 87; Farmers National Bank v. Coles (1981) 33 NDR (2d) 248; General Instrument Corp v. Maritime Ont. Freight Lines Ltd. (1973) 8 NBR (2d) 376.
48. Report on Foreign Money Liabilities (1983) LCR 65.
49. Fargo Shipping Co. S.A. v. Hwa Haur Trading (Hong Kong) Co. [1979] HKLR 327
50. Lucian Vevehupa v. Motor Vehicle Ins. (PNG)Trust (1983) PNGLR 343.
51. Commerzbank AG v. Lange 1973 SLT 219
52. eg. Bank of Scotland v. Davis 1982 SLT 20
53. eg. Consumer Credit Act 1974 (UK)
54. s.94 Supreme Court Act 1970 (NSW); s.84 Supreme Court Act 1979 (NT); s.72 Common Law Practice Act 1867 (Qld); s.30(c) Supreme Court Act 1935 (SA); ss 78 and 79A Supreme Court Act 1958 (Vic). But see also s.34 Supreme Court Civil Procedure Act 1932 (Tas) and s.32 Supreme Court Act 1935 (W.A.).
55. eg. s.114 Supreme Court Act 1935 (SA)
56. English Law Commission Working Paper at para 43
57. Miliangos v. George Frank (Textiles) Ltd. (No. 2) 1976 3WLR 477
58. note 56 at 4.5
59. note 57
60. [1977] 2 Lloyds Rep 444
61. [1981] 2 Lloyds Rep 40

62. note 10 at 481

63. Bowles and Whelan 1979-1980 25 Magill Law Journal 240; 60 Can Bar Review 805.

64. Sabah Shipbuilding v. Heuston Engineering and Equipment Ltd. [1978] HKLR 550

65. [1978] QB 396

66. English Law Commission Report (note 36) 3.27

67. Isaac Naylor and Sons Ltd. v. New Zealand Co-op Wool Marketing Association Ltd. [1981] 1 NZLR 361; President of India v. Lips Maritime Corp [1987] 3 ALL ER 110

68. Re Dawson [1966] 2 NSWR 211

69. [1982] 1 WLR 1350 see also Verehupa v. Motor Vehicles Insurance (PNG) Trust [1983] PNGLR 343

70. [1979] 1 WLR 783