The Law Commission

Working Paper No. 80

Private International Law
Foreign Money Liabilities

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This Working Paper, completed for publication on 31 July, 1981 is circulated for comment and criticism only.

It does not represent the final views of the Law Commission.

The Law Commission would be grateful for comments on this Working Paper before 1 March 1982.

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CONTENTS

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PRIVATE INTERNATIONAL LAW[1]

FOREIGN MONEY LIABILITIES

PART I: INTRODUCTION

1.1 We were asked by the Foreign and Commonwealth Office on 25 February 1972:

> "To advise on the problems which may arise if a sum of money is due in a currency other than that of the place of payment or the place where payment is sought."

A similar request for advice was also made to the Scottish Law Commission.

1.2 These terms of reference were then mainly directed to the question whether the United Kingdom should participate in the Council of Europe Convention on Foreign Money Liabilities (1967) and early in 1972 both we and the Scottish Law Commission were also asked by the Foreign and Commonwealth Office to advise on the question of United Kingdom participation in the Council of Europe Convention on the Place of Payment of Money Liabilities (1972). The two Commissions have now submitted a joint Report[2] recommending that the United Kingdom should not become a party to either of these Conventions.

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1 Item XXI of the Third Programme.

2 Law Com. No. 109; Scot. Law Com. No. 66 (1981).

1.3 However, the terms of reference also cover the question whether our own law is in any need of reform in the general field of foreign money liabilities. This question remains for consideration despite the fact that since 1972 our law in this field has been transformed by a number of judicial decisions, as explained below. The subject-matter of this Working Paper is accordingly to consider whether, and if so to what extent, any changes in the law of England and Wales concerning foreign money liabilities remain desirable against this background.

1.4 At the outset of our work it was decided to establish a Joint Working Party on Foreign Money Liabilities to advise both Commissions on the merits of the Council of Europe Convention on Foreign Money Liabilities (1967) and to advise us on the general reform of the law relating to foreign money liabilities. The Joint Working Party comprised representatives of both Commissions and of interested Government Departments, as well as a banker.[3] This Working Party met on several occasions to examine both the present law and the desirability of any changes that might be made. We are very grateful for the assistance that this Working Party has given to the Commission. We should also like to express our gratitude to Sir Jack Jacob Q.C., the former Senior Master of the Supreme Court, for the considerable help he has given with the practical implications of the present law and, in particular, with the matters dealt with in Part V of this Working Paper.

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3 A list of the membership of the Joint Working Party as at the time of its last meeting in 1980 is to be found in Appendix A.

1.5 In 1972, when we were first invited to consider the question, there was a long-standing rule that the courts could only give judgment in sterling, and the principles governing the date on which sums in foreign currency had to be converted into sterling for the purposes of calculating the debt or damages due to the plaintiff were well settled. However, there followed a number of important decisions in this area of the law, the most far-reaching of which was Miliangos v. George Frank (Textiles) Ltd. in 1975.[4] In that case the House of Lords abrogated the rule that the courts could give judgment only in sterling in relation, specifically, to claims for money due under contracts governed by foreign law, and made it possible generally for judgments to be expressed in foreign currency, leaving future judicial decisions to determine the manner in which this new power should be applied in other categories of claim. Thereafter, in the light of the fundamentally different approach adopted in Miliangos, there have been further important developments and a number of relevant decisions in this field.

1.6 The task of dealing with our terms of reference against this background has therefore confronted the Joint Working Party and ourselves with something like a moving staircase of judicial development, and it was necessary to judge when this had reached a stage at which a general review of our law in this field appeared to be appropriate. We think that this stage has now been reached, for two main reasons. First, the broad repercussions of Miliangos have now been worked out by the courts and there appears to be something of a lull in further development, although this

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4 [1976] A.C. 443; hereafter in this Working Paper referred to as "Miliangos".

impression can of course be overtaken at any time by new decisions. Secondly, there still remain issues which require consideration, both as the result of Miliangos and independently. Such issues may well fall to be dealt with by our courts after the publication of this Working Paper, and in relation to them its contents may be of assistance.

1.7 However, while we consider that it is now appropriate to take stock of the position which the law has reached, the extensive judicial activity in this field since our terms of reference were formulated, and the fact that this process is still no doubt to some extent continuing, have provisionally led us to a further conclusion which differs from our usual approach at the Working Paper stage. This is that we have formed the provisional view that, at any rate for the time being, it would be inappropriate to propose specific legislation even in respect of aspects which have not yet fallen for determination or of the few relatively minor matters which in our view are not yet entirely satisfactory. We would, however, welcome views on this question, especially from those who have practical experience of the operation of this area of the law.

1.8 Nevertheless, even if our work does not result in legislation, we believe that the publication of this Working Paper - comprising as it does a detailed and systematic survey and reappraisal of both the law and procedure across the field of foreign money liabilities - will provide a useful statement, of a kind not to be found elsewhere, of the issues in this part of the law. Furthermore, we believe that, as to procedure, it will play a role in exposing potential problems of a procedural kind which may require amendment or clarification, for example by means of Practice Directions or rules of court.

1.9 In accordance with normal practice, our intention is to publish a report in the light of the consultation upon this Working Paper. However, having regard to the detailed and comprehensive character of this Working Paper and to our provisional view that legislative intervention at the present time may be inappropriate, we envisage that the report itself will be relatively short.

1.10 We have divided this Working Paper into a number of Parts. In Part II, we provide an account of the present state of the law across the field of foreign money liabilities. Part III contains a reappraisal of the present law and makes a limited number of proposals for reform. In Part IV we examine the present rules for determining the law to be applied to decide whether interest is payable, and at what rate, on a foreign money obligation. We also consider whether any change in the present law is called for. Part V deals with a number of the practical problems that may arise, especially in the field of enforcement of judgments, from a decision as to the appropriate date for converting foreign money obligations into sterling. There is, finally, a summary of our provisional recommendations in Part VI.

PART II: THE PRESENT LAW

A. DEBTS PAYABLE IN ENGLAND IN FOREIGN CURRENCY

2.1 Where a debt expressed in a foreign currency is payable in England (for example, where a promise is made to pay 1,000 U.S. dollars in the City of London), it may as a general rule be paid, at the debtor's option, either in

the foreign currency in question[5] or in sterling.[6] When the debtor chooses to make payment in sterling, the necessary conversion into the latter currency from the foreign currency in which the debt is expressed is calculated as at the date of payment.[7]

2.2 Although there is little authority on the point, it would seem that the parties to a contract have power to exclude the general rule that a debtor may, if he wishes, discharge his obligation to pay in England a sum expressed in foreign currency by making a payment in sterling.[8]

2.3 It has not been established whether or not the principles outlined in the two preceding paragraphs are limited to contracts governed by English law. In

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5 Marrache v. Ashton [1943] A.C. 311, 317; Barclays Bank International Ltd. v. Levin Brothers (Bradford) Ltd. [1977] Q.B. 270, 277-8; George Veflings Rederi A/S v. President of India [1978] 1 W.L.R. 982, 984 (per Donaldson J., whose decision was affirmed by the Court of Appeal: [1979] 1 W.L.R. 59).

6 Adelaide Electric Supply Co. Ltd. v. Prudential Assurance Co. Ltd. [1934] A.C. 122, 148, 151; Auckland Corporation v. Alliance Assurance Co. Ltd. [1937] A.C. 587; Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society Ltd. [1938] A.C. 224, 240-241.

7 Barclays Bank International Ltd. v. Levin Brothers (Bradford) Ltd. [1977] Q.B. 270; George Veflings Rederi A/S v. President of India [1979] 1 W.L.R. 59.

8 In Anderson v. Equitable Assurance Society of the United States (1926) 134 L.T. 557, Bankes L.J. stated (at p. 562) that such an obligation was, on its true construction, one to pay in sterling; and in Heisler v. Anglo-Dal Ltd. [1954] 1 W.L.R. 1273, the rule was explained as being "primarily" one of construction that might require reconsideration at a time when foreign exchange was no longer freely available, since it might defeat the intention of the parties (ibid., p. 1278, per Somervell L.J.).

principle, however, it would seem that these rules of English law, being the law of the place of payment, should extend to contracts whose proper law is foreign,[9] save where the manner of payment goes to the substance of the parties' obligations.[10]

B. JUDGMENTS IN FOREIGN CURRENCY

(1) The former law: judgment had to be in sterling converted as at the "breach-date"

2.4 The procedural rule that formerly applied to the enforcement by action of a foreign currency obligation was that the claim, the judgment and any process of execution of such judgment in this country had to be in sterling.[11] That principle was apparently applied also to arbitration awards in England.[12]

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9 This is because, in general, the manner in which a contract is to be performed is a matter for the law of the place of performance, whereas the substance of the parties' obligations under a contract is governed by the proper law: see Dicey & Morris, The Conflict of Laws, 10th ed., (1980), pp. 812-818.

10 Thus, where there is more than one possible rate of exchange because, for example, at the relevant date an official rate co-exists with, but differs from, the market rate at the place of payment, the question which rate of exchange should apply will affect the substance of the obligation if it is discharged in the currency of the place of payment. Accordingly, that question should in principle be determined by the proper law of the obligation.

11 Although there are earlier decisions on the point, the fons et origo of the former modern rule is Manners v. Pearson & Son [1898] 1 Ch. 581 (C.A.).

12 The Teh Hu [1970] P. 106, 129, per Salmon L.J.

2.5 In the light of that procedural rule, a separate, substantive rule was necessary to determine the date as at which obligations expressed in a foreign currency fell to be converted into sterling. Large fluctuations in the rate of exchange and wholesale devaluations of one currency in relation to another lent great importance to the point. It was established, first, as to damages for breach of contract in Di Ferdinando v. Simon, Smits and Co. Ltd.,[13] secondly as to tort in The Volturno[14] and then as to a foreign debt in the Havana Railways case[15] that the "breach-date" rule applied - that is to say, broadly, that the obligation to pay a sum of foreign money was to be converted into sterling at the rate of exchange on the day when it became due and payable.[16] The rule was extended in The Teh Hu[17] to salvage awards so that the remuneration due to salvors under a salvage agreement fell to be assessed according to the rate of exchange on the day when the salvage services were completed. In this Working Paper the principle that judgment might be given only in sterling is sometimes referred to, for convenience, as the "sterling-judgment rule". When it is desired to refer both to that principle and the breach-date rule, the expression "sterling-breach-date rule" is used.

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13 [1920] 3 K.B. 409 (C.A.).

14 S.S. Celia v. S.S. Volturno [1921] 2 A.C. 544.

15 Re United Railways of Havana and Regla Warehouses Ltd. [1961] A.C. 1007.

16 The expression "breach-date" is a convenient one, but it was never formulated in precise terms in relation to every kind of claim. For example, the question whether in a claim for damages for breach of contract the appropriate date for conversion was, on the one hand, the date of breach or, on the other hand, that on which the loss was sustained was never clearly resolved.

17 [1970] P. 106 (C.A.). The powerful dissenting judgment of Lord Denning M.R. presaged the subsequent abandonment of the rule: see para. 2.7, below.

2.6 In principle, the sterling-breach-date rule ought to have applied only to the case where a plaintiff sought judgment for the payment of a sum of money; and, indeed, the rule was held not to apply to certain kinds of claim - for example, an action to redeem a mortgage loan,[18] and a claim by a creditor to share in a fund expressed in foreign currency.[19] In fact, however, this distinction was not drawn in every kind of case.[20]

(2) The new approach

(a) The dissenting judgment of Lord Denning M.R. in The Teh Hu (1969)

2.7 The first herald of a new judicial approach to the sterling-breach-date rule appears to have been the attack on the rule by Lord Denning M.R. on the ground that it caused injustice, in a dissenting judgment in The Teh Hu[21] in 1969. In that case the majority of the Court of Appeal (Salmon and Karminski L.JJ.) applied the rule to a salvage award made in an arbitration in London, with the result that a 14% devaluation of sterling which had occurred between the date when the cause of action accrued and the date of the award was ignored in assessing in sterling the amount awarded. In his attack on the rule, Lord Denning pointed out that it had become unsatisfactory because sterling was no longer the most stable currency in the world. It had

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18 See para. 2.45, below.

19 See para. 2.46, below.

20 See, for example, the decision concerning the terms of a declaratory judgment, referred to in n. 114, below.

21 [1970] P. 106.

been devalued more than once. The court ought (he said) to recognise the fact and to modify the common law in order to meet the new situation.[22] "... [M]en of all nations have been confident they could get justice in London at the hands of English arbitrators. But once justice is denied, confidence is lost. And once confidence is lost, it is hard to restore."[23]

(b) The new principle

2.8 In 1973 an award by English arbitrators in foreign currency was upheld by the Court of Appeal in the Jugoslavenska case.[24] The subject matter of the arbitration in that case was a charterparty under which both the money of account and the money of payment[25] were expressed in United States dollars, and the contract had no connection with England save that its arbitration clause provided for arbitration in London instead of New York. It was held that English arbitrators had power to award payment in foreign currency, Lord Denning M.R. explaining that they should do so:

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22 Ibid., p. 124.

23 Ibid., p. 127.

24 Jugoslavenska Oceanska Plovidba v. Castle Investment Co. Inc. [1974] Q.B. 292.

25 The meaning of the terms "money of account" and "money of payment" has been succinctly expressed by Lord Denning M.R. as follows:

> "The money of account is the currency in which an obligation is measured. It tells the debtor how much he has to pay. The money of payment is the currency in which the obligation is to be discharged. It tells the debtor by what means he is to pay."

(Woodhouse A.C. Israel Cocoa Ltd. S.A. v. Nigerian Produce Marketing Co. Ltd. [1971] 2 Q.B. 23, 54 (C.A.); aff'd [1972] A.C. 741 (H.L.)).

> "... whenever the money of account and the money of payment is in one single foreign currency. They should make their award in that currency because it is the proper currency of the contract. By that I mean that it is the currency with which the payments under the contract have the closest and most real connection. Likewise, whenever the proper currency of a contract is a foreign currency, English arbitrators can and should make their award in that currency, unless the parties have expressly or impliedly agreed otherwise. The proper currency can usually be ascertained without difficulty."[26]

Lord Denning went on to say that if the transaction was closely connected with two currencies the award should be made in whichever of those two currencies would produce the "most appropriate and just result"; and he distinguished The Teh Hu[27] on the ground that the salvage agreement in that case was thought to contemplate an award in sterling.[28]

2.9 The next step towards the abrogation of the sterling-breach-date rule took place in 1974, when the Court of Appeal held in the Schorsch Meier case[29] that judgment should be given in Deutschmarks. The plaintiffs in that case were a German company who had sold and delivered goods to the order of the defendant in England. Both the money of account and the money of payment were German. The value of the pound fell against the Deutschmark between the date on which the price became due

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26 [1974] Q.B. 292, 298.

27 [1970] P. 106: see para. 2.7, above.

28 [1974] Q.B. 292, 299.

29 Schorsch Meier G.m.b.H. v. Hennin [1975] Q.B. 416 (C.A.).

and the date of the trial. It was held that judgment should be given in the form: "It is adjudged this day that the defendant do pay to the plaintiff [X Deutschmarks] or the sterling equivalent at the time of payment." The Court of Appeal explained that when the money of account and the money of payment of a contract were the same foreign currency the English court had power to give judgment in that currency; that if the defendant failed to comply with the judgment, the plaintiff could seek to enforce it, producing an affidavit showing the sterling equivalent at the date of that application; but that such a judgment would be given only if the plaintiff claimed in the foreign currency in question.

2.10 By far the most significant development,[30] however, was the decision in 1975 of the House of Lords in the leading case of Miliangos,[31] a decision which subsequent cases showed to have revolutionised the approach of the common law to foreign money liabilities. The facts of that case were as follows. A contract was made in 1971 between a Swiss national and an English textile company

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30 There had previously been a minor development in The Halcyon the Great [1975] 1 W.L.R. 515, where Brandon J. held that the Admiralty Marshal had power to sell an arrested ship for U.S. dollars and (subject to the consent of the Treasury under the Exchange Control Act 1947, which was then necessary) to place the proceeds of sale in a dollar deposit account.

31 Miliangos v. George Frank (Textiles) Ltd. [1976] A.C. 443. Although the House of Lords adopted a similar approach to that of the Court of Appeal in the Schorsch Meier case, (see para. 2.9, above), it was pointed out that the latter court should nonetheless have regarded themselves as bound to apply the sterling-breach-date rule: [1976] A.C. 443, 459, per Lord Wilberforce.

for the sale to the company of a quantity of yarn. The proper law of the contract was Swiss law, and the moneys both of account and of payment were Swiss. The price was some 415,000 Swiss francs which was equivalent to £42,000 at the date of the contract. The buyer failed to pay on the due date (in 1971) but judgment was not obtained until the end of 1974, when the sterling equivalent had risen to some £60,000. The majority in the House of Lords (Lord Wilberforce, Lord Cross of Chelsea, Lord Edmund-Davies and Lord Fraser of Tullybelton),[32] decided that judgment could and should be given in Swiss francs in the form referred to in paragraph 2.11 below. It was emphasised that the decision was limited, first, to a claim for an agreed sum due under a contract (as distinct in particular, from a claim for damages for breach of contract or in tort) and, secondly, to an obligation to pay foreign currency under a contract whose proper law was that of a foreign country and where the money of account and payment was that of that country, or possibly of some other country, but not of the United Kingdom.[33]

2.11 Lord Wilberforce explained that:

(a) In order to obtain judgment in foreign currency it was necessary for a plaintiff specifically to seek such a judgment, and the words "or the sterling equivalent at the date of ..." might be added to his claim. See sub-paragraph (b) below.

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32 Lord Simon of Glaisdale delivered a powerful dissenting speech.

33 [1976] A.C. 443, 467, per Lord Wilberforce.

(b) The judgment should be in the form proposed by Lord Denning M.R. in the Schorsch Meier case[34] - namely: "it is adjudged this day that the defendant do pay to the plaintiff [X units of the foreign currency] or the sterling equivalent at the time of payment". In this context the terms "time of payment" and "date of payment" bear their ordinary meaning, namely the date of actual payment, unless it becomes necessary to enforce the judgment, in which case the terms mean "the date when the court authorises enforcement of the judgment in terms of sterling".[35]

2.12 Throughout this Working Paper unless the context otherwise requires, we accordingly use the terms "time of payment" and "date of payment" in a specialised sense, i.e., "the date of actual payment or, failing such payment, the date on which the court authorises enforcement of the judgment".

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34 [1975] Q.B. 416, 427.

35 [1976] A.C. 443, 468, per Lord Wilberforce. In cases where an order of the court is required, such as in garnishee proceedings, the expression "authorises enforcement of the judgment ..." is apt; but strictly speaking it might be thought inappropriate in the case of a writ of fi.fa., which issues as a matter of course. It is, however, clear that the relevant date is that on which the judgment creditor sets in motion a process of execution whether by applying, for example, for a garnishee order nisi or for a charging order or by issuing a writ of fi.fa. On enforcement generally, see paras. 5.28-5.61, below.

2.13 Further, it should also be borne in mind that the form of judgment approved in Miliangos specifies only a quantity of foreign currency: it does not specify a quantity of sterling. Accordingly, where in this Working Paper we refer to judgment being given in terms of the foreign currency or its sterling equivalent at the time of payment, we are to be understood as referring to the form in which such a judgment is "entered",[36] and to the result that it may then be satisfied either by payment of the specified sum of foreign currency or, at the option of the debtor, by payment of whatever may be the sterling equivalent of that sum at the time of payment.

2.14 It is convenient at this stage to point out the difference between a claim in the alternative on the one hand, and a foreign currency claim in the form "foreign currency or the sterling equivalent at the time of payment" on the other hand. Thus, the plaintiff may seek alternative relief in different currencies, of which one may be sterling: for example, he may claim "(1) $10,000 or, in the alternative, (2) £4,000". In this Working Paper we are not concerned with his claim for a specific sum of sterling.[37] The plaintiff's claim for $10,000 will be taken to mean "$10,000 or the sterling equivalent at the time of payment". The question whether it is or should be permissible to obtain judgment for $10,000 only is considered below.[38] It should also be borne in mind that a judgment as expressed by the court at the conclusion of the hearing may well be simply

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36 See R.S.C. O.42.

37 Except in so far as the plaintiff's loss is properly to be expressed in a currency other than sterling: see paras. 2.30, 3.8-3.11, below.

38 See paras. 2.31, 3.20-3.23, below.

for "$10,000", without the addition of the words "or the sterling equivalent at the time of payment" although this alternative will normally be implied.[39] Thus, if judgment is subsequently formally entered, it will state the relevant sum of foreign currency which is payable, and it will also refer to the alternative right to pay whatever may be the sterling equivalent of that sum at the time of payment.[40]

(c) The principle underlying Miliangos (1975)

2.15 It is clear that the impetus for a new approach to the question of judgments in respect of liabilities in foreign currencies originated in judicial dissatisfaction with the application of the sterling-breach-date rule to cases where sterling had been devalued between the date when the cause of action arose and the date of judgment, with the resulting injustice to plaintiffs that they recovered less than they deserved.[41] However, the

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39 As to whether this is always the case, see below, ibid.

40 See Practice Direction para. 9 [1976] 1 W.L.R. 83, 85. See also The Supreme Court Practice 1979, vol. 1, para. 42/1/3A, the second paragraph of which states the position. (The third paragraph of para. 42/1/3A is incomplete, and appears to have been inserted in error).

41 In particular, Lord Denning's criticisms of the rule in his dissenting judgment in The Teh Hu [1970] P. 106, 124, referred to at para. 2.7, above. In Miliangos, Lord Wilberforce pointed out that instead of the main world currencies, including sterling, being fixed and fairly stable in value (as they had once been), they were now "floating", and accordingly the search for a formula to deal with the changed situation had become urgent in the interests of justice: [1976] A.C. 443, 463.

question how such injustice might be remedied admitted of more than one possible answer - including, for example, (i) that conversion into sterling should be effected at the date of judgment or (ii) that judgment should be given for a sterling sum enhanced to take the devaluation into account.[42]

2.16 However, in the event, the approach adopted in Miliangos not only remedied the injustice caused by any devaluation in sterling, but created a completely new principle whereby the courts were to deal with foreign currency obligations. By directing that a judgment concerning a foreign currency obligation might be expressed in terms of the relevant currency, the House of Lords in that case were making the foreign currency the standard by which to determine the amount to be paid by the judgment debtor. Lord Wilberforce explained this principle in the following terms:

> "... I do not ... think it doubtful that, in a case such as the present, justice demands that the creditor should not suffer from fluctuations in the value of sterling. His contract has nothing to do with sterling: he has bargained for his own currency and only his own currency....
>
> "... Appeal has been made to the principle of nominalism, so as to say that the creditor must take the pound sterling as he finds it.... [But] [t]he creditor has no concern with pounds sterling: for him what matters is

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42 Lord Denning suggested this second approach as an alternative, if the solution he proposed of giving judgment in a foreign currency should be unacceptable: [1970] P. 106, 125.

that a Swiss franc for good or ill should remain a Swiss franc...." (emphasis added).[43]

(3) The subsequent major developments of the Miliangos principle

2.17 As we have said in paragraph 2.10 above, the decision in Miliangos itself was specifically limited first, to the case of debts (as distinguished, in particular, from claims for damages in contract or tort)[44] and, secondly, to contracts governed by a foreign system of law and of which the money of account and payment was that of the foreign country in question (or possibly of another foreign country). However, the Miliangos principle has since been extended by a number of decisions to (a) damages both for breach of contract[45] and for the commission of a tort,[46]

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43 [1976] A.C. 443, 465 and 466. It must be borne in mind that, as indicated by the words underlined in this passage from Lord Wilberforce's speech, the principle should logically operate, in the converse case where the value of the foreign currency has fallen against sterling, to give the plaintiff a smaller sum (in terms of sterling) than he would have received when the sterling-breach-date rule obtained. However, a claim by the plaintiff in the alternative (e.g., for (1) $10,000 or, in the alternative,(2) £4,000) should logically not assist him, since judgment will be given in what the court, not the plaintiff, considers to be the appropriate currency.

44 Ibid., p. 468, per Lord Wilberforce. The question whether the Miliangos approach should be extended to claims for damages was expressly left "open for future discussion".

45 Services Europe Atlantique Sud v. Stockholms Rederiaktiebolag Svea [1979] A.C. 685 (referred to hereafter as "The Folias"). See paras. 2.22-2.23, below.

46 The Despina R [1979] A.C. 685: see paras. 2.24-2.26, below.

(b) restitution under the Law Reform (Frustrated Contracts) Act 1943[47] and (c) to debts due,[48] and to claims for liquidated[49] and unliquidated[50] damages, arising under contracts whose proper law was English.

(4) Major issues arising from Miliangos and subsequent decisions

(a) Is the power of the court to give judgment in foreign currency a question of substance or one of procedure?

2.18 The general rule in English private international law is that questions of procedure are governed by English law (as the law of the forum), irrespective, in the case of a contract, of what in a particular case the proper law of the contract or the place of payment may happen to be or, in regard to torts, of the place where the tort was committed. It can hardly be doubted that the principle that the court may give judgment in foreign currency is essentially one of a procedural character; and that, accordingly, the existence of the court's power in that regard is unaffected by any foreign law.[51]

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47 B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2) [1979] 1 W.L.R. 783, 840-841 (affd. [1981] 1 W.L.R. 232 (C.A.)): see paras. 2.27-2.28, below.

48 Barclays Bank International Ltd. v. Levin Brothers (Bradford) Ltd. [1977] Q.B. 270.

49 Federal Commerce and Navigation Co. Ltd. v. Tradax Export S.A. [1977] Q.B. 324, 341-342, 349, 354 (C.A.). This decision was subsequently reversed but on grounds not bearing on this point: [1978] A.C.1. See also The Despina R [1978] Q.B. 396, 407; cf. [1977] Q.B. 324, 342.

50 The Folias [1979] A.C. 685.

51 In Miliangos, for example, Lord Wilberforce specifically categorised the sterling- breach-date rule, and hence by necessary implication the new principle which supplanted it, as a matter of English law as the lex fori: [1976] A.C. 443, 465.

2.19 This question, whether the court has power to give judgment in a foreign currency, must, however, be distinguished from the different question of the principles to be applied in a particular case for the purpose of determining whether that power should be exercised and, if so, along what lines. Thus, in the case of a debt, the ascertainment of the money of account is a matter which is determined by applying the proper law of the contract. The rules (considered below)[52] which have been laid down for determining the currency in which a judgment ought to be given apply only where the proper law of the contract, or the law governing liability in tort (as the case may be), is English.

(b) The principles whereby the currency of the loss is determined

(i) Debts and liquidated damages

2.20 It may be recalled[53] that one of the limitations placed by Lord Wilberforce[54] on the scope of the Miliangos decision was to emphasise that in that case the money of account and the money of payment were both of the same foreign country. He left open for discussion whether the Miliangos principle would apply if the moneys of account and of payment were of different countries. There is no doubt that, in a claim for a debt or liquidated damages expressed in a foreign currency, judgment as in Miliangos

52 See below, paras. 2.22-2.23 (contract) and paras. 2.24-2.26 (tort).

53 See para. 2.10, above.

54 [1976] A.C. 443, 467.

will be given in a foreign currency which is both the money of account and that of payment. However, the critical case for determining the currency of judgment is where the money of account and of payment are different currencies. It would appear that in this situation the loss will normally be measured, and judgment given, in the currency of account. Support for this approach is to be found in the judgment of Donaldson J. in George Veflings Rederi A/S v. President of India[55] where he had to consider the payment of demurrage payable in London in sterling at a rate expressed in U.S. dollars. He regarded the money of payment as sterling and the money of account as U.S. dollars,[56] and it is implicit in his judgment[57] that, "whatever be the money of payment, the plaintiff is entitled to judgment in the foreign money of account." However, in some cases the currency of payment may also be a factor in determining the currency of judgment.[58]

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55 [1978] 1 W.L.R. 982.

56 On appeal, the Court of Appeal [1979] 1 W.L.R. 59, 62-63 concluded that the currency in which the demurrage fell to be paid was U.S. dollars, so the question of choice between money of account and of payment did not, on that view of the facts, arise.

57 [1978] 1 W.L.R. 982, 984-985.

58 B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2) [1979] 1 W.L.R. 783, 840-841. This decision was affirmed by the Court of Appeal ([1981] 1 W.L.R. 232) but without reference to this point.

(ii) Unliquidated damages

General

2.21 It must be emphasised at the outset that the decisions on damages (both before and after Miliangos) have been limited to compensation for actual as distinct from prospective loss[59] and have not extended to claims for damages for death or personal injury.[60] Claims under these two heads would seem to involve issues which remain as yet unexplored by the courts.[61]

Damages for breach of contract

2.22 The principles whereby the court should determine the currency in which to give judgment for damages for

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59 In The Folias [1979] Q.B. 491, Lord Denning M.R. said that the problem of damages for loss of future profit or future opportunities of gain was "under discussion in other branches of law and may need separate consideration". He confined himself "to cases where the damage consists of expenses incurred in consequence of a breach or loss of hire or wages": ibid., p. 516.

60 "... the court is usually concerned to think in English currency and would do so in a claim, for example, for the loss of an eye whether arising in contract or in tort, and even though foreign law applied.": per Eveleigh J. in Jean Kraut A.G. v. Albany Fabrics Ltd. [1977] Q.B. 182, 189. It was later decided in The Folias [1979] A.C. 685 that damages could be awarded in foreign currency for breach of contract, but although this observation was made before that decision and was expressed in relation to any claim for "damages at large", it would appear to remain relevant notwithstanding that subsequent decision. In the Jean Kraut case, the plaintiffs successfully claimed (among other matters) damages in Swiss francs for breach of contract for non-acceptance of goods sold to the defendants, who, under Swiss law (the proper law of the contract), were in the position of debtors.

61 See para. 3.70, below.

breach of contract were laid down by the House of Lords in The Folias.[62] In that case a charterparty was made by French charterers carrying on business in Paris with the owners of The Folias for the carriage of a cargo of onions from Spain to Brazil. The proper law of the contract was English, and it provided for arbitration in London. The cargo having been damaged in transit, the Brazilian cargo receivers claimed for the damage against the charterers, who purchased, with French francs, Brazilian cruzeiros with which they settled the claim. The charterers then claimed damages from the shipowners. Liability was admitted, and the question was: in which currency should the shipowners pay damages to the charterers? This was of considerable significance because, between the date when the expenditure was incurred and that of the arbitration, the cruzeiro had lost over half its value. It was held by the House of Lords that the award should be made in French francs rather than in cruzeiros, since it was reasonable to contemplate under the contract that the charterers would have to use French francs to purchase other currencies to settle cargo claims. Lord Wilberforce laid down the following principles:[63]

(i) Whether an award should be given in a particular foreign currency depended on the general law of contract, and on the rules of the conflict of laws. The former required the application (as nearly as possible) of the principle of

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62 [1979] A.C. 685. The appeal to the House of Lords was heard together with that in The Despina R (as to which see paras. 2.24-2.26, below) and both appeals are reported together.

63 Ibid., pp. 700-703.

restitutio in integrum, regard being had to the reasonable contemplation of the parties; the latter involved the ascertainment and application of the proper law of the contract.

(ii) If the proper law was English, the first step was to see whether the contract itself expressly or impliedly answered the question. If it appeared from the contract that the parties had accepted a currency as the currency of account and payment for all transactions arising under the contract, judgment should be given in that currency.

(iii) But if, although obligations under the contract were to be met in a specified currency, no intention was shown that damages for breach should be given in that currency, damages should be calculated in "the currency in which the loss was felt by the plaintiff or 'which most truly expresses his loss'". That did not necessarily signify the currency in which the loss first arose: the court should ask "what is the currency, payment in which will as nearly as possible compensate the plaintiff in accordance with the principle of restitution, and whether the parties must be taken reasonably to have had this in contemplation."

(iv) The principle of giving judgment in the currency in which the loss was felt was equivalent to a finding that such currencies "appropriately or justly" reflected the recoverable loss, a rule which was very flexible according to the

circumstances of each case;[64] and in the case of an arbitration an award based upon the arbitrator's appreciation of the circumstances in which the foreign currency came to be provided should not be set aside by the court, for as such it involved no error of law.[65]

2.23 Finally, it would seem to be a proper inference from the propositions enunciated by Lord Wilberforce in The Folias, referred to in paragraph 2.22(i) and (ii) above, that the currency in which damages for breach of contract should be awarded is always a matter for determination by the proper law of the contract.

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64 This decision was followed by Lloyd J. in The Food Corporation of India v. Carras (Hellas) Ltd. (The Dione) [1980] 2 Lloyd's Rep. 577. In that case, under the terms of a charterparty certain overtime payments made to stevedores at Buenos Aires, the port of loading, fell to be shared equally between the owners and the charterers. The owners had paid the full amount due to the stevedores in Argentinian pesos. However, the owners had previously arranged for funds to be remitted to their agents in dollars. It was held that the owners' claim was for damages for breach of contract (ibid., p. 579) and that the arbitrators had been right to express their award in dollars. (It would seem that English law governed the contract, though the report does not say so in terms).

65 This principle was followed by Lloyd J. in the case referred to in n. 64, above. Having found that the owners' claim was for damages, he added that, even if the claim were to be categorised as a claim for a sum due under the charterparty, it was essentially a matter for the arbitrators to determine the true "cost" to the owners of incurring the overtime and no question of law was involved. Even on that basis, therefore, the arbitrators' award ought not to be upset by the court.

Damages in tort

2.24 The question of the currency in which a judgment for damages in tort should be given arose for decision by the House of Lords in The Despina R.[66] In that case a collision had occurred in Chinese waters between The Despina R and another vessel, in which the latter was damaged. The principal place of business of the managing agents of the owners of the other vessel was New York, and the bank account used for moneys received and payments made on behalf of her owners was a U.S. dollar account there. The owners of The Despina R agreed to pay a specified proportion of the loss and damage suffered in consequence of the collision. The expenses of repair had been incurred in various currencies, including (as to a small amount) in sterling.

2.25 The crucial question for decision in The Despina R[67] was whether judgment should be given in the "expenditure currency" (that is, the currency in which the expense or loss was immediately sustained), or in the "plaintiff's currency" (that is, the currency in which the loss was effectively felt or borne by the plaintiff). The House of Lords preferred the second approach, and held that judgment should be given in U.S. dollars, that currency being the one in which the loss had been effectively felt or borne by the plaintiff, together with a declaration that, where the expenditure and loss suffered had been incurred in any other currency, the sums representing such expenditure and loss should be converted

66 [1979] A.C. 685, and see note 62, above.

67 Ibid.

into dollars as at the date when the loss or expenditure was incurred. Lord Wilberforce based his conclusion on the application of the normal principles governing the assessment of damages in tort - namely, those of restitutio in integrum and reasonable foreseeability of the damage sustained. Their application led to the conclusion that the loss sustained by the plaintiff was to be measured by reference to the amount of the currency which he used in the normal course of his operations to obtain the immediate currencies in which the loss first emerged. Lord Wilberforce, dealing with the possible objection to the adoption of this approach that it might involve complicated inquiries for the purpose of finding the loss in terms of the plaintiff's currency, went on to explain that the plaintiff had to prove his loss, and that the burden lay on him to prove (a) that his operations were conducted in that currency and that it was the currency that he would normally use to meet his expenditure, or (b) that his loss could be appropriately measured only in that currency (as in the case of total loss of a vessel.[68]) Lord Wilberforce emphasised that he was not laying down a hard and fast principle in favour of the plaintiff's currency: in some cases the plaintiff would be unable to discharge the burden of establishing that he would in the normal course of events use, and be expected to use, the currency in which he normally conducted his operations. In those cases his loss would be felt in the currency in which it

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68 Brandon J. at first instance excluded the case of the total loss of the vessel from the ambit of his judgment: [1978] Q.B. 396, 417. In the Court of Appeal, however, Stephenson L.J. expressed a view similar to that of Lord Wilberforce: ibid., p. 436.

immediately arose.[69] Lord Wilberforce agreed that two plaintiffs might come out with different sums according to the currency in which they traded, a result which, it was argued, produced "inequality" between plaintiffs: this result was not (Lord Wilberforce explained) in fact unjust, since each plaintiff would receive compensation for his loss, and any change in the relative values of the currencies of the two plaintiffs was a risk they both had to accept.[70]

2.26 By contrast to their approach to damages for breach of contract, where (implicitly) the proper law was held to govern the question of the currency in which damages should be awarded,[71] the House of Lords in The Despina R[72] applied English law without considering whether there was any significance in the fact that the tort had been committed in foreign waters. However, by analogy

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69 [1979] A.C. 685, 698. In the Court of Appeal Stephenson L.J. pointed out that, although the plaintiff's currency was "generally to be preferred" (i) the plaintiff could not be awarded damages in his own currency if he had paid for repairs in another currency without using his own, since in such a case he had not lost his own currency, and (ii) if he had "gone out of his way" to use his own currency, or held up payment until he could use that currency, in order to obtain another foreign currency to pay for repairs, he might have difficulty in proving that his use of his own currency was a reasonably foreseeable consequence of the defendant's negligence: [1978] Q.B. 396, 436-437.

70 [1979] A.C. 685, 698.

71 See para. 2.23, above.

72 [1979] A.C. 685.

with the principle applied in relation to the award of damages in contract, it would seem that the rules laid down in The Despina R[73] are to be applied only where English law governs liability.[74]

Restitutionary awards

2.27 One situation where a claim for restitution may be made arises when the further performance of a contract is discharged under the doctrine of frustration. In that case the question arises whether the parties should restore benefits already conferred on each other under the contract. This matter is governed by the Law Reform (Frustrated Contracts) Act 1943.[75]

2.28 The question of the currency in which an award should be made under the 1943 Act arose for determination by Robert Goff J. in B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2).[76] The case concerned a contract for the exploration and development by the plaintiffs of an oil concession in Libya owned by the defendant in return for

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73 Ibid.

74 And it is a rule of English private international law that, in general, English law is applied in cases where, as in The Despina R, there is no proof of the foreign law.

75 It has been said that the Act is based on the principle of unjust enrichment: Goff and Jones, The Law of Restitution, 2nd ed., (1978), p. 565.

76 [1979] 1 W.L.R. 783, 837-845; (aff'd. [1981] 1 W.L.R. 232 (C.A.)).

benefits which included an interest in the concession. The contract was frustrated by the Libyan Government's expropriation of the plaintiffs' interest in the concession. Certain benefits had been conferred by the plaintiffs on the defendant before the contract was frustrated. Robert Goff J. indicated that the following principles in relation to foreign currency were generally to be applied to an award to a plaintiff by way of restitution:

(a) In contrast to the principles applicable to the currency in which damages for breach of contract or in tort were given, the award must be related to the benefit obtained by the defendant rather than to the expense incurred by the plaintiff, and in the case of services should take the form of a quantum meruit or reasonable remuneration.[77]

(b) Where the benefit consists of money, the award should generally be expressed in the currency in which the payment has been made to the defendant.[78]

(c) Where the benefit takes a form other than that of money, the award should be made along the lines applied to claims in tort and contract respectively in The Despina R[79] and The Folias[80] - namely, in the currency in which the defendant's benefit can be most fairly and appropriately

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77 [1979] 1 W.L.R. 783, 841.

78 Ibid., p. 840.

79 [1979] A.C. 685: see paras. 2.24-2.26, above.

80 Ibid.; see paras. 2.22-2.23, above.

valued.[81]

(d) Where, as is frequently the case, the currency in which the benefits are to be both valued and paid for is identified in the contract, that currency will often be chosen by the court.[82] Where the currency of payment is different from the currency of account, the latter is generally to be preferred unless the contract envisages an appreciable delay between the date when the debt falls due and the date of payment, "in which event it may be desirable to make some different award."[83]

Compensation for late payment of a debt: the *Ozalid* case

2.29 In Ozalid Group (Export) Ltd. v. African Continental Bank Ltd.[84] the debtors failed to make payment until some weeks after the due date. The money of account and of payment under the agreement in question, which was governed by English law, was the U.S. dollar; and, as a consequence of the debtors' delay in making payment, the creditors sustained loss owing to a fall in the value of the dollar against sterling, the creditors' currency, between the due

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81 [1979] 1 W.L.R. 783, 839-840.

82 Ibid., p. 840. Robert Goff J. pointed out, however, that there was no presumption to this effect.

83 Ibid., p. 841. This is because if there is a delay between the due date and the date of payment the parties take the risk of fluctuations in the currency of payment, whereas between the date of the contract and the date fixed for payment they take the risk of changes in the relative value of the currency of account.

84 [1979] 2 Lloyd's Rep. 231

date and the date of actual payment. Donaldson J. held that the creditors were entitled to compensation in respect of that loss. He cited the decisions of the House of Lords in The Folias[85] and The Despina R[86] as authority but, in our view, the application of the principles laid down in the two latter decisions to the case of late payment of a debt gives rise to difficulties. The question of compensation for late payment of a debt is considered further in our reappraisal of the present law in Part III of this Working Paper.[87]

(iii) Can a plaintiff claim a judgment in (a) sterling alone or (b) a foreign currency alone?

2.30 The ordinary form of judgment in foreign currency, approved in Miliangos, allows the judgment debtor the option of paying either the specified amount of foreign currency or the sterling equivalent of that amount calculated as at the date of payment. However, it was stated in that case that if the plaintiff wanted judgment in foreign currency he had to claim judgment in those terms.[88] This would appear to suggest that a plaintiff who preferred to obtain judgment in sterling alone (as would be likely to happen, for example, in the case of a debt in a foreign currency which the plaintiff expected to be devalued between the date of his commencing proceedings and the date of judgment) might always be entitled to do so.

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85 [1979] A.C. 685.

86 Ibid. The decisions related respectively to awards of damages for breach of contract (see paras. 2.22-2.23, above) and for the commission of a tort (see paras. 2.24-2.26, above).

87 See paras. 3.63-3.69, below.

88 [1976] A.C. 443, 468, per Lord Wilberforce.

On the other hand, to allow a plaintiff the unconditional right to do so in every case would be contrary to the principle underlying Miliangos whereby a foreign currency obligation should, subject only to qualifications imposed by the practicalities of procedure, continue after judgment to be measured in terms of the foreign currency in question.[89] However, in the Ozalid[90] case Donaldson J. stated that a plaintiff was not required to claim in a foreign currency, but he then went on to say that, although the point had not in terms arisen for decision in Miliangos, it had subsequently been held in The Folias[91] and The Despina R,[92] that the plaintiff did not have a free choice: he had to select the currency in which to make his claim and prove that a judgment in that currency would most truly express his loss.[93] We return to this question in our reappraisal of the present law in Part III of this Working Paper.[94]

2.31 There appears to be no reported case on the question whether a plaintiff may today obtain judgment in a foreign currency alone, that is to say without the debtor having the option, available to him under the form of judgment approved in Miliangos, of paying in sterling. However, we understand that in at least one case since Miliangos the judgment was expressed in terms of a foreign currency alone, although it

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89 See para. 2.16, above.

90 [1979] 2 Lloyd's Rep. 231.

91 [1979] A.C. 685: see paras. 2.22-2.23, above.

92 Ibid., see paras. 2.24-2.26, above.

93 [1979] 2 Lloyd's Rep. 231, 234.

94 See paras. 3.8-3.11, below.

would seem that there could be considerable difficulty in enforcing such a judgment in England.[95] This issue is discussed further in our reappraisal of the existing law in Part III, at paragraphs 3.20-3.23, below.

(iv) The date for conversion into sterling

2.32 The general rule is that, where it is necessary, for the purpose of payment in sterling, to convert any sum in a foreign currency pursuant to a judgment expressed in that currency, the conversion must be effected as at the "date of payment". In this context the expression "date of payment" signifies either the date of actual payment or, should it become necessary for the creditor to enforce the judgment, the date on which the court authorises its enforcement.[96]

2.33 However, it is appropriate here to refer to two special matters which have been respectively the subject of judicial decision and judicial comment since Miliangos. These are (i) bankruptcy and the winding-up of an insolvent company and (ii) set-off. So far as the bankruptcy of an individual or the winding-up of an insolvent company is concerned, Lord Wilberforce and Lord Cross of Chelsea expressed the view, obiter, in Miliangos that the appropriate date for the conversion into sterling of a creditor's foreign currency claim would be the date when the creditor's claim

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95 We discuss the question of the enforcement of a judgment entered in terms of foreign currency in Part V.

96 See para. 2.11(b), above.

in terms of sterling was admitted by the liquidator.[97]

2.34 However, in Re Dynamics Corporation of America[98] Oliver J. declined to follow these dicta, holding that conversion should be effected as at the date of the winding-up order. The purpose of the winding-up of a company was (he explained) the ascertainment of the company's liabilities at a particular date and the distribution of its assets pro rata among the creditors at that date. Accordingly the relevant date had to be the same for every creditor, namely the date of the winding-up order. To adopt the course suggested by Lord Wilberforce and Lord Cross of Chelsea would in his view create inequality between the sterling creditors and the "foreign" creditors. It is also clear from the judgment in this case that:

(a) although the case concerned a compulsory liquidation, the principles which it laid down were applicable to a voluntary liquidation[99] and to bankruptcy; and

(b) the valuation of any set-off should also be made as at the date of the winding-up order.[100]

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97 [1976] A.C. 443, 469, per Lord Wilberforce; 498 per Lord Cross of Chelsea. Although Lord Wilberforce did not refer in terms to bankruptcy, it would seem that the principle he had in mind must extend to that field. Lord Cross of Chelsea specifically referred to bankruptcy.

98 [1976] 1 W.L.R. 757.

99 Ibid., p. 770. See also Re Lines Bros. Ltd. (1981) 125 S.J. 426.

100 Ibid., p. 775.

2.35 The second case is that of the application of the principle underlying Miliangos to cases of set-off, where the following question arises: what is the conversion date if, in the same action, A establishes a claim against B in one currency and B in turn establishes a claim against A in another currency, when the circumstances are such that, were no foreign money element involved, B's claim would be set-off against A's claim so as to reduce or extinguish the amount for which A is to have judgment? This difficult problem has not directly arisen for determination by the courts in the light of Miliangos, although in The Despina R[101] Brandon J. at first instance canvassed essentially similar problems which might arise in relation to Admiralty proceedings and proposed a solution along lines which, in our view, are relevant to the problem of set-off in general. We consider in some detail the nature of the problem of set-off, the solution suggested by Brandon J. and possible alternative answers in Part III.[102]

(5) Issues which remain undecided after Miliangos

2.36 Certain comparatively minor issues, in addition to the major questions we have considered above, remain undecided after Miliangos. As to some of these issues, which were governed by rules as to conversion into sterling inconsistent with the Miliangos principle, the rules were subsequently amended by statute so as to harmonise with that principle. The amendments concern (i) foreign judgments and arbitral awards, and (ii) bills of exchange. The amendments concerning foreign judgments and arbitral awards are respectively considered at paragraphs 2.53

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101 [1978] Q.B. 396.

102 Paras. 3.29-3.35, below.

and 2.59, below. In the case of bills of exchange, the requisite amendments were effected by repeals of two provisions of the Bills of Exchange Act 1882. There is accordingly now no problem in that regard.[103]

2.37 There remain some matters upon which there has been no direct authority since Miliangos but to which, however, we have little doubt that the Miliangos principle would be applied as and when they arise for decision. These matters include the following.

(a) Salvage awards

2.38 We have referred in paragraphs 2.5 and 2.7, above, to The Teh Hu,[104] a decision of the Court of Appeal before Miliangos which concerned the conversion into sterling of a salvage award in foreign currency, and to the

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103 The two former provisions of the 1882 Act were (i) s. 57(2) which related only to bills dishonoured abroad (and which provided, in effect, that the amount recoverable on dishonour should be such amount of sterling as would buy the relevant foreign currency) and (ii) s. 72(4), which broadly provided for conversion of sums payable under bills of exchange expressed in foreign currency to be converted into sterling as at the date of payment. Both sections were repealed by the Administration of Justice Act 1977, s. 4 (save as to bills drawn before the section came into force). And even before the repeal of s. 72(4), Mocatta J. had held in Barclays Bank International Ltd. v. Levin Brothers (Bradford) Ltd. [1977] Q.B. 270 that, in the light of Miliangos, it was open to him to construe that provision as being inapplicable to the case where a party liable on the bill was sued for payment notwithstanding the authority to the contrary prior to Miliangos (Syndic in Bankruptcy of Salim Nasrallah Khoury v. Khayat [1943] A.C. 507 (P.C.)).

104 [1970] P. 106.

dissenting judgment of Lord Denning M.R. in that case, which presaged the abandonment of the sterling-breach-date rule. With the abrogation of that rule, the principle on which The Teh Hu[105] was based no longer represents the law.[106] From dicta of Lord Wilberforce and Lord Denning M.R. in Miliangos and The Folias respectively,[107] it is clear that, if facts similar to those in The Teh Hu[108] were to arise today, an award could be made in foreign currency and would not be open to challenge on that ground.

(b) An order for an account to be taken

2.39 The only authority before Miliangos as to the date for the conversion into sterling which was then required if the court ordered the taking of an account appears to be the

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105 Ibid.

106 In regard to the particular facts of that case, however, it is perhaps worth noting that one ground on which it was distinguished in the Jugoslavenska case was that the arbitration agreement (Lloyd's form) expressly empowered only a sterling award: [1974] Q.B. 292, 303-304 per Roskill L.J.

107 Miliangos v. George Frank (Textiles) Ltd. [1976] A.C. 443, 468; The Folias [1979] Q.B. 491, 516.

108 [1970] P. 106. The arbitrator would have to decide whether to express in yen or dollars the part of the award which represented remuneration. As security had been put up in dollars, it seems that the part of the award representing remuneration would be properly expressed in that currency: [1970] P. 106, 125 per Lord Denning M.R. There would be no difficulty about the expenses, since these were paid for in yen.

decision of the Court of Appeal in 1898 in Manners v. Pearson & Son,[109] which is generally regarded as the modern source of the sterling-judgment rule.[110] The majority of the court held that conversion into sterling was to be effected at the rate of exchange prevailing on the day when the amount due was ascertained by taking the whole account. Thus, they did not apply the rule which subsequently became the general principle - namely the breach-date rule.[111] In a dissenting judgment, however, Vaughan Williams L.J. held that the correct date for conversion into sterling was that on which each payment became due; and, it was pointed out before Miliangos, his judgment "has since so often been quoted with approval that it may be doubtful whether the view taken by the majority (Lindley M.R. and Rigby L.J.) would find favour with the House of Lords".[112]

2.40 As to the position today, it is almost certain that by virtue of the principle underlying Miliangos the

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109 [1898] 1 Ch. 581.

110 Originally stated by Lindley M.R. at p. 587.

111 The majority were influenced by the fact that Manners (the personal representative of one Morison, deceased, and the party to whom the account was due) did not become the personal representative of the deceased until two years after his death, and during those two years Morison had had no personal representative to whom the defendants could pay anything.

112 Mann, The Legal Aspect of Money, 3rd ed., (1971), p. 368, n. 2. See, for example, Re Chesterman's Trusts [1923] 2 Ch. 466 in which the judgment of Vaughan Williams L.J. was referred to with approval in the Court of Appeal both by Warrington L.J. of the majority and Younger L.J. who dissented: ibid., pp. 485, 492.

balance found to be due would, in an appropriate case, be ordered (as in the case of foreign currency judgments in general) to be paid in foreign currency or in its sterling equivalent at the date of payment. There is, however, the further problem of determining the conversion dates to be applied where the constituent items of the account are expressed in different currencies. We return to these aspects of an order for an account in Part III.[113]

(c) Declaratory judgments

2.41 A declaratory judgment does not order the payment of money, so there appears to be no reason why, even before Miliangos, the court should not have expressed its judgment in terms of the appropriate foreign currency.[114]

(d) An order for restitution against a defaulting trustee

2.42 It seems that the breach-date rule did not extend to a claim for restitution against a trustee who in breach

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113 See paras. 3.38, and 3.74, below.

114 However, the decision of Farwell J. in Kornatzki v. Oppenheimer [1937] 4 All E.R. 133 appears to be to the contrary. In that case a contract governed by German law was made in 1905 whereby the defendant was bound to pay to the plaintiff an annuity of 8,000 Marks for her life. The question for determination was how that obligation had to be performed in the light of the replacement of the Mark by the Reichsmark. Farwell J. determined the issue on the basis of German law; and on that basis he granted a declaration that the defendant was bound to pay an annuity at such rate in Reichsmarks as was the equivalent of £500 per annum, although the plaintiff did not, apparently, seek a declaration expressed in sterling. We believe, however, that on similar facts today, following the abrogation of the sterling-judgment rule, such a declaration would be expressed in Deutschmarks as the present currency of the Federal Republic.

of trust had withdrawn investments from a trust fund. There is little direct English authority on the point, but the general principle of restitution is that, if the investments subsequently rise in value, the trustee must restore to the fund their value as at the date of restitution.[115] This principle was applied in 1966, in Re Dawson,[116] a decision of the Supreme Court of New South Wales, to the case where the investment withdrawn consisted of foreign currency, the value of which had risen against the Australian pound when restitution was ordered. It was held that the defaulting trustee had to pay into the trust fund the amount which in terms of Australian currency was then the equivalent of what he had withdrawn. The then leading decisions on the breach-date rule, and especially the Havana Railways case,[117] were distinguished:

> "The reasoning which the House of Lords adopted in [the Havana Railways case] ... proceeds upon the basis that damages at common law are ordinarily not affected by subsequent fluctuations in currency exchange rates any more than ordinarily they are affected by subsequent fluctuations in market values. This reasoning is not available in a claim against a defaulting trustee as his obligation has always been regarded as tantamount to an obligation to effect restitution in specie; such an obligation must necessarily be measured in the light of market fluctuations since the breach of trust; and in my view it must also necessarily be affected, where relevant, by currency fluctuations since the breach."[118]

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115 Kellaway v. Johnson (1842) 5 Beav. 319; 49 E.R. 601; Phillipson v. Gatty (1848) 7 Hare 516; 68 E.R. 213; Re Massingberd's Settlement (1890) 59 L.J. Ch. 107.

116 [1966] 2 N.S.W.R. 211.

117 [1961] A.C. 1007: see para. 2.5, above.

118 Re Dawson [1966] 2 N.S.W.R. 211, 216, per Street J. Some support for Re Dawson may possibly be found in a dictum of Jenkins J. in Re Rickett [1949] 1 All E.R. 737, 743.

2.43 Although the converse situation, namely that in which the value of the foreign currency had fallen between its wrongful withdrawal and the restitution order, did not arise in Re Dawson, and it was therefore unnecessary to "examine this question closely",[119] it seems that the beneficiaries would have had the option to compel the trustee to pay the equivalent in Australian currency of the amount withdrawn, converted as at the date of the withdrawal.[120]

2.44 The approach adopted in Re Dawson[121] to the currency in which an order should be made against a defaulting trustee is consistent with the principle underlying Miliangos, and the subject accordingly gives rise to no difficulty in the context of this Working Paper.

(e) The redemption of a mortgage securing a loan in foreign currency

2.45 An action to enforce the redemption of a loan involves no claim or judgment for the payment of a sum of money, so that where the loan was expressed in foreign currency the sterling-breach-date rule did not apply. Thus in one case,[122] the plaintiffs, a British bank, obtained in 1914 a loan of 750,000 Russian roubles from a Russian bank on the security of certain bonds. Subsequently, the roubles fell to a small fraction of their original worth. In an action for redemption of the loan it was held that on payment of principal and interest in

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119 [1966] 2 N.S.W.R. 211, 220.

120 Ibid.

121 [1966] 2 N.S.W.R. 211.

122 British Bank for Foreign Trade Ltd. v. Russian Commercial and Industrial Bank (1921) 38 T.L.R. 65.

roubles (together with costs in sterling) the plaintiffs were entitled to redeem the security.[123] This approach to redemption actions is in accord with the principle underlying Miliangos, since the creditor's right to repayment and his correlative duty to discharge the security for the loan is measured in the foreign currency.

(f) A claim by a creditor to a share in a fund (other than in bankruptcy or on the winding-up of a company)

2.46 The breach-date rule was not applied to a creditor's claim for a share in a fund the right to which arose after the fund was constituted. Thus, in Re Chesterman's Trusts[124] the question was how much of a fund in court, representing mortgaged property, was to be paid to lenders entitled to a sum of German marks, to whom one of those entitled to a share in the fund had mortgaged his interest. In the inquiry the Master issued a certificate as to how much, in German currency, should be paid to the lenders out of the fund. It was held that conversion into sterling should be effected as at the date of the Master's certificate, notwithstanding that the amounts payable to the lenders had become due and payable long before then. It was stressed both at first instance and by the two judges in the majority in the Court of Appeal that the cases establishing the breach-date rule were distinguishable on the ground that no money judgment was involved.[125]

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123 This situation must be distinguished from the case of an English mortgage loan in sterling, the amount of sterling repayable being expressed to vary proportionately with the rate of exchange between the pound and, say, the Swiss franc. Such an arrangement was held by Browne-Wilkinson J. to be valid in Multiservice Bookbinding Ltd. v. Marden [1979] Ch. 84.

124 [1923] 2 Ch. 466.

125 [1923] 2 Ch. 466, 474 per Russell J., 479 per Lord Sterndale M.R. and 485 per Warrington L.J.

2.47 In Part III of this Working Paper[126] we consider whether the date selected in Re Chesterman's Trusts[127] for the conversion into sterling is appropriate, having regard to the form of judgment approved in Miliangos; and we also there canvass the question whether special provision is required to deal with situations where, unlike the position in Re Chesterman's Trusts,[128] the fund in question is, or may be, insufficient to meet every claim in full.

(g) Pecuniary legacies

2.48 Where a pecuniary legacy expressed in a foreign currency is given by will, the question arises whether or not the legacy should be converted into sterling. Such authority as there is suggests that where the legatee resides abroad, no conversion is necessary.[129] Where, however, the legatee lives in the United Kingdom, or where the will provides for the legacy to be retained in this country, the amount of the legacy is converted into sterling; and it was held before Miliangos that, apart from express direction in the will, conversion into sterling should be effected as at the first anniversary of the testator's death (that is, at the end of the "executor's

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126 See paras. 3.51-3.53, below.

127 [1923] 2 Ch. 466.

128 Ibid.

129 F.A. Mann, The Legal Aspect of Money, 3rd ed., (1971), pp. 325-7. No distinction is drawn in that work between cases in which the legatee resides in the country in whose currency the legacy is expressed and those in which he resides in another country: op. cit., pp. 325-7.

year").[130] There is authority for the view that the rate of exchange applicable to annuities is that obtaining on the date of each payment.[131] We return in Part III[132] to consider these principles further in the light of Miliangos.

(6) Foreign judgments, arbitral awards and maintenance orders

(a) Foreign judgments

2.49 Although a judgment of a foreign court cannot be enforced here directly, it may be enforceable either by an action at common law or under statute by means of registration.

(i) Enforcement of foreign judgments by action at common law

2.50 A foreign judgment gives rise to a cause of action at common law on which a judgment may be given by an English court, provided that the foreign judgment was final and conclusive and given by a court of competent jurisdiction, and that it is for a definite sum. Consistently with the breach-date rule, it was held before Miliangos that the appropriate date for converting a sum of foreign currency into sterling for the purpose of an action on a foreign

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130 Re Eighmie [1935] Ch. 524; Oppenheimer v. Public Trustee (C.A.) (1927), unreported, but set out in the work referred to in the preceding footnote, at p. 592.

131 Kornatzki v. Oppenheimer [1937] 4 All E.R. 133, where an annuity expressed in sterling was to be paid in Germany in the currency of that country.

132 See paras. 3.71-3.72, below.

judgment was the date of that judgment.[133] Although there has been no English decision on the point since Miliangos, there can be little doubt that the approach adopted in that case would extend to an action on a foreign judgment and that conversion should be at the date of the later English judgment. In a Canadian case, in which an action was brought in Ontario to enforce a judgment obtained in Pennsylvania, the view was expressed that there was no reason why the English courts could not adopt the same approach as in Miliangos in every case where the conversion rate was material, including an action to enforce a foreign judgment.[134]

2.51 The right of a foreign-judgment creditor to bring an action on his judgment does not affect his right to sue on his original cause of action. Accordingly he can, it seems, sue either on the foreign judgment or on the original cause of action. When the breach-date rule applied, this option enabled him to select the most favourable rate of exchange, but this advantage has disappeared with the abrogation of that rule.

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133 Scott v. Bevan (1831) 2 B. & Ad. 78, 109 E.R. 1073; East India Trading Co. Inc. v. Carmel Exporters and Importers Ltd. [1952] 2 K.B. 439.

134 Batavia Times Publishing Co. v. Davis (1978) 88 D.L.R. (3d) 144, 153. All Canadian courts were, however, bound by statute to give judgment only in Canadian currency. It was held that the date of the judgment of the Canadian court was the appropriate time at which to calculate the conversion; and see Williams and Glyn's Bank Ltd. v. Belkin Packaging Ltd. (1980) 18 B.C.L.R. 279. In Airtemp Corp. v. Chrysler Airtemp Canada Ltd. (1980) 11 Bus. L.R. 47, conversion was made as at the date of issue of the writ. However, the breach date for conversion was reluctantly still applied in Am-Pac Forest Products Inc. v. Phoenix Doors Ltd. (1979) 14 B.C.L.R. 63, 67.

(ii) Enforcement of foreign judgments by statutory registration [135]

Part II of the Administration of Justice Act 1920

2.52 Part II of the Administration of Justice Act 1920 enables the judgments of superior courts in the Commonwealth outside the United Kingdom to be enforced by registration in the High Court. The Act extends to any particular Commonwealth country only when brought into force in relation to that country on a reciprocal basis by Order in Council. The Act has been applied to many Commonwealth territories,[136] but no further extension has been permissible since 1933, reliance having been placed on the wider provisions of the Foreign Judgments (Reciprocal Enforcement) Act 1933.[137] Although the 1920 Act itself is silent on the question of the conversion into sterling of a judgment expressed in foreign currency, both before and after Miliangos, the same principles have apparently been applied in England to such judgments as to those registered under the 1933 Act.[138]

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135 The Judgments Extension Act 1868 (as supplemented by the Inferior Courts Judgments Extension Act 1882 and as amended) provides for judgments obtained in one part of the United Kingdom to be registered in a court of another part of the United Kingdom. As, of course, no problem concerning currency arises under this head, these provisions are not further considered here.

136 A list is to be found in The Supreme Court Practice 1979, in the notes to R.S.C. O. 71, r. 1.

137 See para. 2.53, below.

138 See para. 2.53, below. In Scotland, however (to which the 1920 Act also extends), it was held before Miliangos that it was not "just and convenient", under s. 9(1) of the 1920 Act, for a judgment of a Kenyan court to be registered in Scotland, because it was expressed in a foreign currency: Ibbetson, Petitioner 1957 S.L.T. (Notes) 15.

The Foreign Judgments (Reciprocal Enforcement) Act 1933

2.53 The Foreign Judgments (Reciprocal Enforcement) Act 1933 applies the principle of registration in the High Court of judgments of foreign superior courts both to the Commonwealth and to foreign countries. Like the 1920 Act it can come into operation only by Order in Council in regard to any country on the basis of reciprocity.[139] Before Miliangos section 2(3) of the 1933 Act provided, consistently with the general sterling-breach-date rule, that conversion into sterling of a sum payable under a foreign judgment should be effected as at the date of the foreign judgment. Following Miliangos, that subsection was repealed by the Administration of Justice

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139 The 1933 Act also extends (subject to any condition or modification specified in the relevant statute) to any country which is a party to certain international Conventions, but only in relation to proceedings arising under those Conventions, which are:

(i) The Geneva Convention on the Contract for the International Carriage of Goods by Road (1956): Carriage of Goods by Road Act 1965, s. 4 and Schedule, article 31(1).

(ii) The Paris Convention on Third Party Liability in the Field of Nuclear Energy (1960): Nuclear Installations Act 1965, s. 17(4).

(iii) The Brussels Convention on Civil Liability for Oil Pollution Damage (1969): Merchant Shipping (Oil Pollution) Act 1971, s. 13(3).

(iv) The Additional Berne Convention on the Carriage of Passengers and Luggage by Rail (1966): Carriage by Railway Act 1972, s. 5 and Schedule, article 20.

(v) The Geneva Convention on the Contract for the International Carriage of Passengers and Luggage by Road (1973): Carriage of Passengers by Road Act 1974, s. 5 and Schedule, article 21 (not yet in force).

(vi) The Brussels Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage (1971): Merchant Shipping Act 1974, s. 6(4) and (5).

Act 1977 (save as to judgments then registered).[140] A foreign judgment expressed in foreign currency will now be registered in that currency. It will then be treated for conversion purposes in the same way as if it was an English judgment in foreign currency and the judgment debtor may, at his option, pay the sterling equivalent at the date of payment.[141] Accordingly the registration of a foreign judgment under the provisions of the 1933 Act (or of the 1920 Act) presents no difficulties in regard to the conversion of the foreign currency in question.

(iii) Registration under the 1968 European Judgments Convention

2.54 In 1978 the United Kingdom signed a Convention of accession to the E.E.C. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968, which is already in force between the six original Member States. The Convention, which has not yet been implemented in this country, provides, among other matters, for the registration and enforcement in one E.E.C. Member State of judgments given by the courts of the other Member States. Although fairly detailed provision is made by the Convention for the various procedures to be followed, the Convention makes no express provision to deal with the conversion of the currency in which judgment has been given

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140 S. 4(2)(b)(i) and Schedule 5, Part I. The wording of s. 4(2)(b) indicates, incorrectly, that conversion under s. 2(3) of the 1933 Act was effected as at the date of registration; the error is, however, immaterial, since it does not affect the operative words of the subsection.

141 See The Supreme Court Practice 1979, Notes to R.S.C. O. 71, r. 3.

into that of the Member State where recognition and enforcement is sought. We discuss the Convention further at paragraph 3.56, below.

(iv) European Community Judgments

2.55 The European Communities (Enforcement of Community Judgments) Order 1972[142] provides that a "Community judgment"[143] to which the Secretary of State has appended an order for enforcement shall, on application duly made by the party entitled to enforce it (normally the Commission of the European Communities), be registered in the High Court. Originally it was provided - by Article 3(2) of the Order - that a judgment or order for a sum of money had to be converted into sterling at the rate of exchange prevailing when such judgment or order was given or made; but following Miliangos, that provision was repealed by the Administration of Justice Act 1977, save as to judgments or orders then registered.[144] There is now

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142 S. I. 1972, No. 1590.

143 This term signifies, not a judgment of an ordinary national court of the E.E.C., but one given by certain specified bodies, such as the European Court of Justice. Amongst the most likely Community judgments to require registration and enforcement in this country are decisions of the Commission imposing fines or penalties, either of lump sums expressed in European Units of Account or percentages of an offending firm's turnover.

144 S. 4(2)(b)(iii) and Schedule 5, Part I. (The wording of s. 4(2)(b) indicates, incorrectly, that conversion under Article 3(2) of the Order required conversion into sterling as at the date of registration; the error is, however, immaterial since it does not affect the operative words of the sub-section.

no express provision as to the conversion date but it would appear to be the case that a Community judgment will be registered in the foreign currency in which it is expressed,[145] and as usual the judgment debtor may, at his option, pay the sterling equivalent at the date of payment. Accordingly, in the context of our Working Paper, no problem arises in relation to Community judgments.[146]

(b) Arbitral awards

(i) English awards

2.56 In order to enforce an English arbitration award an order of a court is necessary. Such an order may be obtained by bringing an action on the award. Alternatively, provided that the arbitration agreement is in writing,[147] an application may be made to the High Court under section 26(1) of the Arbitration Act 1950[148] for leave to enforce the award which, upon leave being given, may then be enforced "in the same manner as a judgment or order to the same effect". It has been held that an English arbitration award made in foreign currency may be enforced under section 26 of the 1950 Act, and such an award is converted into

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145 Including, presumably, European Units of Account.

146 We return to the topic of foreign judgments in paras. 3.54-3.56, below, in our reappraisal of the law in Part III.

147 Arbitration Act 1950, s. 32.

148 For completeness it should be mentioned that the county court has a concurrent jurisdiction in respect of arbitration awards where the amount sought to be recovered does not exceed the relevant financial limit: Arbitration Act 1950, s. 26(2) (inserted by the Administration of Justice Act 1977, s. 17(2)). Our subsequent consideration of this matter is expressed only in terms of High Court procedure.

sterling when application is made to the court for leave under that section, the date at which conversion is calculated being that of the award.[149] There is no direct authority on the question whether judgment in foreign currency can be given where the party entitled to the benefit of an award chooses to bring an action on the award at common law; but it can hardly be doubted that, in the light of Miliangos, such a judgment could and would be given in an appropriate case. Whether the date of conversion into sterling would be that of the award or that of the enforcement of the judgment is an open question.

(ii) Foreign awards

2.57 A foreign arbitral award may be enforced in England in various ways. The first is by an action at common law. However, whether a plaintiff may sue on the original cause of action instead of on the award is a question which is determined by the law governing the arbitration proceedings.[150] Since Miliangos there can be little doubt that an English judgment on a foreign award made in foreign currency would be given in that foreign

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149 Jugoslavenska Oceanska Plovidba v. Castle Investment Co. Inc. [1974] Q.B. 292. In Miliangos Lord Wilberforce indicated that the date for conversion into sterling of a foreign currency award in respect of which leave to enforce was sought under s. 26 represented a possible minor discrepancy from the general rule laid down in that case, and might require consideration: [1976] A.C. 443, 469. See paras. 3.24-3.26, below.

150 Dicey and Morris, The Conflict of Laws, 10th ed., (1980), p. 1129. When the sterling-breach-date rule obtained, the issue was important in the case where an award was expressed in a foreign currency which fluctuated between the breach-date and the date of the award.

currency.[151] However, as in the case of English awards,[152] it has not been decided whether the option to pay the sterling equivalent of the amount of the award would be calculated, on the one hand, at the date of the award or, on the other hand, at the (later) date on which the court gives leave to enforce its judgment on the award. We further consider the question of foreign arbitral awards in paragraph 3.27 below.

2.58 The second method of enforcing a foreign arbitral award is by proceedings under Part II of the Arbitration Act 1950 or under the Arbitration Act 1975. A party who has obtained a foreign award falling within the scope of these Acts may at his option enforce it by action[153] or apply to the court for leave to enforce it under section 26 of the 1950 Act.[154] In nearly every case a foreign award will be expressed in a foreign currency, and the same principle applies to foreign awards as to English awards in a foreign currency - namely, that conversion into sterling is

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151 It was held, when the sterling-breach-date rule obtained, that conversion into sterling should be calculated at the date of the foreign judgment in the case where a foreign arbitration award was the subject-matter of that judgment: East India Trading Co. Inc. v. Carmel Exporters and Importers Ltd. [1952] 2 Q.B. 439. Though not expressly overruled, this decision cannot stand after Miliangos where the House of Lords disapproved Madeleine Vionnet et Cie v. Wills [1940] 1 K.B. 72, which had been followed in the East India Trading Co. case: see [1976] A.C. 443, 469.

152 See para. 2.56, above.

153 1950 Act, ss. 36(1) and 40(a); 1975 Act, s. 6.

154 1950 Act, s. 36(1); 1975 Act, s. 3(1)(a). S. 26 of the 1950 Act is considered at para. 2.56, above.

to be effected as at the date of the award.[155]

2.59 Where an arbitral award has, under the law of the country where it was made, become enforceable as a judgment of the foreign court, it will be treated in this country as a foreign judgment, recognition of which depends on the statutory rules already discussed,[156] including those relating to the conversion of the foreign currency in which the award is expressed. Mention should also be made of arbitration awards made under the Arbitration (International Investment Disputes) Act 1966 which implements the 1965 Washington Convention on the settlement of any legal dispute between a contracting state and a national of another state, arising directly out of an investment. It enables an award to be registered in the High Court and thereafter to be enforced as if it were a judgment of that court. Section 1(3) of the 1966 Act provided for any award expressed in a foreign currency to be converted into sterling as at the date of the award but, following Miliangos, that subsection was repealed by the Administration of Justice Act 1977,[157] (except as to awards then registered). It is to be assumed that an

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155 Jugoslavenska Oceanska Plovidba v. Castle Investment Co. Inc. [1974] Q.B. 292, 305. The observations made in para. 2.56, above in relation to English awards are applicable also to foreign awards which it is sought to enforce under Part II of the 1950 Act or under the 1975 Act.

156 Under the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933, see paras. 2.52-2.53, above.

157 S. 4(2)(b)(ii), and Schedule 5, Part I. The wording of s. 4(2)(b) indicates, incorrectly, that conversion into sterling under s. 1(3) of the 1966 Act had to be made at the date of the award: the error is, however, immaterial, since it does not affect the operative words of the subsection.

award expressed in foreign currency will now be registered in that currency and that the debtor may, at his option, pay the sterling equivalent at the date of payment.[158]

(c) Maintenance orders in foreign currency

(i) Foreign maintenance orders

2.60 A foreign maintenance order cannot generally be enforced in this country as a foreign judgment because it is not final and conclusive, since the court which pronounced it normally has power to vary or discharge it as regards both past and future payments.[159] There are, however, various statutory provisions enabling foreign maintenance orders to be enforced here.[160] First, the Maintenance Orders (Facilities for Enforcement) Act 1920 provides machinery whereby maintenance orders, made in any part of the Commonwealth outside the United Kingdom to which the Act has been extended on a reciprocal basis by

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158 The question of the enforcement both of English and of foreign arbitral awards in foreign currency is further considered in paras. 3.24-3.27, below, in Part III of this Working Paper, where we make a provisional proposal for a change in the conversion date to be applied to such awards.

159 Harrop v. Harrop [1920] 3 K.B. 386; Re Macartney [1921] 1 Ch. 522.

160 In addition to the statutory provisions mentioned in the text, Part II of the Maintenance Orders Act 1950 enables a maintenance order made in Scotland or Northern Ireland to be enforced in England, and vice versa, but of course no question of foreign currency arises in that connection.

Order in Council,[161] may be registered in the High Court or a magistrates' court (depending on whether the order was made by a superior or an inferior court); and an order so registered has the same effect as if made by the court in which it is registered. The detailed procedure for recognition and enforcement is laid down by rules of court,[162] but no reference is made in the 1920 Act or those rules to conversion of foreign currency into sterling. We are informed by the Principal Registry of the Family Division, however, that in practice the registration of foreign maintenance orders is, as in the case of registrations under the 1972 Act, made in terms of the foreign currency. For the purposes of enforcement the foreign currency is converted into sterling as at the date of registration.[163] This is different from the Miliangos rule where conversion is made as at the date when the enforcement process is set in motion.

2.61 The second provision is Part I of the Maintenance

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161 The 1920 Act has been extended to many countries but it will ultimately be superseded and repealed by the 1972 Act referred to in paras. 2.61-2.62, below. How soon the provisions of the later Act can supersede those of the earlier statute depends on how soon other countries amend their own legislation: the 1920 Act still applies to many Commonwealth countries. For a list of the countries currently subject to the 1920 Act, see Law Commission Working Paper No. 77 (Financial Relief after Foreign Divorce) (1980), Appendix, para. 3.

162 R.S.C. O. 105, (formerly O. 104), r. 2.

163 Following the analogy of s. 16 of the 1972 Act. See para. 2.62, below.

Orders (Reciprocal Enforcement) Act 1972 which provides for the reciprocal enforcement of maintenance orders along lines similar to those of the 1920 Act.[164] The scheme of the 1972 Act is for the enforcement of orders in England to be dealt with by magistrates' courts. The countries to which Part I of the 1972 Act has been extended may for convenience be considered as falling into one of two categories. The first category comprises the countries to which Part I of the Act has been extended by way of implementation of the 1973 Hague Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations.[165] The second category consists of those countries to which Part I of the 1972 Act has been applied otherwise than in pursuance of the 1973 Hague Convention. To date the only countries falling under this head are certain Commonwealth countries,[166] save that Part I of the 1972 Act also extends, with modifications, to the Republic of Ireland.

2.62 There is no doubt that foreign maintenance orders falling for registration under the 1972 Act may be registered in the foreign currency in which they were made.

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164 There are some differences of detail between the two schemes. For example, the 1972 Act extends to affiliation orders, which are excluded from the 1920 Act; and it applies not only to England and Wales and Northern Ireland, but also to Scotland.

165 They are listed in the Order in Council which applies the Act to them: S.I. 1979, No. 1317, Sch. 1, (as amended by S.I. 1981, No. 837), namely Czechoslovakia, France, Netherlands (Kingdom in Europe and Netherlands Antilles), Norway, Portugal, Sweden and Switzerland.

166 For a list of the countries currently designated under Part I of the 1972 Act as "reciprocating" countries, see Law Commission Working Paper No. 77 (1980), Appendix, para. 6.

In such a case section 16 of that Act provides for the conversion of the order into sterling. This conversion is to be made at the appropriate rate of exchange prevailing on the "relevant date", which is defined as:

> (i) the date on which the order was registered; or
>
> (ii) in the case of a registered order which has been varied, the date on which the last order varying that order is registered.[167]

However, in the case of the countries which fall within the second category referred to in paragraph 2.61, above, (namely those countries to which Part I of the 1972 Act has been applied otherwise than in pursuance of the 1973 Hague Convention), the date of the confirmation of a foreign "provisional order"[168] by a United Kingdom court, if earlier than the date of registration, is substituted for the date of registration.[169] The consequence is that section 16 of the 1972 Act provides a conversion date which is different from that under the Miliangos rule. The latter rule looks to the date of actual payment, or the date when the court authorises enforcement of the judgment, whichever is the earlier; section 16 looks to the earlier date of the registration of the maintenance order.[170]

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167 1972 Act, s. 16(5), as modified in its application to the Hague Convention countries by S.I. 1979 No. 1317, Sch. 2, para. 16 (and set out, as amended, ibid., Sch. 3).

168 A "provisional order" is, for these purposes, an order made in a foreign country "which is provisional only and has no effect unless and until confirmed ... by a court in the United Kingdom ...": see 1972 Act, s. 21(1).

169 1972 Act, s. 16(5).

170 See further, paras. 3.59-3.61, below.

2.63 Finally, mention ought to be made in this context of the 1968 E.E.C. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, to which some consideration has already been given at paragraph 2.54, above. The Convention extends to the recognition of maintenance orders obtained in another Member State but it contains no provision relating to the conversion of the currency of that Member State into that of the Member State where recognition and enforcement is sought.[171]

(ii) Maintenance orders made in foreign currency by an English court

2.64 A foreign money obligation may also arise by virtue of a maintenance order made in England. We understand from the Principal Registry of the Family Division that maintenance orders (whether by way of periodical payments or a lump sum) are in appropriate cases expressed in foreign currency. Such a case might arise where, for example, a woman resident in England obtains an order for maintenance expressed in U.S. dollars against her former husband who is at that time employed in the United States and expected to remain in his post there for several years. If it is subsequently sought to enforce such an English order in England (in the example given above by means, say, of execution against goods owned by the former husband which he has left in this country), conversion into sterling is in practice effected as at the date when the enforcement procedure is initiated - a date analogous to that applicable generally to judgments in foreign currency.[172]

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171 See further, para. 3.62, below.

172 Maintenance orders are further considered in our reappraisal of the law in Part III, paras. 3.57-3.62, below.

(7) Miscellaneous statutory conversion dates

(a) Limitations of liability under the Merchant Shipping Act 1894 (as amended)

(i) Section 503

2.65 Section 503 of the Merchant Shipping Act 1894 (as amended) empowers a shipowner in certain cases to set up by way of defence to part of a claim a limit on his liability to pay damages for personal injury or for loss of or damage to goods. In any particular case this limit is based on the tonnage of his ship; and it is now fixed from time to time by statutory instrument in sterling, calculated by reference to "gold francs".[173] Before Miliangos the amounts of gold francs which represented the limit of a shipowner's liability were converted into sterling at the statutory rate for the time being in force when the limit of liability "[fell] to be ascertained"[174] by the Admiralty Registrar.[175] On the other hand, the loss for which the

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173 Merchant Shipping (Liability of Shipowners and Others) Act 1958 s. 1(3). This section and s. 503 of the 1894 Act will be replaced by s. 17 of the Merchant Shipping Act 1979 when that section is brought into force. S. 17 gives the provisions of the Convention on Limitation of Liability for Maritime Claims (1976) the force of law in the United Kingdom and will mean that limitation of liability will be calculated by reference to special drawing rights rather than to gold francs. Pending the repeal of s. 503 of the 1894 Act, amendment of that section is contained in s. 1 of the Merchant Shipping Act 1981 which, when it is brought into force, will substitute a reference to special drawing rights for the reference to gold francs.

174 The Mecca [1968] P. 665, 668.

175 The Abadesa (No. 2) [1968] P. 656; The Mecca [1968] P. 665.

shipowner was liable was, of course, calculated by reference to the date when it was incurred.[176]

2.66 In the light of Miliangos, Brandon J. at first instance in The Despina R[177] posed the question as to the form of judgment to be given in the common situation where damages in foreign currency exceeded the statutory limit of liability in sterling; and he provisionally suggested the answer that judgment should be given in sterling for the amount of the limit.[178] He presumably had in mind the judgment date as the one on which the relative rates of exchange were to be selected.[179]

(ii) Section 504

2.67 Section 504 of the Merchant Shipping Act 1894 (as

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176 The Volturno [1921] 2 A.C. 544; see para. 2.5, above.

177 [1978] Q.B. 396.

178 Ibid., 415. Under the 1979 Act, conversion of special drawing rights into sterling is to be made "at the date the limitation fund shall have been constituted, payment is made, or security is given which ... is equivalent to such payment": Sch. 4, Part I, Article 8. Under s. 1(3) of the Merchant Shipping Act 1981, conversion of special drawing rights into sterling is to be made, if a limitation action is brought, on the date on which the limitation fund is constituted and, in any other case, on the date of the judgment in question.

179 The question of the limitation of a shipowner's liability under s. 503 of the Merchant Shipping Act 1894 (as amended), which is akin to the problem of set-off, is further considered at paras. 3.36-3.37, below, in Part III.

amended)[180] allows a shipowner who faces or anticipates facing several claims arising out of the same casualty to bring an action for a decree limiting the total amount of his liability. If he succeeds and the total of the claims exceeds his limit, the fund out of which a dividend on them will be paid will be in sterling. So if the damages claimed by at least one claimant are proved in a foreign currency, the question arises as to the date on which conversion into sterling should take place. Brandon J., who discussed this problem in The Despina R,[181] considered the situation to be "a form of statutory insolvency" so that the rule should be similar to that applicable to debts proved in the winding-up of a company.[182] The date in Admiralty limitation proceedings corresponding to the date of a winding-up order would be the date of the decree of limitation.[183]

(b) The conversion of foreign currency under certain international Conventions

2.68 Finally, we would mention the necessity for the conversion into national currencies of the amounts specified in certain international Conventions which have been, or are likely to be, implemented in the United Kingdom. As the terms of the Conventions cannot be amended without the agreement of the other Contracting States, they fall in practice outside the ambit of this Working Paper, and we

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180 S. 504 will be replaced by s. 17 of the Merchant Shipping Act 1979 when that section is brought into force.

181 [1978] Q.B. 396.

182 Ibid., p. 415-416. See Re Dynamics Corporation of America [1976] 1 W.L.R. 757 (para. 2.34, above). Brandon J. expressly refrained from expressing an opinion as to whether that case was correctly decided: [1978] Q.B. 396, 416.

183 [1978] Q.B. 396, 416. We further consider s. 504 of the 1894 Act (as amended) in Part III, at para. 3.50, below.

refer to them only for completeness. The main Acts in question are:

(i) The Carriage by Air Act 1961, the Carriage by Air (Supplementary Provisions) Act 1962 and the Carriage by Air and Road Act 1979, which give effect to the 1929 Warsaw Convention (as amended at The Hague in 1955 and in Montreal in 1975) and to the Guadalajara Convention of 1961.

(ii) The Merchant Shipping Act 1979, section 14(1) of which, when brought into force, will implement the 1974 Athens Convention relating to the Carriage of Passengers and their Luggage by Sea.[184]

(iii) The Carriage of Goods by Road Act 1965, (as amended by the Carriage by Air and Road Act 1979) which gives effect to the 1956 Geneva Convention on the Contract for the International Carriage of Goods by Road.

(iv) The Carriage of Passengers by Road Act 1974 (as amended by the Carriage by Air and Road Act 1979)

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184 The Unfair Contract Terms Act 1977, s. 28, made temporary provision for contracts for the carriage of passengers and their luggage by sea, and applies "where the provisions of the Athens Convention (with or without modification) do not have, in relation to the contract, the force of law in the United Kingdom". However, since 1 January 1981, the Athens Convention, notwithstanding that it has not yet come into force internationally, has (subject to modification) had the force of law in the United Kingdom in relation to certain contracts: Carriage of Passengers and their Luggage by Sea (Interim Provisions) Order 1980 (S.I. 1980 No. 1092), made under s. 16 of the Merchant Shipping Act 1979.

which gives effect to the Geneva Convention of 1973 on the Contract for the International Carriage of Passengers and Luggage by Road.

(v) The Carriage of Goods by Sea Act 1971 which gives effect to the 1924 Brussels International Convention for the unification of certain rules of law relating to bills of lading (as amended by the Brussels Protocol of 1968 and, when the Merchant Shipping Act 1981 has been brought into force, as amended by the 1979 Brussels Protocol).

(vi) The Merchant Shipping (Oil Pollution) Act 1971, (as amended by the Merchant Shipping Act 1979), implementing the 1969 Brussels International Convention on Civil Liability for Oil Pollution Damage.

PART III: A REAPPRAISAL OF THE PRESENT SUBSTANTIVE LAW: PROPOSALS FOR REFORM

A. INTRODUCTION

3.1 For the purpose of our examination of the law it is convenient to divide into three categories the issues which fall to be considered. In the first place, there are those questions that involve major issues of policy: they are considered in Section B below. The second category, considered in Section C below, comprises problems of detail rather than principle. The third category consists of those matters which, though not to date the subject of decision after Miliangos, are thought to present no difficulty in the light of that case. Such matters are set out, for completeness, in Section D below. A summary of the conclusions and recommendations made in this Part of our Working Paper is to be found in Part VI.

B. MAJOR ISSUES OF POLICY

(1) Are judgments in foreign currency desirable in principle?

3.2 The first question for consideration must be whether the abrogation by Miliangos of the sterling-breach-date rule[185] and the adoption of a new rule - namely, that in an appropriate case the court may give judgment in the form that the defendant "do pay [say] 1,000 U.S. dollars or their sterling equivalent at the time of payment"[186] - is to be

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185 See paras. 2.10-2.11, above.

186 i.e. the date of actual payment or the date when the court authorises enforcement of the judgment, whichever event should be the earlier; see para. 2.11, above.

welcomed in principle.[187] Although we are not aware that this change is causing difficulties (indeed, we believe that it has generally been strongly welcomed), we have nevertheless thought it right in the interests of completeness to consider this question. To answer it requires examination of the substantive principle which underlies the change.

3.3 The thrust for the abandonment of the former rule originated in judicial dissatisfaction with the injustice suffered by a plaintiff due to the sterling-breach-date rule in the case where, at the date of judgment, the value of sterling as against that of the foreign currency in question was lower than at the date when the obligation had become due.[188] This occurred, for example, after a devaluation of sterling or through the operation of floating exchange rates.

3.4 The following hypothetical example illustrates the point made in the preceding paragraph:

> D has incurred an obligation to pay C 1,000 U.S. dollars on May 1, when the rate of exchange is 4 dollars to the pound. Accordingly, if D had discharged his obligation in sterling on that date, C would have received £250.
>
> However, D fails to pay on 1 May, the due date, and C commences proceedings, obtaining judgment

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187 In the discussion of this question no reference is made to the fact that a judgment has to be converted into sterling for the purpose of enforcement. This practical limitation, which is considered separately at paras. 5.35-5.52, below, does not affect the principle that a judgment may now be expressed in a foreign currency.

188 See, for example, the observations of Lord Denning M.R. in his dissenting judgment in The Teh Hu [1970] P.106, 124.

on 1 December. By that date the value of sterling has fallen by 50% against the U.S. dollar, so that the exchange rate is then 2 dollars to the pound.

When the sterling-breach-date rule obtained, C would have obtained judgment for £250, being the sterling value of the debt of 1,000 U.S. dollars converted as at the rate of exchange of 1 May. But on 1 December, C can, with that sum of £250, acquire only 500 dollars, which is one-half of the sum due to him.

Today, on the other hand, judgment would be given for C in the form: "1,000 U.S. dollars or their sterling equivalent at the time of payment".

3.5 The effect of a judgment in the form indicated in Miliangos is to ensure that the value of the defendant's foreign money liability is measured in terms of the foreign currency in question. Accordingly the principle underlying the adoption of that form of judgment goes further, in two respects, than simply to obviate the injustice to the creditor caused by a fall in the relative value of sterling between the date when the obligation became due and the date of judgment. In the first place, it prevents a corresponding injustice to a debtor in the converse case - that is to say, where the relative value of sterling has risen after the due date.[189] To illustrate:

As in the example set out in the previous paragraph, D is under an obligation to pay C 1,000 U.S. dollars on 1 May when the pound is worth 4 dollars, so that

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189 See Barclays Bank International Ltd. v. Levin Brothers (Bradford) Ltd. [1977] Q.B. 270, 278, per Mocatta J.

£250 then represents the sterling value of that obligation.

Again as in the previous example, D fails to pay on the due date (1 May) and C obtains judgment on 1 December. But in this case the relative value of the pound has doubled, to 8 dollars.

Under the sterling-breach-date rule, C would have obtained judgment for £250 (as before); but that sum is then worth 2,000 U.S. dollars, being twice the amount of the obligation.

Today, however, C would have judgment for "1,000 U.S. dollars or the sterling equivalent at the time of payment".

3.6 The second respect in which Miliangos goes further than is necessary only to protect the plaintiff against a fall in the relative value of sterling between the date on which the obligation became due and the date of judgment is by ensuring that the value of such obligation remains constant after judgment. When judgment is given (say) for "1,000 U.S. dollars or their sterling equivalent at the date of payment", neither a rise nor a fall in the relative value of sterling after judgment will affect the real value of the sum (whether expressed in dollars or in sterling) which is needed to satisfy the judgment debt: if the debtor chooses to pay in sterling, he will have to find such sterling sum as is equivalent to 1,000 U.S. dollars on the date when he satisfies the judgment.

3.7 It is our view that the principle which underlies Miliangos and the consequences which flow from it produce a result which both in theory and in practice is greatly

to be preferred to that produced by the sterling-breach-date rule. Any comments on this conclusion would nevertheless be welcomed.

(2) Should a plaintiff be precluded from obtaining judgment in sterling in the case where the relevant obligation ought properly to be expressed in a particular foreign currency?

3.8 On a literal construction of the new rule that a claim may be made, and judgment given, in the appropriate foreign currency, it might seem that the plaintiff may at his option have judgment either in that foreign currency, or (as before Miliangos) for a specific sum in sterling - though whether, on this view, the date for converting the sum involved into sterling is in accordance with the sterling-breach-date rule obtaining before Miliangos or at some other date is not clear.

3.9 It must be borne in mind, however, that, as Lord Wilberforce explained in Miliangos, the principle underlying that decision is that a "foreign" creditor has no concern with pounds sterling: for him what matters is that, for example, "a Swiss franc for good or ill should remain a Swiss franc".[190] The application of that principle in the case where sterling has appreciated in terms of the foreign currency between the date of maturity of the debt and the date of judgment would therefore also entitle the debtor to demand that judgment be given in the foreign currency.

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190 [1976] A.C. 443, 466.

3.10 Moreover, in the Ozalid case[191] Donaldson J. explained, obiter, that the plaintiff does not have a free choice; it is (he said):

> "... for the plaintiff to select the currency in which to make his claim and it is for him to prove that an award or judgment in that currency will most truly express his loss and accordingly most fully and exactly compensate him for that loss".[192]

3.11 Although the point has not yet arisen directly for decision, we believe that the courts will have little difficulty as part of their judicial development of the principle underlying Miliangos in applying that principle to the case where the relative value of sterling has risen against the foreign currency in question between the date when the obligation was due and the date of judgment, (and it is in this situation, for example, that the plaintiff may well be tempted to seek judgment for a specific sum in sterling). We do not think that legislative intervention is necessary to preclude a plaintiff from obtaining judgment in sterling in any case where the relevant obligation is properly to be expressed in a foreign currency.

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191 Ozalid Group (Export) Ltd. v. African Continental Bank Ltd. [1979] 2 Lloyd's Rep. 231.

192 Ibid., p. 234. (It is true that Donaldson J. also stated, at p. 233, that the plaintiff was entitled, not bound, to claim in foreign currency. But he was making the point that, since on the facts of Ozalid the currency of the plaintiff's loss happened to be sterling despite the money of account being foreign, judgment should be given in sterling. He was not apparently suggesting that, where the plaintiff's loss was most truly expressed in a foreign currency, the plaintiff could obtain judgment for a specific sum in sterling.)

(3) Should the date of conversion into sterling of the foreign currency in which a judgment is expressed be different from the date indicated in Miliangos?

3.12 Although the form of judgment approved in Miliangos is for "[X] units of foreign currency or their sterling equivalent at the date of payment", this presupposes that the debtor complies with the judgment, thereby rendering enforcement unnecessary. However, if the money cannot be obtained except by one of the processes of enforcement, an earlier date than that of actual payment is usually taken, namely the date on which the court authorises enforcement.[193] To that extent, therefore, it may be said that the present rules do not adequately implement the principle on which Miliangos is based.

3.13 The question which therefore arises is whether a change is required in the present rule as to the date at which conversion into sterling should be made. The feasible options seem to be:

(i) to adopt the "ideal" date - that is, the date of actual payment. In other words, the present procedure for enforcement of judgment debts would be amended in such a way that the creditor received the sum of foreign currency specified in the judgment, or its sterling equivalent at the date of actual payment, even where payment was made after the date on which application was made to enforce the judgment;

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193 See para. 2.11, above.

(ii) to adopt the date on which judgment is given;

(iii) to retain the present date - namely, the date at which payment is actually made or the date when the court authorises enforcement of the judgment; whichever is the earlier.[194]

3.14 It would follow from the two previous paragraphs that in theory option (i) would most closely implement the Miliangos principle, since this date gets nearest to securing for the creditor exactly what he bargained for. It is, however, most unlikely that the enforcement of a judgment in terms of a foreign currency is practicable, (at least for most methods of enforcement) for the detailed reasons set out in Part V of this Working Paper.

3.15 In favour of option (ii), it could be argued that from the point of view of procedure the adoption of a judgment-date principle would be preferable to the present rule, because judgments would then be expressed in a form which in terms of sterling would remain constant after judgment notwithstanding subsequent currency fluctuations. This might be more convenient, and it would produce consistency between cases which involve a foreign currency and those which do not.[195] On the other hand, there are in our view strong reasons why it would be undesirable to

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194 A fourth possibility, the date of commencement of the action, was considered briefly and rejected by Lord Wilberforce in Miliangos on the ground that it placed "...the creditor too severely at the mercy of the debtor's obstructive defences (cf. this case) or the law's delay." [1976] A.C. 443, 469.

195 In addition, the difficulties involved in cases of set-off, discussed at paras. 3.29-3.35, below, would be obviated if conversion into sterling were calculated at the date of judgment.

replace the present form of judgment with one based on conversion into sterling as at the date of judgment. The most powerful argument against taking such a step is that to do so would contravene the "philosophy" on which the present rule is based - namely, that once the court has selected, by applying the principles pertaining to the particular category of claim in question, a specified foreign currency as the one by which liability ought to be measured, subsequent fluctuations in the value of sterling relative to that foreign currency, including those that occur after judgment, ought to be immaterial.[196]

3.16 Turning to option (iii), no evidence appears to exist of any injustice caused by, or dissatisfaction with, the present rule; although it is true that a number of procedural points relating to the present form of judgment arise for consideration. These are considered further in Part V of this Working Paper. Our provisional conclusion is that no change should be made in the present law as to the date of conversion of the foreign currency into sterling. The rule that conversion is to be effected at the date of actual payment or the date on which the court authorises enforcement of the judgment, whichever is the earlier,[197] provides in our opinion the best practical implementation of the Miliangos "philosophy."

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196 In Miliangos Lord Wilberforce briefly considered, but at once rejected, a judgment-date rule to replace the breach-date principle, on the ground that in some cases, particularly where there was an appeal, a considerable currency risk would be placed on the creditor: [1976] A.C. 443, 469.

197 See para. 2.11, above.

(4) Should it be possible to make an enforceable agreement to pay in this country in foreign currency alone?

3.17 As explained at paragraph 2.2 above, while a debt payable in England in foreign currency may as a general rule be discharged, at the debtor's option, either in that currency or in sterling converted at the date of payment, there is no direct authority as to whether it is open for the parties to exclude the right to pay in sterling by means of an agreement to the contrary. However, irrespective of what the present law may be, it is for consideration whether an agreement to make payment in England in a foreign currency and in that currency alone ought to be upheld.

3.18 It seems right in principle that contracting parties should be free to agree that payment should be made only in a particular currency. There may well be a great variety of sound commercial reasons (arising from a creditor's financial position or from the way in which he conducts his affairs) why in a particular case a creditor should require a promise of payment in a stipulated currency. If the parties' right to agree that payment should be made only in the foreign currency is to be enforceable, it will be a necessary corollary that the court should have power to give judgment in foreign currency without allowing the debtor the option of satisfying the judgment in sterling. Whether the court ought to have such a power is discussed at paragraphs 3.20 to 3.23 below. We also think that the parties should be free, as we believe they now are, to agree the date at which conversion should be made and to agree the exchange rate to be applied to any conversion.[198]

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198 See Boissevain v. Weil [1950] A.C. 327; Dicey and Morris, The Conflict of Laws, 10th ed., (1980), p.1017.

3.19 Our provisional view, on which we welcome comments, is that the parties should be free, not only to agree the date and rate of conversion, but also to agree that payment in England should be made in a particular foreign currency alone, with no option to pay in sterling.

(5) Should it be possible to obtain and enter judgment in a foreign currency alone, without the option of payment in sterling?

3.20 Under the consideration of the preceding question ("Should it be possible to make an enforceable agreement to pay in this country in foreign currency alone?"), reference has been made at paragraph 3.17 above to the rule that in general a debt payable in England may be discharged at the debtor's option either in that foreign currency or in sterling. In regard to enforcement of the creditor's right to payment, the form of judgment approved in Miliangos harmonises with that principle. Accordingly a debtor may in general make payment in sterling whether or not his creditor has to institute proceedings and obtain judgment for the debt.

3.21 We have also referred in paragraph 2.14 above to the common practice of making claims and giving judgment in terms of foreign currency without reference to sterling; but, as we there explained, such claims and judgments normally carry with them the implication that they may be satisfied by payment of the foreign currency or the sterling equivalent at the date of payment, and if the judgment is entered it will so provide.[199] The question arises whether

199 Practice Direction [1976] 1 W.L.R. 83, 85; The Supreme Court Practice 1979, vol. 1, para. 42/1/3A. See para. 2.14 and n.40, above.

the court ought to have an additional power to give judgment in appropriate cases in a foreign currency alone - that is to say, without allowing the defendant the option of satisfying the judgment in sterling. We are informed that in some cases since Miliangos the plaintiff has successfully requested such a judgment, and such requests could well increase in view of the lifting of exchange controls. Such judgments might also be sought more readily when the E.E.C. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters comes into force in the United Kingdom. However, our inquiries have not enabled us to discover how often judgment is sought, or given and entered, in foreign currency in a form which neither expressly nor by implication allows the defendant the option of satisfying it in sterling; nor have we managed to discover whether such judgments are confined to any particular type of claim.

3.22 We have formed the view that the court ought to have power to give judgment in foreign currency alone, but that a successful plaintiff should not have a right to a judgment in that form. As we explained in paragraph 3.18 above, the affirmative answer given to the question discussed at paragraphs 3.17-3.19 above, namely, "Should it be possible to make an enforceable agreement to pay in this country in foreign currency alone?", suggests that a similar answer ought to be given to the instant question in order to avoid creating an anomaly arising as between cases where the agreement to pay in a foreign currency has been performed by payment in that currency and cases where an action is brought on such an agreement. In reaching our provisional conclusion we have borne in mind that in some cases a judgment debtor ordered to pay in a particular foreign currency (and not in sterling) might be placed in difficulty. For example, although there are now no United Kingdom exchange controls,

the particular foreign currency might not be readily available on the market, or the debtor may be unable to transfer the requisite sum in the relevant currency because of foreign exchange control legislation. However, in such cases it would be for the court to take circumstances of that nature into account in determining whether to give judgment exclusively in the foreign currency. Judgments in such terms would not be given as a matter of course: the form of judgment which allows the defendant to pay, if he chooses, in sterling would be the form generally used, and it would be necessary for a plaintiff seeking a judgment depriving the defendant of his normal right to pay alternatively in sterling to justify his claim to a judgment in that restrictive form. We believe that in fact judgment will rarely be sought in this form, since we understand that with such a judgment it would not be possible to levy execution in this country, other, perhaps, than by a garnishee order on a foreign currency bank account.

3.23 Our provisional conclusion is that it should be possible to obtain and enter judgment in foreign currency alone, but that a successful plaintiff should not have a right to judgment in that form without leave of the court.

C. MATTERS OF DETAIL REQUIRING CONSIDERATION

(1) Arbitral awards

(a) Arbitral awards in respect of which leave to enforce is given by the court under section 26(1) of the Arbitration Act 1950

3.24 It has been explained in Part II of this Working Paper that both English[200] and foreign[201] arbitration awards may be enforced under section 26(1) of the Arbitration Act 1950 by leave of the court in the same manner as a judgment or order; and such leave is normally granted. However, there is a special rule as to the conversion date; in these cases conversion into sterling is effected at the date of the award.[202] As Lord Wilberforce pointed out in Miliangos,[203] this special rule applicable to arbitration awards represents a possible minor deviation from the rule for judgments laid down in that case and he suggested that "if desired" it could be rectified so as to enable conversion to be made as at the date when leave to enforce the award in sterling was given.[204]

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200 Para. 2.56, above.

201 Paras. 2.57-2.59, above.

202 Jugoslavenska Oceanska Plovidba v. Castle Investment Co. Inc. [1974] Q.B. 292.

203 [1976] A.C. 443, 469.

204 If this suggestion means that conversion into sterling should be calculated as at the date when the court grants leave to enforce the award, the proposed solution would fail to assimilate the rules concerning awards to the rule governing judgments: since the grant of leave to enforce the award is the analogue of a judgment, the date on which leave is given is earlier than the date applicable in the case of judgments.

3.25 The present anomaly is aggravated by the fact that section 26(1) not only empowers the court to grant leave to enforce an award but also entitles an applicant who has been granted such leave to enter judgment in terms of the award. In most cases it is unnecessary to enter judgment but it may be a precondition of the issue of a bankruptcy notice.[205] A judgment so entered provides, contrary to the general rule in Miliangos, for conversion into sterling at a date earlier than the date when the court authorises enforcement of its judgment. It is interesting to note that the impetus for abandonment of the sterling-breach-date principle originated in the needs of parties who had agreed to submit disputes to arbitration. In Miliangos Lord Wilberforce observed that in the Jugoslavenska case Roskill L.J. "referred to inquiries made by Kerr J., at first instance, of the Central Office of the High Court which showed that there is no difficulty in practice in enforcing foreign currency awards: the foreign currency is simply converted into sterling at the rate prevailing at the date of the award".[206] However, the conversion date finally adopted in Miliangos was not the counterpart of the date of the award in arbitration cases, which leaves for consideration whether there is any justification for having different conversion dates depending on whether the dispute goes to arbitration or is litigated in the ordinary way.

3.26 We take the view, provisionally, that the rule as to conversion into sterling of arbitral awards made in foreign currency should be harmonised with the rule relating

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205 Jugoslavenska Oceanska Plovidba v. Castle Investment Co. Inc. [1974] Q.B. 292, 300.

206 [1976] A.C. 443, 464.

to judgments. Where, on an application made under section 26(1) of the Arbitration Act 1950, the leave of the court has been given to enforce the award as if it were a judgment, we propose that:

(i) Where, unusually, judgment is actually entered, such judgment should be expressed in the ordinary form - that is to say, for [X] units of foreign currency or their sterling equivalent at the date of payment.[207]

(ii) Where, as in the ordinary case, judgment is not actually entered[208] then for the purpose only of calculating conversion into sterling, judgment should be presumed to have been entered in the form referred to in sub-paragraph (i).

(b) The form of judgment in a common law action brought to enforce an arbitral award

3.27 As explained above,[209] one method of enforcing an English or a foreign arbitral award is to bring an action at common law on the award. However, there is no authority as to whether, in the case of an award expressed in a foreign currency: (i) judgment would be given in the form approved in Miliangos, whereby the defendant would have an option of paying in sterling converted at the date of payment; or (ii) conversion into sterling would be effected

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207 It will be remembered that the term "payment" here signifies the date of actual payment or the date when the court authorises enforcement of the judgment, whichever event should be the earlier: see para. 2.11, above.

208 Judgment is not normally entered because, under s. 26(1) of the 1950 Act, the giving of leave to enforce is sufficient to enable the award to be enforced as if it were a judgment.

209 Paras. 2.56-2.58, above.

as at the date of the award. What we have said in paragraphs 3.24-3.26 above about the need to change the law concerning the conversion date in relation to awards enforceable under section 26(1) of the 1950 Act applies equally to awards on which an action is brought. We therefore propose that judgment in an action brought on an arbitral award expressed in foreign currency should be given in the general form approved in Miliangos.

(2) Set-off; and limitation of a shipowner's liability under section 503 of the Merchant Shipping Act 1894 (as amended)

(a) Introduction

3.28 The questions of set-off and of limitation of a shipowner's liability under section 503 of the Merchant Shipping Act 1894 (as amended) raise problems which, in the context of this Working Paper, are essentially similar. It is therefore convenient to deal with them together.

(b) Set-off

3.29 Set-off creates difficulties in the foreign money context where, in the same action, A establishes a claim against B in one currency and B in turn establishes a claim against A in another, in circumstances in which (were no foreign money element involved) B would be allowed to set off his claim so as to reduce or extinguish the amount for which A is to have judgment.[210] Difficulties arise where the

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210 Similar problems arise in the case of an order for an account to be taken, discussed in para. 3.38, below.

two currencies in question are foreign, and also where one of them is foreign and the other sterling. It may be that in a particular case, under the rules of English private international law, the claim of each party is determined by the application of a different system of law - where, for example, A's claim against B is based on the breach of a contract governed by French law, and B claims damages against A for breach of another contract, governed by German law. However, our present difficulty arises whether or not the court has applied a system of law to A's claim which is a different one from that by which B's was determined, because the question of set-off is categorised as one of procedure and accordingly falls to be resolved by English law as the law of the forum.[211]

3.30 The general rule for the conversion of foreign currency into sterling cannot, of course, be applied without qualification to the set-off situation, except where the appropriate foreign currency in the case of both claims happens to be the same one: a successful claim in one currency cannot be set off directly and without conversion against another successful claim in another currency. Moreover, in some cases, the court might find difficulty in deciding which of the two claims was the larger and thus for which party judgment should be given.

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211 Meyer v. Dresser (1864) 16 C.B. (N.S.) 646; 143 E.R. 1280. It is, however, suggested by Dicey and Morris, The Conflict of Laws, 10th ed., (1980), p. 1194 that set-off is of two kinds. One kind amounts to an equity directly attaching to the plaintiff's claim and operates to extinguish that claim in whole or in part; and (it is suggested) the question whether such a set-off exists is one of substance for the lex causae. The other kind, being "... a claim of a certain kind which the defendant has against the plaintiff and which can conveniently be tried together with the plaintiff's claim against the defendant", is the only category considered in this problem in the context of this Working Paper.

3.31 There has been no decision after Miliangos which lays down principles for resolving the problem of set-off that arises as a consequence of abandoning the sterling-breach-date rule. However, in The Despina R[212] Brandon J. (at first instance) canvassed certain difficulties that would arise in relation to Admiralty proceedings and he provisionally proposed solutions. One of those difficulties was the problem of set-off (as to which it was merely observed in both the Court of Appeal[213] and the House of Lords[214] that it should be possible to find solutions as and when cases arose for decision). Brandon J. discussed set-off in relation to damage caused by a collision between two ships in a "both-to-blame" situation. In such cases the rule was that one judgment was given, for the difference between the two claims. He suggested that where two currencies were involved the currency of the lesser liability should be converted into that of the greater liability and the set-off effected:

> "... at the date on which the amounts of the two liabilities are established by agreement or decision. 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."[215] (emphasis added).

3.32 The approach proposed by Brandon J. in relation to set-off in Admiralty proceedings represents one possible solution to the problem of set-off in general. Its great merit lies in its practicability. On the other hand, its application could be said to produce the anomaly that only in cases of set-off would the conversion of the currency of the lesser claim into that of the greater one be effected

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212 [1978] Q.B. 396.

213 Ibid., p. 437, per Stephenson L.J.

214 [1979] A.C. 685, 704, per Lord Russell of Killowen.

215 [1978] Q.B. 396, 415.

at the date of judgment. The following example illustrates this point:

> A succeeds in establishing a claim against B in respect of which, apart from any question of set-off, the court would give judgment in French francs. B's successful defence as to part of that claim consists of a claim by him against A which is properly expressed as a sum in Deutschmarks, which, converted at the date of the hearing, is worth one-half of A's claim. The result is: A obtains judgment for a sum in francs for one-half of his claim or the sterling equivalent of that sum at the time of payment, (or on the date on which the court should authorise enforcement of the judgment, whichever date is earlier).
>
> Any subsequent change in the value of the Deutschmark against the French franc will be immaterial.
>
> However, if instead of defending A's claim, B chooses to bring a separate action, he will obtain judgment in Deutschmarks or their sterling equivalent at the time of payment. No conversion into francs takes place.

It seems wrong in principle that the result should differ according to whether B has made his claim separately or by way of set-off.

3.33 Solutions other than the one suggested by Brandon J. are of course possible. One approach might be to calculate the relevant conversion as at a time earlier than the judgment date. For example, conversion might be

calculated as at the date when the later of the two losses was incurred. This solution has what may be considered to be the advantage of relating the conversion to the subject-matter of the claim rather than, as in the case of the judgment date, to an extraneous and arbitrary point of time. But this approach has a number of drawbacks. In the first place, it is open to the same criticism as that referred to in paragraph 3.32 above in relation to the judgment date - namely, that it applies only to a claim by way of set-off. Secondly, in regard to the value of the smaller claim in terms of the currency of the greater, such a principle would bear defects similar to those exhibited by the now abandoned breach-date rule in relation to the fluctuating value as against sterling of a claim expressed in foreign currency. Furthermore, it would be necessary for the court to determine the dates on which the losses were incurred, and this could in some cases prove to be difficult.

3.34 Another possibility would be simply to exclude the operation of set-off where the currencies of the two claims are different, each party being given judgment for his claim, thereby preserving the principle underlying Miliangos in relation to both claims. It is for consideration in this connection whether set-off might not be effected by procedural rules whereby if, for example, one party seeks to enforce in terms of sterling his part of the judgment in (say) French francs, he would have to take into account the other judgment expressed in (say) Deutschmarks converted at the same date. It is also for consideration whether this solution would be satisfactory in cases involving an insolvent party.

3.35 We have found the problems relating to set-off to be difficult and there are disadvantages with each of the solutions which we have canvassed. Our provisional view is that a solution along the lines of that proposed in the preceding paragraph is to be favoured; and we should welcome comments.

(c) Limitation of a shipowner's liability under section 503 of the Merchant Shipping Act 1894 (as amended)[216]

3.36 We considered, at paragraphs 2.65-2.66 above, the power conferred on a shipowner by section 503 of the Merchant Shipping Act 1894 to set up by way of defence to part of a claim a limit on his liability to pay damages for personal injury or for loss of or damage to goods. Such limit is, as we explained, based on the tonnage of his ship and is expressed in terms of sterling, calculated by reference to gold francs. The question arises: in what form should judgment be given in a case in which it should be expressed in a foreign currency but the statutory limit on liability also applies? There has been no decision on the matter since Miliangos, although (as mentioned at paragraph 2.66 above) Brandon J. has tentatively suggested that, in the common situation where

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216 This section will be replaced by s. 17 of the Merchant Shipping Act 1979 when that section is brought into force. S. 17 gives the provisions of the Convention on Limitation of Liability for Maritime Claims (1976) the force of law in the United Kingdom and will mean that limitation of liability will be calculated by reference to special drawing rights rather than to gold francs. Pending the repeal of s. 503 of the 1894 Act, amendment of that section is contained in s. 1 of the Merchant Shipping Act 1981 which, when it is brought into force, will substitute a reference to special drawing rights for the reference to gold francs.

the damages in foreign currency exceed the limit, judgment should be given in sterling for the limit (the rate of exchange for determining whether in fact the damages were above the limit being, presumably, the rate current at the date of judgment).[217]

3.37 Although the principle suggested by Brandon J. is unexceptionable for the purpose of ensuring that judgment is given for the correct amount in terms of sterling, it is perhaps inconsistent with the general rule that a judgment which may properly be expressed in a foreign currency ought to be given in terms of that currency. Strictly, we think that the position should, in the light of that rule, be that:

(a) where the damages in foreign currency, when converted into sterling as at the date of judgment, are lower than the statutory limit, judgment should (as is apparently the present law) be expressed in that currency in accordance with the general form approved in Miliangos;

(b) where the damages in foreign currency, converted as at the date of judgment, would exceed the statutory limit (of, say, £100,000) judgment should be given

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217 Under the Merchant Shipping Act 1979, conversion of special drawing rights into sterling is to be made "at the date the limitation fund shall have been constituted, payment is made, or security is given which ... is equivalent to such payment": Sched. 4, Art. 8. Under s. 1(3) of the Merchant Shipping Act 1981, conversion of special drawing rights into sterling is to be made, if a limitation action is brought, on the date on which the limitation fund is constituted and, in any other case, on the date of the judgment in question.

> in some form which, in effect, is for "£100,000 or such sum in [the foreign currency] as is at the date of payment[218] the equivalent of £100,000."

In regard to case (b), the question whether a judgment in that form would give rise to any difficulty is a matter on which we should welcome views. The only alternative would seem to be to make the conversion in all cases as at the date of judgment, the solution proposed by Brandon J; this, however, runs counter to the Miliangos philosophy.

(d) An order for an account

3.38 Although it is our view that an order for an account will in most circumstances not give rise to problems,[219] there is a difficulty which may well arise where the constituent items of the account are expressed in different currencies. In such a case the court will have to select a date on which to convert these different currencies into the one in which the final balance of the account is to be expressed. On analysis, however, it is clear that this exercise raises a problem essentially similar to that which arises in connection with set-off, since it involves the necessity for the court to convert an obligation expressed in the terms of one currency into those of another at the time of the judgment or order. We think that this problem should be solved along the same lines as those to be applied in the case of set-off.[220]

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218 That is, the date of actual payment or the date when the court authorises enforcement of the judgment, whichever event should prove to be the earlier. See para. 2.11, above.

219 See para. 3.74, below.

220 See paras. 3.29-3.35, above.

(3) Claims to share in a fund

(a) On the liquidation of a company and on bankruptcy[221]

3.39 We have referred at paragraph 2.34 above to Re Dynamics Corporation of America[222] in which it was held by Oliver J. that on the compulsory winding-up of an insolvent registered company a creditor's claim for a debt in foreign currency, and any set-off in foreign currency against such a debt, must be converted into sterling at the date of the winding-up order. In relation to bankruptcy the closest equivalent to the date of the winding-up order seems to be that of the receiving order.

3.40 In his judgment in that case, Oliver J. reviewed in detail the authorities relating to the underlying aims of the procedures governing liquidation and bankruptcy; and he concluded that the purpose of the relevant provisions of the Bankruptcy Act 1914 and of the Companies Act 1948 (and their predecessors) was to ascertain the liabilities of the bankrupt or the company as at the date of the bankruptcy or liquidation and to secure the division of the debtor's property among the claimants pro rata according to the values of their claims at that time.[223] Accordingly,

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221 The whole of the law on insolvency is under consideration by the Insolvency Law Review Committee. In their Interim Report (1980) Cmnd. 7968, they did not examine any of the problems which arise in insolvency from the fact that debts may be expressed in terms of foreign currency, but this topic may be examined in their final Report. Further changes in the field of insolvency would stem from implementation of the E.E.C. Draft Bankruptcy Convention, discussed in paras. 3.48-3.49, below.

222 [1976] 1 W.L.R. 757.

223 Ibid., 761.

he held that foreign debts must be valued in terms of sterling as at the date of the bankruptcy or liquidation, subsequent fluctuations in the value of the relevant foreign currency as against sterling being immaterial.[224]

3.41 Against the approach adopted in Re Dynamics Corporation, it could be argued that a more satisfactory rule would be for the conversion of a foreign currency obligation into sterling to be effected at the latest practicable date - which, it would seem, is the date of each occasion on which it is decided to declare and pay a dividend. Such a rule would, it might be said, correspond more closely with the philosophy underlying Miliangos and so produce a fairer result for a creditor whose claim is properly expressed in terms of a foreign currency, especially in the numerous cases where the process of liquidation or bankruptcy is prolonged, sometimes over many years. In other words, the value in terms of sterling of a foreign currency debt should not vary depending on whether or not its value falls to be assessed in the context of liquidation or bankruptcy.

3.42 On the other hand, however, it must be borne in mind that argument along these lines was advanced before Oliver J. in Re Dynamics Corporation, and specifically rejected by him after careful consideration of the way in which the principle of Miliangos should be applied to winding-up and bankruptcy, together with an explanation why the alternative date suggested by Lord Wilberforce in Miliangos[225] - namely, that of the admission of the claim

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224 Ibid., 767-8. See Re Lines Bros. Ltd. (1981) 125 S.J. 426.

225 [1976] A.C. 443, 469.

in terms of sterling by the liquidator - was considered by him to be unacceptable.

3.43 Oliver J. pointed out that a creditor's right to receive, say, 1,000 dollars was not, as was argued, a right to receive an uncertain sum (1,000 dollars or its sterling equivalent at the date of actual payment) requiring subsequent assessment of its value by the liquidator, but simply a right to receive 1,000 dollars. The form of judgment approved in Miliangos did not relate to a creditor's substantive right; it was merely the form in which judgment should be expressed if the court had to give effect to that right.[226] He went on to say that,[227] even if the creditor's right could be considered as being of uncertain value, the obligation of a company in relation to a foreign money debt at the date of a winding-up order was an obligation to pay the sterling equivalent of the sum in question at that date. To adjust the then sterling equivalent because of a subsequent fluctuation in the relative value of sterling would be to substitute a different value. In our view the reasoning of the judgment in Re Dynamics Corporation is convincing. Furthermore, in reappraising the decision in Re Dynamics Corporation, we bear in mind that adoption of the approach rejected in that case would extend to the field of liquidation and bankruptcy the difficult problems connected with set-off, which we have discussed earlier;[228] whereas the need to resolve those problems is obviated by the

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226 [1976] 1 W.L.R. 757, 766-7.

227 Ibid., p. 768.

228 See paras. 3.29-3.35, above. Oliver J. referred to this point in his judgment: [1976] 1 W.L.R. 757, 769-70.

present rule.[229] We have provisionally formed the view that it would be undesirable to propose any alteration of the rule laid down in the Dynamics Corporation decision.

3.44 On the assumption that the present law remains unaltered, three minor matters remain. There is, first, the question of the principle which ought to apply to the voluntary winding-up of an insolvent company. On this point, Oliver J. pointed out in the Dynamics Corporation case that the conversion date must be the same in a voluntary as in a compulsory liquidation; and, for this purpose, the analogue of a winding-up order is presumably the date of the resolution to wind up the company. However, whatever date may be determined by the court as appropriate should the matter arise for determination, we believe that the question ought to be left for judicial decision and should not be the subject of specific legislation. We invite comment on this point.

3.45 The second question for consideration relates to the conversion of foreign debts in the liquidation, whether voluntary or compulsory, of solvent companies. It may be argued that the reasoning of Oliver J. in Re Dynamics Corporation of America could apply to solvent, as well as to insolvent, companies: in both situations the purpose of winding-up is to ascertain the company's liability as at the date of its liquidation and to distribute its property among the claimants according to the value of their claims as at that date. The only major distinction between the two kinds of situation, which is immaterial in the context of this Working Paper, is that in the case of an insolvent company the creditors may receive payment of only part of their claims. It could, on the other hand, be argued that

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229 See para. 3.39, above.

where a company is solvent the creditors will be paid in full and that, consistently with the Miliangos principle, the appropriate date for conversion is that of actual payment. The real difficulty comes with companies whose solvency is in doubt and where it is not known whether they are solvent until the winding-up process is completed. Indeed, there may be companies whose solvency could depend on the conversion date for a foreign currency debt. In the case of winding-up, we do not think that it would be practicable to devise different conversion dates dependent on the solvency of the company. The initial conversion date must, in our view, be that of the winding-up order in every case. We believe that similar rules should be applied in bankruptcy in cases where it transpires that the debtor is solvent.

3.46 It may turn out in a small minority of cases that, conversion of foreign currency debts having been duly made as at the date of the winding-up order, the company is found to be solvent. This raises a third question - namely, whether in such cases foreign currency creditors should be compensated from the assets of the company or the bankrupt for adverse exchange rate fluctuations between the date of the relevant order and the date of actual payment. This would involve a second, later, conversion of these debts as at the date of actual payment, or as close thereto as is practicable. We have explained in paragraphs 3.41-3.43 above why we do not favour this approach in regard to a foreign currency debt, irrespective of whether in terms of sterling it has increased or decreased in value after its original conversion.[230] To apply a later conversion date

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230 See Re Lines Bros. Ltd. (1981) 125 S.J. 426, where this approach was not adopted.

only in the case where a change in the relative value has been adverse to the creditor in question would, in our view, be even more unacceptable, since it would involve a discrimination between foreign currency debts depending on whether the exchange rates have moved to the advantage or disadvantage of the creditors. There appears to be no justification in principle for such a step, which would run counter to the generality of the Miliangos rule. In our view any alternative to the date of the winding-up order or of the receiving order as the conversion date must not only be practicable but must also be based on the application of the same conversion date to every foreign currency debt.

3.47 To summarise: we support the view of Oliver J. in the Dynamics Corporation case that the date of the winding-up order is the appropriate, once-for-all, date for the conversion of every foreign currency debt on the winding-up of both solvent and insolvent companies: and we believe that similar rules should apply to bankruptcy, whether or not it transpires that the debtor is solvent. We should welcome comments on this conclusion and on our view that development of this area of the law could be left to judicial decision.

3.48 Finally, we should draw attention to the E.E.C. Draft Bankruptcy Convention, the latest text of which was published by the Department of Trade in April 1980.[231] Adoption of this Convention would involve further changes in the field of insolvency. The immediate aim of the Draft Convention is to facilitate the recognition of bankruptcy proceedings (which in this context includes company winding-up and analogous procedures) throughout the E.E.C. by application of the principles of unity and universality, and

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231 See also the Report of the Bankruptcy Convention Advisory Committee (1976) Cmnd. 6602, commenting on an earlier draft of the Convention.

thereby to avoid simultaneous and concurrent bankruptcy proceedings in the courts of more than one E.E.C. state against the same legal person. The Draft Convention envisages a single bankruptcy opened in one Contracting State only,[232] and provides that, subject to certain exceptions, the bankruptcy will be governed by the law of that State. However, the Draft Convention does not deal specifically with foreign currency liabilities[233] or with the conversion of currencies. It therefore appears that foreign currency conversions will be dealt with according to national law and procedure.

3.49 In many situations the Convention will raise no new problems relating to foreign currency liabilities. In one area of particular practical significance, however, the Convention does appear to raise problems of conversion for which it provides no solution. These problems arise in connection with preferential and secured claims and claims by creditors in respect of debts incurred on behalf of the general body of creditors.[234] For the purpose of distributing assets in respect of such claims, a separate account (a "sub-estate") will have to be kept of the assets in each individual Contracting State. The currency in which this is to be kept is not specified. Certain types of creditor may be entitled to have their claims satisfied out of a particular sub-estate only, or out of all the sub-estates but to a different extent from each. The Draft Convention lays down rules for apportioning contributions to be made out of the relevant sub-estates.[235] For the

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232 Article 2. There is a limited exception to this in Article 66.

233 Except in Article 2 of Annex 1 as applied by Article 36 of the Draft Convention.

234 Section VI of Title IV (Articles 43 to 52).

235 Article 50.

purpose of making the appropriate calculations, however, it appears necessary to reduce all the quantities concerned to the same units, which would involve conversions from one currency into another. However, the Draft Convention provides no guidance as to how or when such conversions are to be made. In the case where creditors are situated in a state for which there is also a sub-estate, the Draft Convention appears in certain circumstances to require a conversion of asset values and claims from the local currency into another and then a re-conversion into the local currency for the purpose of making payments. It appears that further consideration of these issues will be needed as the further negotiations on the Draft Convention progress.

(b) Section 504 of the Merchant Shipping Act 1894 (as amended)[236]

3.50 We have explained in Part II of this Working Paper[237] that section 504 of the Merchant Shipping Act 1894 (as amended) allows a shipowner who faces or anticipates several claims arising out of the same casualty to obtain a decree from the court limiting his liability. In The Despina R[238] Brandon J. thought that there were three possible dates on which conversion might be made, that of the decree of limitation, of the constitution of the limitation fund or of proof of the claim against the fund. He provisionally expressed the view that any necessary conversion into sterling, in the case where the total amount of all the claims exceeded the statutory limit of liability expressed in sterling, should be

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236 S. 504 of the 1894 Act will be replaced by s. 17 of the Merchant Shipping Act 1979 when that section is brought into force.

237 Para. 2.67, above.

238 [1978] Q.B. 396, 415-416.

effected along lines similar to those applicable to the liquidation of an insolvent company, with the substitution of the decree of limitation for that of the winding-up order. For the reasons given in relation to bankruptcy and company liquidation in paragraphs 3.39-3.43 above, we agree with the solution proposed by Brandon J., but we believe that the final resolution of this matter should be left to judicial decision.

(c) Other claims to share in a fund

3.51 We have referred in Part II of this Working Paper, at paragraphs 2.46-2.47 above, to Re Chesterman's Trusts[239] in which it was held that the conversion into sterling for the purpose of the payment, out of a sterling fund in court, of a sum of foreign currency certified to be due by the Master should be effected at the date on which the Master's certificate was issued.

3.52 In reviewing Re Chesterman's Trusts in the light of Miliangos, we bear in mind that no question of "insolvency" is involved. On that basis, we consider that the approach to such cases as Re Chesterman's Trusts ought to accord with the general principle applicable to judgments in foreign currency, with the result that the amount found due by the Master should be expressed in terms of the foreign currency, and conversion into sterling effected as near to the date of actual payment out to the claimant as procedural considerations will allow.[240] This approach

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239 [1923] 2 Ch. 466 (C.A.).

240 So far as payment out of money in court is concerned, we consider the procedural aspects of this question at paras. 5.30-5.34, in Part V, below.

would of course extend to the case where the fund consists of a foreign currency, and conversion into sterling or into another foreign currency is necessary. In regard to claims on a fund not in court, a similar principle ought, in our view, to apply, namely that conversion should be effected as near to the date of actual payment as is practicable.

3.53 However, in the case where the sufficiency of the fund to meet every claim in full is, or may be, in doubt, the position is analogous to the winding-up of an insolvent company or to bankruptcy. In such a case, a date ought to be fixed as at which all claims have to be valued, and at which any obligations expressed in a currency other than the currency of the fund have to be converted into the latter currency. What that date should be will naturally depend upon the circumstances of each case: it is impossible to formulate a principle in general terms appropriate to the great variety of situations that can arise. In our view this also is a matter which should be left for judicial determination.

(4) Foreign judgments

3.54 Although there has been no relevant English decision on the recognition of foreign judgments in the context of foreign money obligations, there can be little doubt as to the present state of the law on two matters. The first is that a judgment given here pursuant to a common law action brought on a foreign judgment could be given in the form approved in Miliangos,[241] i.e., that the defendant pay a sum

241 East India Trading Co. Inc. v. Carmel Exporters and Importers Ltd. [1952] 2 Q.B. 439 would accordingly not be followed.

in foreign currency or its sterling equivalent at the date of payment.[242] The second is that, with the repeal[243] of section 2(3) of the Foreign Judgments (Reciprocal Enforcement) Act 1933, which directed conversion into sterling as at the date of the foreign judgment, registration of a foreign judgment effected under that Act or under the Administration of Justice Act 1920 would be in similar terms.

3.55 The question whether a defendant may claim that judgment on a claim in sterling ought to be expressed in a foreign currency[244] is of particular interest in the present context because of the plaintiff's option either, on the one hand, to sue on or register a foreign judgment, or, on the other hand, to sue on the original cause of action. However, we do not think that any change in the present law is called for, at least if our assumptions in the previous paragraph as to the application of the Miliangos principle to the recognition of foreign judgments are correct.

3.56 If this were all that we felt it necessary to say about foreign judgments, we should have included this discussion in the later section D of this Part of our Working Paper dealing with matters which, in our view, give rise to no problems.[245] There is, however, one further matter relating to foreign judgments to which we should draw attention. The E.E.C. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is likely to be implemented in this country in the

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242 See para. 2.11, above.

243 By the Administration of Justice Act 1977, s. 4.

244 This is discussed at paras. 3.8-3.11, above.

245 See paras. 3.73-3.79, below.

near future. Under the Convention judgments given in another Member State of the E.E.C. may be registered and enforced in this country.[246] The Convention does not contain any provision as to the date for converting into sterling such foreign judgments expressed in foreign currency. That being so, we have assumed that the legislation necessary to give effect in this country to the Convention will similarly be silent on this matter. Subject to a question relating to foreign maintenance orders discussed in paragraph 3.62 below, we do not think that any difficulty is likely to arise from the fact that the Convention is silent on the matter of conversion if, as we believe will be the case, courts in this country feel as free to apply the Miliangos rule to judgments recognised and enforced under the Convention as to judgments recognised and enforced under the Acts of 1920 and 1933.[247]

(5) Maintenance orders

3.57 The present law concerning maintenance orders has been outlined above, at paragraphs 2.60-2.64, in Part II of this Working Paper. It is convenient to advert, briefly, to the rules for the conversion into sterling of orders expressed in foreign currency under the three heads in question. The heads are:

(i) Orders of an English court expressed in a foreign currency: in these cases conversion into sterling is effected when the procedure to enforce the order in England is initiated.[248]

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246 See para. 2.54, above.

247 A similar view has been adopted in Scotland, see Report of the Scottish Committee on Jurisdiction and Enforcement (1980) H.M.S.O., paras. 6.182-6.183.

248 See para. 2.64, above.

(ii) Orders made by a foreign court that are registered in this country under the Maintenance Orders (Facilities for Enforcement) Act 1920, or under Part I of the Maintenance Orders (Reciprocal Enforcement) Act 1972: broadly speaking, conversion is effected as at the date of registration.[249]

(iii) When the 1968 E.E.C. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters is implemented in this country, maintenance orders made by another Contracting State and registered here pursuant to the Convention: the Convention does not contain provision as to the date for conversion into sterling.[250]

3.58 So far as head (i) is concerned, the procedure adopted by the court harmonises with Miliangos: all payments due under the order will be payable in terms of the foreign currency, so that any payment in sterling is converted at the date of payment; save that, if it becomes necessary to enforce the order, conversion into sterling of the sums which are the subject-matter of the enforcement proceedings takes place at the date of the institution of the enforcement procedure. This is an application of the general principle governing judgments in foreign currency and in our view it does not call for change.

3.59 However, in the case of orders under head (ii), the statutory rule whereby conversion is effected at the

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249 See s. 16 of the Maintenance Orders (Reciprocal Enforcement) Act 1972 and see paras. 2.60-2.62, above.

250 See para. 2.63, above.

date of registration conflicts with the principle underlying Miliangos. In order to accord with that principle, registration would have to be made in terms of the foreign currency and there would be no conversion into sterling (unless it became necessary to enforce payments through the court, in which case conversion would be made at the time when enforcement was authorised). The repeal, by the Administration of Justice Act 1977,[251] of section 2(3) of the Foreign Judgments (Reciprocal Enforcement) Act 1933 has pointed up the difference between the general Miliangos rule and the statutory rule relating to maintenance orders. That sub-section, which provided for conversion into sterling of foreign judgments registered in this country under the 1933 Act at a date inconsistent with the principle underlying Miliangos, was also listed in the schedule of repeals, which was stated to include enactments which had become "obsolete or unnecessary".[252]

3.60 We understand that the question whether to amend the statutory rule relating to maintenance orders was considered by the Home Office at the same time as the question of which statutory provisions called for amendment in the light of Miliangos - that is, when it was decided to repeal, among other provisions, section 2(3) of the 1933 Act. The view was then taken that it was not appropriate to deal with the conversion date for registered foreign maintenance orders in the context of the Bill which became the Administration of Justice Act 1977.

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251 S. 4 (save as to judgments registered before the section came into force).

252 S. 32(4), and Sch. 5, Part I.

3.61 It must however be borne in mind that there are two important practical differences between, on the one hand, a maintenance order which (as is normally the case) directs the making of periodical payments, and, on the other hand, a money judgment for a single amount. In the first place, a maintenance order is a continuing obligation. Accordingly, a rule that required payments under a registered order to be converted into sterling at the date of payment would necessitate a fresh calculation for each payment. In the second place, a maintenance order may normally be varied by the court in the light of changed circumstances, even in respect of payments that are overdue. We appreciate, therefore, that to change the present statutory rule might create practical and administrative difficulties, especially in the case of persistent defaulters, where frequent conversions would have to be made. Nevertheless, we believe that, in principle, the same basis of conversion into sterling ought to apply to foreign maintenance orders registered here under the Acts of 1920 or 1972 as to foreign judgments which it is sought to enforce in this country. We should welcome views as to whether the practical or administrative problems which might be created by amendment of the present statutory rule are such as to outweigh the consideration that all the rules governing the conversion of foreign money obligations into sterling ought to be based on the same principle, whether the conversion relates to a judgment of our courts expressed in foreign currency, a foreign judgment or a foreign maintenance order.

3.62 We have indicated earlier[253] that recognition and enforcement of foreign maintenance orders falls within the scope of the 1968 E.E.C. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

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253 See para. 2.63, above.

That Convention makes no provision as to the date for conversion of foreign currencies, nor do we expect any general provision to be made in the legislation necessary to give effect to the Convention in this country. Whilst it may be thought appropriate that the general Miliangos approach should be applied to foreign judgments recognised under the Convention, a problem does arise as to maintenance orders whose recognition falls within the Convention. We would point out the obvious desirability of similar rules as to conversion dates being applied both to foreign maintenance orders registered under the Acts of 1920 or 1972, and to those which, when the 1968 Convention is implemented here, are registered pursuant to that Convention. This situation may be highlighted by the fact that the countries to which the 1972 Act has been extended include France and the Netherlands, members of the European Economic Community. No difficulty arises if it is thought desirable to repeal the statutory conversion date now to be found in the 1972 Act. If, however, the arguments of practicability outlined in paragraph 3.61 above suggested that the 1972 Act should remain unamended in this respect and should constitute an exception to the Miliangos approach, then in our view a similar rule should be introduced for determining the conversion date in the case of maintenance orders recognised under the E.E.C. Convention.

(6) Compensation for loss sustained by a creditor in consequence of failure to pay on the due date

3.63 It is a general principle of the English law of contract that only nominal damages are recoverable for

failure to pay money.[254] This rule has been the subject of judicial[255] and academic[256] criticism, and there were dicta in the Court of Appeal in 1952 to the effect that the rule might not be rigidly followed in the future.[257] Exceptions also exist to the rule: for example, a banker is liable for substantial damages if he wrongfully fails to honour his customer's cheque.[258]

3.64 The recent case of Wadsworth v. Lydall[259] has created a further exception to the general rule in respect of a specific loss (that is, special damage). In Wadsworth v. Lydall[260] the Court of Appeal held that a party to a contract was entitled to special damages in respect of loss suffered by him as a result of the failure by the other

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254 See Chitty on Contracts, 24th ed., (1977), vol. 1, para. 1589, though see McGregor on Damages, 14th ed., (1980), paras. 845-848. The question of recovery of damages is distinct from any claim for interest as such, which in the absence of a contractual term or the exercise of the court's discretion under s. 3 of the Law Reform (Miscellaneous Provisions) Act 1934 is not recoverable: see London, Chatham and Dover Railway Co. v. South Eastern Railway Co. [1893] A.C. 429. See paras. 4.3-4.5, below.

255 For example, Jessel M.R. observed that the rule was "not quite consistent with reason", pointing out that a man might be "utterly ruined" by non-payment on the due date and that the damages might be "enormous": Wallis v. Smith (1882) 21 Ch.D. 243, 257 (C.A.).

256 For example, Treitel, The Law of Contract, 5th ed., (1979), p. 734; Beale, Remedies for Breach of Contract, (1980), pp. 169-170.

257 Trans Trust S.P.R.L. v. Danubian Trading Co. Ltd. [1952] 2 Q.B. 297, 306 per Denning L.J., and 307 per Romer L.J.

258 Rolin v. Steward (1854) 14 C.B. 595; 139 E.R. 245.

259 [1981] 1 W.L.R. 598 (C.A.).

260 Ibid.

party to the contract to pay money due to him under the contract, provided the loss had been foreseeable by the debtor.[261] We see no reason for excluding from an award of such special damages losses sustained as a result of fluctuations in exchange rates. In other words, in an appropriate case it seems right that such losses should be recoverable as damages on the basis of the criteria that apply to the recovery of any other loss.

3.65 In Part II of this Working Paper[262] we have referred to the Ozalid case,[263] in which compensation was awarded to a creditor who, as a result of non-payment of a debt on the due date, suffered specific loss in consequence of a fall in the value of the money of account, in circumstances where such loss was foreseeable by the debtor. The judgment in Ozalid does not make clear in terms whether the compensation which was awarded should be characterised as damages for breach of contract or as an order for payment of a debt.[264] It would seem that the award should be regarded as one of damages in respect of a specific loss (that is, special damages), because first, the criterion of reasonable foreseeability is relevant only to a claim for damages as distinct from an action for an agreed sum; secondly, the plaintiffs' successful claim included items for expenses incurred in their attempt

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261 That is, in accordance with the principles laid down in Hadley v. Baxendale (1854) 9 Exch. 341; 156 E.R.145.

262 See para. 2.29, above.

263 Ozalid Group (Export) Ltd. v. African Continental Bank Ltd. [1979] 2 Lloyd's Rep. 231.

264 Donaldson J. said that the obligation was a foreign money obligation, "... whether the plaintiffs' claim is regarded as being to recover a debt due under the letter of credit or as being to recover damages for failure to accept a sight draft" - ibid., p. 233.

to obtain payment before commencement of proceedings (which are not allowable in an action for an agreed sum) and, thirdly, the authorities cited in support of the conclusion in Ozalid - namely The Folias[265] and The Despina R[266] were recent decisions of the House of Lords relating to damages in foreign currency for breach of contract and tort respectively.[267]

3.66 Although we believe that Ozalid can best be understood on the basis that the compensation awarded in that case should be regarded as damages, the matter is far from clear and we must now consider Ozalid on the assumption that it concerned a claim for a debt. The money of account (and of payment)[268] was the U.S. dollar, but both parties contemplated that the creditors would, immediately on payment, convert the sum they received into sterling. Donaldson J. stated that, accordingly:

> "It is nothing to the point that the plaintiffs [the creditors] took the risk of changes in the sterling value of the U.S. dollar between the date of the contract and the due date for payment. The risk was still a sterling risk, but it was their risk and not that of the defendants. The plaintiffs undertook it for that period, but for no longer."[269]

So, he concluded, the creditors were entitled to sue for the sterling equivalent of the debt as at the due date.

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265 [1979] A.C. 685.

266 Ibid.

267 If this is the correct view of Ozalid, it would seem to represent an application of the principle later sanctioned by the Court of Appeal in Wadsworth v. Lydall [1981] 1 W.L.R. 598, though Ozalid was not cited in that case.

268 "... the price of the goods was agreed to be paid in U.S. dollars..." [1979] 2 Lloyd's Rep. 231, 234.

269 Ibid.

3.67 In our view, such an approach conflicts with the Miliangos principle, since it represents an application of the now abandoned breach-date rule. To adapt the words of Lord Wilberforce in Miliangos to the facts of Ozalid, the creditors had no concern with sterling; for them what mattered was that a U.S. dollar for good or ill should remain a U.S. dollar.[270] If the value of the U.S. dollar relative to sterling had appreciated between the due date and the date of the judgment, the creditors would have derived a benefit in sterling terms from such appreciation: equally, they should have borne the loss which they in fact incurred from the fall in the dollar.

3.68 We see no inconsistency between the principle underlying Miliangos and the recent development of a rule in relation to an award of special damages in respect of a specific and foreseeable loss consequent upon late payment of a debt, of which rule Ozalid, viewed as such an award, may be considered an example. We should welcome comments on the whole area of compensation for loss resulting from currency fluctuations sustained by a creditor in consequence of failure to pay on the due date.

3.69 For completeness we ought, in the present context, to draw attention to the Council of Europe Convention on Foreign Money Liabilities (1967). This Convention, which has not been signed by the United Kingdom, contains in an Annex rules relating to the payment, including late payment, of money obligations. Where a money obligation, including a debt, is paid late and the creditor suffers loss as a result of adverse currency fluctuations, Article 4 of the Annex would require the debtor to "pay an additional amount equivalent to the difference between the rate of exchange

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270 [1976] A.C. 443, 466.

at the date of maturity and the date of actual payment." Furthermore, in the case where there are currency fluctuations adverse to a creditor between the date of judgment and the date of actual payment, Article 7 of the Annex gives the creditor a similar right to an additional sum "corresponding to the difference between the rate of exchange at the date of the judgment and the date of actual payment." We have criticised the 1967 Convention, and in particular the rules in Articles 4 and 7 of the Annex, in our recent Report on the Council of Europe Conventions on Foreign Money Liabilities (1967) and on the Place of Payment of Money Liabilities (1972).[271] We concluded so far as the 1967 Convention was concerned that the Miliangos approach was to be preferred to that of Articles 4 and 7 and that there should be no special foreign money exception to the rule that damages are not available merely for late payment of a debt[272] (as distinguished from being recoverable in the limited number of cases where there is a specific and foreseeable loss).[273] We have recommended that the United Kingdom should not become a party to either Convention.

(7) Should the court be specifically empowered to give judgment in foreign currency in claims for damages in contract or in tort for (i) loss of future profit or (ii) death or personal injury?

3.70 We have mentioned at paragraph 2.21 above, in Part II of this Working Paper, that decisions since Miliangos relating to claims for damages for breach of contract or the commission of a tort have been stated in terms not to extend to damages for loss of future profit (or for future opportunity for gain), or to damages for death or personal

271 Law Com. No. 109, Scot. Law Com. No. 66.

272 See para. 3.63, above.

273 See para. 3.64, above.

injury. We appreciate that claims falling within these categories may give rise to difficulties hitherto unexplored, which will require to be resolved by the courts in determining whether to give judgment in foreign currency and, if so, what principles to apply for the purpose of identifying the particular foreign currency in which judgment should be expressed. In our view the issues involved are of such a kind as to be most appropriately resolved by the process of judicial development and require no further discussion here.

(8) Pecuniary legacies

3.71 We pointed out in paragraph 2.48 above that in some circumstances it is necessary to convert into sterling a pecuniary legacy expressed in a foreign currency; and we explained that, before Miliangos, it had been held that in general the appropriate date by reference to which the requisite conversion should be calculated was the end of the "executor's year" - i.e., the first anniversary of the testator's death.[274]

3.72 It has been suggested[275] that, in the light of Miliangos, the appropriate date for conversion would now be the date on which the legacy is paid. We doubt, however, whether this approach would be satisfactory. It was successfully argued in Re Eighmie[276] that a foreign money legacy should be treated like "any other general legacy such as a legacy of stocks or shares" at the end of the

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274 In the case of annuities conversion is effected as at the date of each payment: see para. 2.48, above.

275 Dicey and Morris, The Conflict of Laws 10th ed., (1980), p. 630.

276 [1935] Ch. 524, 529.

executor's year, since otherwise it would be impossible to value the interest accurately; and in his very brief judgment in that case Eve J. explained that equality between legatees could be brought about only by "fixing one and the same date for ascertaining the amount or value" of their several legacies.[277] It seems to us that nothing in Miliangos invalidates that reasoning, and we therefore provisionally take the view that the conversion into sterling of legacies expressed in foreign currency should continue normally to be made as at the end of the executor's year. We should, however, welcome comments.

D MATTERS WHICH, THOUGH IN OUR VIEW NOT GIVING RISE TO PROBLEMS, HAVE NOT ARISEN FOR DECISION AFTER MILIANGOS

(1) Salvage awards

3.73 Although, even in the light of Miliangos, The Teh Hu[278] may possibly be justified on its facts since the arbitration agreement in that case (Lloyds form) expressly empowered only a sterling award (and it has not been specifically overruled), it seems clear from the dicta referred to under this head in Part II of this Working Paper[279] that a salvage award may now be made in a foreign currency.

(2) An order for an account

3.74 Two questions fall for consideration in connection with an order for the taking of an account. To the first question - namely, whether in the light of Miliangos the

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277 Ibid.

278 [1970] P. 106.

279 See para. 2.38, above.

balance found to be due may in an appropriate case be expressed in a foreign currency, we have little doubt that an affirmative answer can be given.[280] If it became necessary to enforce payment of any sum found to be due, we believe that conversion of that sum into sterling would be made on the Miliangos principle, i.e., as at the date of actual payment or the date when the court authorises enforcement, whichever is the earlier.[281] The second problem, which arises where the constituent items of the account are expressed in different currencies, has already been considered in paragraph 3.38, above.

(3) A claim for restitution against a defaulting trustee

3.75 As explained under this head in Part II of this Working Paper,[282] a trustee who in breach of trust has withdrawn investments will be ordered by the court to restore the investments, valued as at the date of restoration, and this rule extends to the case where the investment consists of foreign currency. By virtue of that principle, the foreign currency provides the measure of the trustee's liability until he repays the sum involved.[283]

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280 As we have explained in para. 2.39, above, the only direct authority as to the date for conversion into sterling when an order is made for the taking of an account is Manners v. Pearson & Son [1898] 1 Ch. 581. In Miliangos Lord Wilberforce pointed out that, although Manners v. Pearson & Son was the fons et origo of the sterling-judgment rule, the question whether judgment could be given in foreign currency had in fact been left open in that case: [1976] A.C. 443, 466-467.

281 See para. 2.11, above.

282 Paras. 2.42-2.44, above.

283 Where the value of the foreign currency has fallen between the wrongful withdrawal and the order for restitution, the beneficiaries apparently have the option of an order based on conversion at the date of such withdrawal rather than the date of restoration: see para. 2.43, above.

That result would seem to us to accord with the philosophy underlying Miliangos.

(4) Declaratory judgments

3.76 It has been pointed out under this head in Part II of this Working Paper[284] that there seems to be no obstacle precluding the expression in a foreign currency of a judgment which merely declares that a particular sum is due to a party.

(5) Bills of exchange

3.77 As noted in Part II,[285] there would appear to be no problem today regarding bills of exchange expressed in foreign currency.

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284 Para. 2.41, above.

285 Para. 2.36, above. Strictly, this item should not be included under this head, "Matters which... have not arisen for decision after Miliangos", because Barclays Bank International Ltd. v. Levin Brothers (Bradford) Ltd. [1977] Q.B. 270 (referred to at n. 103, above), which concerned the effect of s. 72(4) of the Bills of Exchange Act 1882, was decided after Miliangos. It is nevertheless appropriate to include bills of exchange here, because, first, that case did not relate to the other relevant statutory provision (s. 57(2) of the 1882 Act, considered at n. 103, above) and, secondly, it was decided before the repeal of both provisions by the Administration of Justice Act 1977.

(6) The redemption of a mortgage securing a loan in foreign currency

3.78 This matter has been discussed at paragraph 2.45 above in Part II of this Working Paper. The relevant principle would appear to be unaffected by Miliangos, and in our view it gives rise to no problem in this context.

(7) Maintenance orders made in foreign currency by an English court

3.79 This matter was referred to at paragraph 2.64 above in Part II of this Working Paper. For the reason given above at paragraph 3.58 in this Part of the Working Paper, the existing practice accords with the principle underlying Miliangos and therefore does not seem to call for any alteration.

PART IV: INTEREST AND FOREIGN MONEY LIABILITIES

A. INTRODUCTION

4.1 An issue of considerable significance in the context of foreign money obligations is whether the plaintiff is entitled to interest on a debt which has not been paid on the due date or on a claim for damages. We touched on this question in our Report on Interest.[286] Our Report recommended, inter alia, the introduction of a statutory right to interest on contract debts but restricted such a scheme to contracts which were governed by English law[287] and excluded debts which were payable in a currency other than sterling, or in either such currency or sterling.[288] Some of those who commented on our earlier Working Paper on the subject of interest[289] had urged that account should be taken of the problems created by foreign money liabilities. Our view was that the appropriate context for such matters to be examined was not reform of the English law relating to interest but rather the examination of the various issues arising in the field of foreign money obligations, i.e., the subject of this Working Paper. However, it was announced by the Lord Chancellor in December 1980[290] that the Government did not intend to implement the main recommendation in our Report that a statutory right of interest on contract debts should be introduced. For that reason, we have not dealt in this Working Paper with the question, raised in the Report,[291] whether that scheme,

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286 Law Com. No. 88 (1978).

287 Ibid., para. 62, and see the draft Bill, clause 2(1).

288 Ibid., paras. 63-64, and see the draft Bill, clause 2(5).

289 Working Paper No. 66 (1976).

290 Hansard (H.L.), 18 December 1980, vol. 415, col. 1278.

291 Law Com. No. 88 (1978), para. 63.

and the draft Bill appended to our Report, should be amended to cover debts expressed in a foreign currency where the proper law of the contract was English law. Nevertheless, there are a number of other matters relating to interest and foreign money obligations which are not dependent on our Report on Interest and which are discussed in this Part of the Working Paper.

B. THE PRESENT LAW

4.2 Two separate legal issues arise in the context of interest and foreign money obligations. They are the determination of the law to be applied to decide whether interest is payable at all, and the determination of the law to be applied to decide the rate at which any interest is to be paid. We therefore examine both these issues in turn.

(1) The right to interest

4.3 The right to recover interest on a contractual debt is a matter which is governed by the proper law of the contract.[292] If that law is foreign, then the court will have to determine whether or not, under the foreign

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292 Gillow & Co. v. Burgess (1824) 3 S. 45; Fergusson v. Fyffe (1841) 8 Cl. & Fin. 121, 140; 8 E.R. 49, 56; Shrichand & Co. v. Lacon (1906) 22 T.L.R. 245; Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society Ltd. [1938] A.C. 224; and see Montreal Trust Co. v. Stanrock Uranium Mines Ltd. (1965) 53 D.L.R. (2d) 594.

law, a creditor is entitled to interest, as of right, on an overdue debt.[293] If the proper law of the contract is English law interest will not be recoverable as of right in the absence of a term in the contract to that effect.[294] The court does, however, have a discretion to include interest in any sum for which judgment is given.[295]

4.4 The law governing the right to recover interest, not as an express or implied term of a contract, but as damages was until recently less clear.[296] However, in the case of a claim for interest as damages for breach of contract, it would now appear to be settled that the right

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293 See, for example, Graham v. Keble (1820) 2 Bli. 126; 4 E.R. 274; Société des Hôtels Le Touquet Paris-Plage v. Cummings [1922] 1 K.B. 451, 460.

294 London, Chatham and Dover Railway Co. v. South Eastern Railway Co. [1893] A.C. 429; Law Com. No. 88 (1978) paras. 7-12. The court does, however, have power to award special damages in respect of foreseeable loss suffered as the result of failure to pay money on time: Wadsworth v. Lydall [1981] 1 W.L.R. 598 (C.A.).

295 Law Reform (Miscellaneous Provisions) Act 1934, s. 3(1). The powers of an arbitrator to award interest have recently been considered by the Court of Appeal in Tehno-Impex v. Gebr. van Weelde Scheepvaartkantoor B.V. [1981] 2 W.L.R. 821.

296 See Dicey and Morris, The Conflict of Laws, 10th ed., (1980), pp. 905-906.

so to claim is determined by the proper law of the contract.[297] This was the approach adopted in Miliangos v. George Frank (Textiles) Ltd. (No. 2).[298] It may be recalled that, in this case, the plaintiff who carried on business in Switzerland claimed from the English defendants the price of goods sold and delivered by the plaintiff. The House of Lords held that judgment could be given in Swiss francs, the currency in which the contract price was expressed. The case was, however, remitted to Bristow J. to determine the amount of interest, if any, payable by the defendants. It was held that the proper law of the contract was Swiss law and that that law should determine whether there was a right to interest by way of damages.[299] Under

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297 The law of Scotland seems to be to the same effect: St. Patrick Assurance Co. v. Brebner (1829) 8 S. 51. A similar rule applies in the case of bills of exchange. Whether interest is recoverable on the dishonour of a bill of exchange depends on the proper law of the contract under which the defendant rendered himself liable: Allen v. Kemble (1848) 6 Moo. P.C. 314; 13 E.R. 704; Gibbs v. Fremont (1853) 9 Exch. 25; 156 E.R. 11; Dicey and Morris, The Conflict of Laws, 10th ed., (1980), p. 902. Similarly in B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2) [1979] 1 W.L.R. 783 (affd. [1981] 1 W.L.R. 232 (C.A.)), where a claim was made for restitution under the Law Reform (Frustrated Contracts) Act 1943, English law, as the proper law of the frustrated contract, was applied to a claim for interest on the award; see at pp. 845-850.

298 [1977] Q.B. 489; and see also Manners v. Pearson & Son [1898] 1 Ch. 581, 588; Société des Hôtels Le Touquet Paris-Plage v. Cummings [1922] 1 K.B. 451, 460.

299 [1977] Q.B. 489, 496-497.

Swiss law there was such a right. Had the proper law been English, the court would have had to conclude that the plaintiff had no right to interest on damages. However, the court would have had to decide whether or not it should exercise its discretion to make an award under section 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934.

4.5 There is no direct authority as to the law which is applicable to determine the recovery of interest in a tort claim. There is some support for the view that this is a matter of substantive law and not of procedure, with the consequence that it is not to be determined by the lex fori, but rather by the law, or laws, governing tortious liability.[300] The position is complicated by the present state of the choice of law rules in tort, namely that, as a general rule, the defendant's conduct must be civilly actionable by the law of the country where the tort was committed and actionable as a tort under the law of the forum, i.e., English law.[301] The effect of this double-barrelled rule is to deny a plaintiff interest unless he can claim it both under the law of the forum and under the law of the country where the tort was committed. When England is the forum, there is a judicial discretion to award interest under section 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934. This means that even if there is an undoubted right to interest under the law of the country where the tort was committed, the most that the plaintiff can claim in an action for damages is the exercise of the

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300 Ekins v. East India Co. (1717) 1 P. Wms. 395; 24 E.R. 441; and see Morse, Torts in Private International Law, (1978), p. 204.

301 See Phillips v. Eyre (1870) L.R. 6 Q.B.1; Boys v. Chaplin [1971] A.C. 356.

discretion under the 1934 Act. If, however, the action is one for damages for death or personal injuries in excess of £200, the court must exercise its power to award interest unless there are special reasons why it should not do so.[302]

(2) The rate of interest

4.6 Once it is accepted that the lex causae enables the plaintiff to claim interest, the question that falls for consideration is whether such matters as the rate of interest or the award of compound, rather than simple, interest are to be determined by the law governing the right to interest, i.e., the lex causae, or by the law of the forum as matters which are essentially procedural in nature. We must, again, distinguish claims for interest by virtue of a term in the contract from claims for interest by way of damages. There seems little doubt that, in the case of a contractual claim for interest, the proper law of the contract determines not only the entitlement to interest,[303] but also whether compound interest [304] or interest on interest[305] is payable and the rate at which interest is to be paid.[306]

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302 Law Reform (Miscellaneous Provisions) Act 1934, s. 3(1A) (added by the Administration of Justice Act 1969, s. 22).

303 See para. 4.3, above.

304 Fergusson v. Fyffe (1841) 8 Cl. & Fin. 121, 140; 8 E.R. 49, 56.

305 Montreal Trust Co. v. Stanrock Uranium Mines Ltd. (1965) 53 D.L.R. (2d) 594.

306 E.g., Bodily v. Bellamy (1760) 2 Burr. 1094; 97 E.R. 727; Graham v. Keble (1820) 2 Bli. 126; 4 E.R. 274; Mount Albert Borough Council v. Australasian Temperance and General Mutual Life Assurance Society Ltd. [1938] A.C. 224.

4.7 The situation is less clear in the case of the rate at which interest is to be paid where interest is claimed by way of damages. Although there is no authority on the rate to be applied in a tort case, the problem has been considered in two recent cases involving contractual claims for interest as damages, both decided since the House of Lords decision in Miliangos. The first of these is Miliangos v. George Frank (Textiles) Ltd. (No. 2).[307] As we have seen,[308] in this case the plaintiff resident in Switzerland had successfully claimed payment of a sum due from the English defendants. The case was remitted to the trial judge to determine the amount of interest due on the sum for which judgment was given in Swiss francs. Bristow J. decided that the question of the right to interest by way of damages was to be referred to Swiss law as the proper law of the contract, and the parties had agreed that Swiss law gave such a right to the plaintiff in this case. However, he also held that the rate at which interest should be awarded was a matter of procedure, to be governed by the law of the forum, i.e., English law, and he said "that while you look to the proper law of the contract to see whether there is a right to recover interest by way of damages, you look to the lex fori to decide how much."[309] The relevant rule of English law was to be found in section 3 of the Law Reform (Miscellaneous Provisions) Act 1934, conferring a general judicial discretion as to simple

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307 [1977] Q.B. 489.

308 See para. 4.4, above.

309 [1977] Q.B. 489, 497. For earlier authority to the same effect, see The Funabashi [1972] 1 W.L.R. 666, 671; Wildhandel N.V. v. Tucker & Cross Ltd. [1976] 1 Lloyd's Rep. 341, 342.

interest. In his exercise of the discretion, the judge awarded interest at the rate at which someone could reasonably have borrowed Swiss francs in Switzerland at simple interest. In so doing he applied the general principle that "if you opt for a judgment in foreign currency, for better or for worse you commit yourself to whatever rate of interest obtains in the context of that currency."[310]

4.8 A rather different approach was adopted by Kerr J. in the second recent case, Helmsing Schiffahrts G.m.b.H. & Co. K.G. v. Malta Drydocks Corporation.[311] The plaintiffs were German shipowners who entered into a contract for the building of two ships by the defendants. An extra ten per cent of the agreed price was paid to the defendants, which was to be returned if not used. The plaintiffs claimed the return of this sum, plus interest. The ten per cent was repaid during the proceedings, so the only remaining issue concerned the claim to interest. English law was both the proper law of the contract and the law of the forum. The currency of account was Maltese pounds and it seems clear that, had the main claim proceeded to judgment, judgment would have been given in Maltese pounds. So far as the claim for interest was concerned, Kerr J. had no doubt that English law, i.e., the Law Reform (Miscellaneous Provisions) Act 1934, governed the right to interest. Exercising his discretion, he decided to award interest, payable in Maltese pounds, based on commercial borrowing rates in Germany. The reason for choosing German rates rather than Maltese rates, being those of the currency of

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310 [1977] Q.B. 489, 495.

311 [1977] 2 Lloyd's Rep. 444.

account and of the currency in which judgment would have been given), was that the plaintiffs, a German company, having been kept out of their money by the defendants, had had to borrow money in Germany at German commercial interest rates. In choosing the German interest rate, Kerr J. did not accept the principle adopted by Bristow J. that interest must be awarded at the rate applicable in the context of the currency of the judgment. In his view, that principle might work well enough where the currency of account and what he described as "the plaintiffs' own currency" were the same, as they were in Miliangos, but not where they were different. The overriding consideration should be "to compensate a plaintiff for the loss which he suffers in the ordinary course".[312]

4.9 So far the difference of approach between the two cases centres on the way in which the court should exercise its discretion when applying English law in the form of the 1934 Act to determine the rate of interest. The difference is, however, more substantial than that. It will be recalled[313] that the determination of the rate of interest was regarded by Bristow J. as a matter of procedure governed

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312 Ibid., p. 449. The question of the determination of the appropriate rate of interest was also considered briefly by the Court of Appeal in Shell Tankers (U.K.) Ltd. v. Astro Camino Armadora S.A., 26 March 1981, so far unreported. It was not necessary, however, on the facts of that case for the court to decide between the differing approaches of Bristow J. and Kerr J., though both were referred to without further comment. However, the court had no doubt that, in the circumstances of the case, where the currency of account was U.S. dollars and judgment was given in that currency, interest should be awarded at the dollar rate.

313 See para. 4.7, above.

by English law as the law of the forum. Kerr J., in an obiter dictum,[314] disagreed, saying:

> "... both the right to interest and its amount should be determined by the proper law. I would respectfully suggest that this view is more consonant with principle. The proper law results from the express or implied choice of both parties or from the nature of the transaction. The lex fori, if it differs, merely results from the choice of the plaintiff and may even be more or less fortuitous according to where it happens to be convenient to institute proceedings. The difference between them may be important. For instance, if there were a statutory exclusion or limitation of interest under the proper law, there would be no good reason for awarding interest to a plaintiff merely because he institutes proceedings in a jurisdiction which does not have such a provision. The inconvenience of it being occasionally necessary to adduce evidence on interest rates in another country appears to me of little weight and difficulty ... It therefore seems to me that this point will require further consideration at a higher level."[315]

This conflict of authority as to the law to determine the rate of interest is one of the matters to which we must now turn in considering whether any change should be made in the present state of the law of interest in the context of foreign money obligations.

C. SHOULD THE LAW BE CHANGED?

4.10 Our discussion of the present state of the law suggests that there are three issues to be considered in the context of possible changes in the law:

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314 The determination of the law to govern the rate did not arise for decision in the Helmsing case because English law was both the proper law of the contract and the law of the forum.

315 [1977] 2 Lloyd's Rep. 444, 450.

(i) the law governing the right to claim interest;

(ii) the operation of the Law Reform (Miscellaneous Provisions) Act 1934 in cases where English law is held to be applicable; and

(iii) the law to determine the rate of interest.

(1) The right to claim interest

4.11 Where interest is claimed on the basis of a contractual term to that effect, we have no doubt that this is a matter going to the substantial validity of a term of the contract and is to be governed by the proper law of the contract. This rule has been accepted since the eighteenth century[316] and we see no reason for suggesting any change. Where interest on a debt is claimed as damages, or where interest is claimed on a sum payable as damages for breach of contract or for tort, the present law would appear to be[317] that the entitlement to interest is governed by the proper law of the contract, or by the law, or laws, governing liability in tort. This approach accords with the general development in the choice of law rules relating to damages where the courts have, in recent years, considered the right to damages, as opposed to the calculation of the measure of damages, as a matter of substance to be governed by the lex causae.[318] Further support for the view that the right to interest should be regarded as a matter of substance may

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316 See, for example, Bodily v. Bellamy (1760) 2 Burr. 1094; 97 E.R. 727.

317 See paras. 4.3-4.5, above.

318 J. D'Almeida Araujo Lda. v. Sir Frederick Becker & Co. Ltd. [1953] 2 Q.B. 329; Boys v. Chaplin [1971] A.C. 356, 379, 392-393, 394-395.

be found in the analogy of the rule as to payment in foreign currency since Miliangos. Although the question whether an English court may give judgment in foreign currency is a matter of procedure,[319] akin to the calculation of the measure of damages, the determination of the appropriate currency in which judgment ought to be given is a matter of substance to be determined, in the case of a contractual claim, by the proper law of the contract.[320] Accordingly, our provisional recommendation is that there should be no change in the rule that the right to claim interest is a matter of substance for the lex causae.

(2) The operation of the 1934 Act

4.12 For ease of exposition, we propose to consider the operation of section 3 of the Law Reform (Miscellaneous Provisions) Act 1934 before we come to the issue of the law to determine the rate of interest, for if this is to be the law of the forum, then the 1934 Act will be applied in all cases before the English courts; and if the rate is to be determined by the lex causae, the 1934 Act will still be applied in those cases where English law is the proper law of the contract. It will be recalled that section 3 of the 1934 Act confers on the court a discretion both as to whether to award interest and to determine the rate of interest. The general principle adopted by the courts in exercising their discretion as to the appropriate rate of interest "has been to compensate successful parties by awarding interest at a rate which broadly represents the rate at which they would

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319 The Despina R [1979] A.C. 685, 704 per Lord Russell of Killowen.

320 Miliangos v. George Frank (Textiles) Ltd. [1976] A.C. 443, 465; Jean Kraut A.G. v. Albany Fabrics Ltd. [1977] Q.B. 182; The Folias [1979] A.C. 685, 700 per Lord Wilberforce.

have had to borrow the amount recovered over the period for which interest is awarded."[321] There is no doubt that the courts are prepared to exercise that discretion, in appropriate cases, so as to apply a foreign rate of interest.[322]

4.13 In examining the basis on which the appropriate foreign rate is chosen, we have considered the views of those commentators on our Working Paper No. 66 on Interest (1976) who expressed views on the question of interest on foreign money obligations.[323] In cases where the court gives judgment in foreign currency some commentators thought it was wrong that the rate of interest appropriate to sterling should be given and they expressed approval of the decision in Miliangos (No. 2)[324] that the rate should be that appropriate to the foreign currency of the judgment. Others suggested that, in the interests of certainty and convenience, the English rate of interest should always be applicable. The comments do not reveal any clear consensus.

4.14 It is, is our view, desirable to examine the economic arguments which can be put forward for determining the appropriate rate of interest under the 1934 Act in the context of foreign money obligations. In order fully to

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321 Cremer v. General Carriers S.A. [1974] 1 W.L.R. 341, 355, per Kerr J.

322 Nishina Trading Co. Ltd. v. Chiyoda Fire and Marine Insurance Co. Ltd. [1968] 1 W.L.R. 1325, 1336; Miliangos v. George Frank (Textiles) Ltd. (No. 2) [1977] Q.B. 489; Helmsing Schiffahrts G.m.b.H. & Co. K.G. v. Malta Drydocks Corporation [1977] 2 Lloyd's Rep. 444; Shell Tankers (U.K.) Ltd. v. Astro Camino Armadora S.A. (C.A.) 26 March 1981, so far unreported.

323 A list of those who commented on this issue is to be found in Appendix B.

324 [1977] Q.B. 489.

appreciate them, it may be helpful to restate the basic principles of law embodied in the Miliangos decision and later cases. The English courts may give judgment in a foreign currency, but the defendant may satisfy the judgment by paying the sterling equivalent calculated at the date of actual payment or the date on which the court authorises enforcement of the judgment, whichever may be the earlier.[325] The plaintiff does not have a right to judgment in the foreign currency of his choice but rather in the currency which would most accurately express his loss and compensate him for it.[326] In the case of a debt or a claim for liquidated damages this will almost certainly be the currency of the money of account.[327] In the case of unliquidated damages, the court is faced with a greater problem in determining the true currency of loss.[328] The general principle seems, however, to be clear.[329] The currency in which the defendant's obligation has been identified, whether it be to pay a debt or pay damages, should remain constant from the moment when the obligation arose until the date of payment, or as close thereto as is practicable. It will be recalled that this was put succinctly by Lord Wilberforce in Miliangos when discussing the plaintiff's claim for payment of his debt in Swiss francs, which was both the money of account and of payment: "The creditor has no concern with pounds sterling: for him what matters is that a Swiss franc for good or ill should remain a Swiss franc."[330]

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325 See para. 2.11, above.

326 Ozalid Group (Export) Ltd. v. African Continental Bank Ltd. [1979] 2 Lloyd's Rep. 231; see paras. 2.30, 3.8-3.11, above.

327 See para. 2.20, above.

328 See The Despina R, The Folias [1979] A.C. 685.

329 See paras. 2.21-2.26, above.

330 [1976] A.C. 443, 466.

The principle is that the plaintiff is committed to the currency of his loss whether it appreciates or depreciates as against other currencies.

4.15 It is against this background that we must examine the arguments on the rate of interest. It is a truism to state that the award of interest on a debt or on damages is made because the plaintiff could, had he himself had the money, have invested it and earned interest on it. In one of the first comments on Miliangos, made by two economists,[331] it was pointed out that, from 1973 to 1975 when sterling was depreciating against the Swiss franc, the United Kingdom Minimum Lending Rate was roughly double the Swiss interest rate. If the plaintiff in Miliangos had been entitled to payment of his debt in Swiss francs, thus protecting himself from the devaluation of the pound, coupled with interest based on the then United Kingdom Minimum Lending Rate,[332] he would have received in interest about double what he could have received on investments in Switzerland. He would, in simple terms, have been overcompensated by payment in a strong currency plus high interest calculated on the basis of a weak currency.

4.16 The relationship between interest rates and exchange rates has been expressed as follows:

> "The importance of ensuring consistency between the currency and the interest rate upon which

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331 Bowles and Phillips, "Judgments in Foreign Currencies: an Economist's View", (1976) 39 M.L.R. 196; and see Bowles and Whelan, "Judgments in Foreign Currencies: Extension of the Miliangos Rule", (1979) 42 M.L.R. 452, 456-457.

332 As the decision of the Court of Appeal suggests: see [1975] Q.B. 487, 507.

> calculations are to be based derives essentially from the existence of an inverse relationship between the interest rate in a country and the international strength of its currency. The rate of interest offered by a central bank reflects a number of factors, but in particular it reflects inflation and expectations about subsequent movements in exchange rates. For example, the Bank of England varies its minimum lending rate according to both the balance of payments position (which determines in part the extent of the Bank's eagerness to attract investment from overseas) and the expected rate of inflation (since the incentive to invest depends in part upon the difference between the nominal rate of return and the rate at which prices in the economy are rising). It is clear that the weaker the currency is expected to be, the higher the domestic interest rate will have to be if investment is to be protected. An important corollary is that the greater the fall in the international value of a currency, the greater the extent to which domestic interest rates will exceed those prevailing abroad."[333]

We believe that this relationship is one which it is desirable to keep in mind in the determination of the appropriate interest rate on debts or damages expressed in foreign currency.

4.17 The relationship between the currency of judgment and interest rates was taken into account by Bristow J., when the question of interest was remitted to him in Miliangos (No. 2).[334] He applied the rate at which Swiss francs could reasonably have been borrowed in Switzerland.

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333 Bowles and Whelan, "The Currency of Suit in Actions for Damages", (1979-80) 25 McGill L.J. 236, 240-241.

334 [1977] Q.B. 489.

In so doing, as we have seen,[335] he purported to apply the general principle to be extracted from the recent cases on foreign money obligations, namely that if you opt for judgment in foreign currency you commit yourself both to the currency, so far as appreciation or depreciation is concerned, and to the rate of interest obtaining in the context of that currency. For, as Bristow J. said: "A Swiss creditor, kept out of money he ought to get in Swiss francs, would reasonably borrow in Switzerland his replacement Swiss francs pending judgment. What he would have to pay to borrow them would have nothing whatever to do with the English sterling bank rate or the English basic lending rate."[336]

4.18 The same economic argument has been applied to the case of interest on damages. It has been suggested[337] that in The Despina R[338] where the currency of loss and of judgment was United States dollars, and in The Folias[339] where the currency of loss and of judgment was French francs, the appropriate rates of interest should have been the United States and French rates respectively.

4.19 It may be recalled[340] that Kerr J. in the Helmsing case[341] disagreed with the approach adopted by Bristow J. in

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335 See para. 4.7, above.

336 [1977] Q.B. 489, 495.

337 Bowles and Whelan, "Judgments in Foreign Currencies: Extension of the Miliangos Rule", (1979) 42 M.L.R. 452, 457.

338 [1979] A.C. 685.

339 Ibid.

340 See para. 4.8, above.

341 Helmsing Schiffahrts G.m.b.H. & Co. K.G. v. Malta Drydocks Corporation [1977] 2 Lloyd's Rep. 444.

Miliangos (No. 2).[342] He held that although the currency in which judgment should be given in the case before him was Maltese pounds, the currency of account, interest should be awarded according to German rates, the plaintiffs being a German company which had had to borrow money in Germany at those rates. The German rates were held to be higher than either Maltese or English rates.[343] He was not prepared to accept Bristow J.'s dictum[344] that the plaintiff who opts for a foreign currency commits himself to the interest rates of that country. Kerr J. felt that the court should apply the interest rates of the currency in which the plaintiff borrowed, or could be expected to borrow, during the period for which payment was delayed.[345] In Miliangos (No. 2)[346] the currency of judgment and the currency in which the plaintiff traded were both Swiss francs, so no problem arose.[347] In the Helmsing case they were different currencies and the judge preferred the interest rate of the plaintiff's currency.

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342 [1977] Q.B. 489.

343 This has been challenged: see Bowles and Whelan (1979-80) 25 McGill L.J. 236, 241-242, where the point is made that comparison between rates of interest must be between comparable rates and not, for example, between commercial lending rates and discount rates.

344 [1977] Q.B. 489, 495, see para. 4.7, above.

345 Cf. B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2) [1979] 1 W.L.R. 783 (affd. [1981] 1 W.L.R. 232 (C.A.)) where a British plaintiff was awarded damages in dollars and the interest payable thereon was calculated by reference to the London Eurodollar market; see at pp. 849-850.

346 [1977] Q.B. 489.

347 Nor did any problem appear to arise in Shell Tankers (U.K.) Ltd. v. Astro Camino Armadora S.A., 26 March 1981, so far unreported.

4.20 This approach has been subjected to stringent economic criticism as a "conceptually-unsatisfactory hybrid."[348] Two courses of conduct would have been open to the plaintiffs had they received the money due to them on the due date. They could immediately have converted the Maltese pounds into German currency and invested that sum in Germany at German interest rates. This suggests that the application of German interest rates should be dependent on conversion of the currency at the now discredited breach-date. The other alternative was that the plaintiffs could have held the funds in Maltese pounds, with Maltese interest rates, until the date of judgment. The criticism is that "[b]y continuing to express the basic sum in Maltese pounds when applying German rates Kerr J. suppresses the influence of the change in the exchange rate between the currencies over the period. A Maltese investor would certainly not expect to be offered German interest rates by his national bank ... just as a German investor would not earn Maltese interest rates on a Deutsch Mark account."[349]

4.21 These criticisms seem to us to be persuasive and our provisional conclusion is to support the general principle expressed in Miliangos (No. 2)[350] that, in exercising the discretion under the Law Reform (Miscellaneous Provisions) Act 1934, the court should award interest to the plaintiff at the rate applicable in the context of the currency of judgment.

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348 Bowles and Whelan, "Judicial Responses to Exchange Rate Instability", in The Economic Approach to Law, ed. Paul Burrows and C. Veljanouski, (1981), p. 263; and see Bowles and Whelan (1979-80) 25 McGill L.J. 236.

349 Ibid.

350 [1977] Q.B. 489.

(3) The law to determine the rate of interest

4.22 Where interest is claimed by virtue of a term in a contract, there is little doubt that the validity of such a term and the rate at which interest is to be paid are governed by the proper law of the contract.[351] This legal position seems to us to be satisfactory and we would propose no change in the law.

4.23 The present state of the law as to interest on damages is that the weight of authority suggests that the rate at which interest is to be determined is a matter of procedure, akin to the calculation of the measure of damages, to be determined by reference to the law of the forum.[352] Against that is the view of Kerr J.[353] that the rate of interest should, like the right to interest, be determined by the lex causae. We are faced with the task of deciding whether to prefer one or other of these views or some other approach, and whether resolution of the issue by legislation is desirable. We can derive relatively little assistance from the consultation on our Working Paper No. 66 on Interest (1976) because only one commentator expressed a view on choice of law, supporting reference of the rate to the lex causae. The other comments went to the question of the appropriate rate to be applied more by application of a foreign rate in exercise of the discretion under the 1934 Act than by reference to a foreign law. To that extent they indicate

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351 See para. 4.6, above.

352 Ibid.

353 Helmsing Schiffahrts G.m.b.H. & Co. K.G. v. Malta Drydocks Corporation [1977] 2 Lloyd's Rep. 444, 449-450; this view is supported by Dicey and Morris, The Conflict of Laws, 10th ed., (1980), pp. 903-908.

support for the rate to be determined by the law of the forum.

4.24 Some of the arguments that have been advanced in favour of one or other choice of law rule do not seem to us to bear much weight. We do not think that the existence of a statutory exclusion or limitation of interest under the proper law can be evaded by bringing proceedings in another forum,[354] because such a statutory exclusion will be a matter of substance to be governed by the lex causae, whatever the forum. We agree with Kerr J.[355] that little weight should be attached to the question of the need to adduce evidence of foreign interest rates. We take this view because such evidence will be needed in proceedings before an English court whether the rate is determined by foreign or English law, given the discretion under the 1934 Act to apply a foreign rate.

4.25 Turning to what seem, in our view, to be arguments of greater weight, a reasoned case can be made out for regarding the rate of interest on the one hand as a matter of procedure and on the other as a matter of substance governed by the lex causae. In support of a procedural classification, and thus that the rate should be determined by the law of the forum, is the argument that the determination of the rate of interest is an issue similar in kind to the calculation of the measure of damages for a particular loss. The latter is regarded as an issue of procedure which lends support to the view that

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354 [1977] 2 Lloyd's Rep. 444, 450; see para. 4.9, above.

355 Ibid., and we disagree with the views of Dunn J. on this point in The Funabashi [1972] 1 W.L.R. 666, 671.

the determination of the rate of interest should be similarly classified.[356] There are two further practical arguments in favour of a procedural classification. The first is that, in cases before the English courts, the judge would be able, by reason of the discretion embodied in the 1934 Act, to apply the rate most economically appropriate to the currency of the judgment. The second argument is that reference to the interest rate determined by the lex causae will create difficulties in tort claims, unless and until the present double barrelled choice of law rule in tort is amended.[357] It is not possible to apply the interest rates laid down by both the law of the country where the tort was committed and the law of the forum. One or other must be chosen. A procedural classification solves this difficulty and also provides flexibility under the 1934 Act.

4.26 However, other considerations militate in favour of the application of the lex causae to decide not only whether any interest should be awarded but also the rate at which interest should be calculated.[358] In the first place, the application of the lex causae to determine the rate of interest might be thought to produce greater certainty in the expectations of contracting parties than the approach adopted in Miliangos (No. 2),[359] because

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356 The issue of the law to determine the rate of interest has undoubtedly been regarded as an issue of procedure in the majority of cases where it has been discussed.

357 This is a matter under consideration by the Law Commission at the moment; see Fifteenth Annual Report, Law Com. No. 106, para. 2.39.

358 Before Miliangos (No. 2) [1977] Q.B. 489, this was thought to be the existing law by the editors of Halsbury's Laws of England: 3rd ed., vol. 7, para. 153; 4th ed., vol. 8, para. 614.

359 [1977] Q.B. 489.

of the discretionary nature of an award of interest under section 3 of the 1934 Act. This factor may be of some importance in the field of commercial contracts, as, for example, where an agreement contains an express choice of a foreign law which provides for payment of interest at a specified rate on damages for breach of contract. Secondly, it may be argued that the analogy between assessment of the measure of damages, as a matter of procedure governed by the law of the forum, and the determination of the rate of interest is not wholly satisfactory. Apart from the fact that the application of the distinction between heads of damage and measure of damages may be a source of difficulty in regard to damages generally,[360] one can argue that there is a significant difference between the kind of exercise involved in assessing the damages to be awarded under a particular head (such as for loss of profit, or pain and suffering)[361] and that of arriving at a figure in respect of interest on a sum of money. And in the case where, for example, the relevant foreign law provides for interest to be paid at the rate of (say) 20 per cent. per annum, a rule that some interest may be awarded because of that provision but that the rate should be in the discretion of the court might be thought, from a commercial point of view, to be artificial. Finally, if a rule whereby the lex causae determined the rate of interest had been applied in

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360 See for example the doubts expressed, obiter, by McNair J. in N.V. Handel My. J. Smits Import-Export v. English Exporters (London) Ltd. [1955] 2 Lloyd's Rep. 69, 72, with which Lord Upjohn expressed sympathy in Boys v. Chaplin [1968] 2 Q.B.1, 31 (C.A.).

361 Cf. the statement by Eveleigh J. in Jean Kraut A.G. v. Albany Fabrics Ltd. [1977] Q.B. 182, that "... the court is usually concerned to think in English currency and would do so in a claim, for example, for the loss of an eye whether arising in contract or in tort, and even though foreign law applied."

Miliangos (No. 2),[362] the result would have been the same: Swiss law, which was applied in that case, was also the proper law of the contract on which the action was brought.

4.27 We find the arguments on the question of the applicable law to determine the rate of interest to be finely balanced. There are, however, practical difficulties in applying any law other than that of the forum which may be highlighted by an examination of the different choice of law rules applicable to the various issues in a foreign money claim. Let us take a simple example where an English plaintiff claims damages from a French defendant for breach of contract in that the defendant has failed to deliver goods. The proper law of the contract is expressed to be French law. As a result of the defendant's failure to deliver, the plaintiff has had to buy alternative goods in Germany, spending pounds sterling to buy German marks in order to purchase the goods. If there is an action for damages in England, the English court is now empowered to give judgment in the appropriate foreign currency. That is a matter of procedure governed by English law as the law of the forum. The next question is then to determine the currency in which the English court should give judgment. That has been held to be a matter of substance, to be determined by the proper law of the contract, French law. If English law had been applied, the currency of the loss would have had to be determined, and let us assume that it was pounds. French law would, for the sake of argument, apply the currency of expenditure, i.e., German marks. That means that the English court must give judgment for damages expressed in German marks. The plaintiff claims interest. The right to interest is referred to French law as the proper law and let us assume that French law confers

362 [1977] Q.B. 489.

a right to interest on damages. What rate should be applied? If it is the rate determined by French law, that may well be the rate appropriate for French francs. The result is that the plaintiff receives judgment in German marks with interest at the French rate. The economic arguments canvassed earlier suggest that this is an undesirable result. It can be avoided by applying the flexibility of the 1934 Act as the law of the forum.

4.28 We would particularly welcome comments on this question whether the law governing the rate of interest should be the law of the forum, the lex causae or, indeed, some other law. Our provisional, though tentative, recommendation is that the rate of interest should be determined by reference to the law of the forum.

PART V: THE PRACTICAL IMPLICATIONS OF DECIDING BETWEEN THE DATE OF BREACH AND THE DATE OF PAYMENT AS APPROPRIATE CONVERSION DATES IN FOREIGN MONEY CLAIMS

A. INTRODUCTION

5.1 The House of Lords' decision in Miliangos has had considerable significance from the point of view of practice and procedure. Whereas previously money judgments had been expressed exclusively in sterling, and there had therefore been no need for special procedures in cases involving a foreign money element, that decision empowered courts to give judgments expressed in foreign currency, to be converted into sterling for enforcement purposes on the date when the court authorised enforcement of the judgment.[363] Accordingly, there arose an immediate need to adapt existing forms and procedures in order to facilitate claims and judgments expressed in foreign currency, which was met (in relation to claims and judgments in the High Court) by the issue of a Practice Direction.[364]

5.2 In this Part we examine the changes in practice and procedure which have been made in consequence of the decision in Miliangos, with a view to discovering how well they work in practice; and we discuss whether there are

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363 See para. 2.11, above.

364 The Practice Direction (Practice Direction (Judgment: Foreign Currency) [1976] 1 W.L.R. 83 as amended by Practice Direction (Judgment: Foreign Currency) (No.2) [1977] 1 W.L.R. 197) was issued shortly after the decision in Miliangos and still regulates the practice relating to claims and judgments in foreign currency in the High Court. This discussion is (unless otherwise stated) confined to High Court practice and procedure, but the County Court Practice recommends that the High Court Practice Direction be followed with suitable amendments.

practical advantages in other possible conversion dates. The House of Lords was of the opinion that the creditor should have as nearly as possible "exactly what he bargained for".[365] We consider whether conversion on the actual date of payment, in principle the ideal date, would work in practice, and whether conversion at the date of judgment would provide a fairer rule.

5.3 Assuming that no date for conversion earlier than the date of judgment would now be acceptable, the same procedural considerations arise up to the point when judgment is entered, whether the date chosen in Miliangos, or the actual date of payment, or the judgment date is the appropriate conversion date. We discuss the procedure up to entry of judgment, in the light of current practice, in paragraphs 5.4 to 5.27 of this Part. In paragraphs 5.28 to 5.61 the practical aspects of obtaining payment of a foreign currency judgment are considered, in relation to each of the three possible conversion dates.

B. PROCEDURAL STEPS UP TO OBTAINING JUDGMENT

(1) Making the claim

5.4 The main advantage of the breach-date conversion rule was that a foreign money claim could be made in sterling and treated exactly like a wholly English claim. If, on the other hand, foreign currency claims are not to be converted into sterling until the date of payment, it follows that a plaintiff who wishes to claim foreign currency has no option but to express his claim in that foreign currency; moreover it cannot be converted into

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365 [1976] A.C. 443, 469 per Lord Wilberforce.

sterling until the time for payment arrives. The Practice Direction provides simply that, where the plaintiff wishes to make his claim in foreign currency, he should expressly state in his writ that he makes his claim in a specified foreign currency. One of the issues between the parties may turn out to be whether the plaintiff has made his claim in the currency which "will most truly express his loss and accordingly most fully and exactly compensate him for that loss";[366] but in practical terms it is for the plaintiff to decide the currency or currencies in which to state his claim.[367] The adoption of the date of payment in preference to the breach date for the purpose of conversion does not therefore appear to have raised any particular difficulty so far as the practical aspects of making a claim are concerned.

(2) Fixed costs on a claim for a debt or liquidated demand

5.5 In certain circumstances the plaintiff in an action is entitled to "fixed costs"; perhaps the best known example being on recovery of a liquidated sum without trial.[368] Where the plaintiff's claim is for a debt or liquidated demand only, the writ must be endorsed with a statement of the amount claimed in respect of the debt or demand and costs; it must further state that proceedings will be stayed if the defendant pays the total amount claimed in

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366 Ozalid Group (Export) Ltd. v. African Continental Bank Ltd. [1979] 2 Lloyd's Rep. 231, 234.

367 If the plaintiff subsequently considers that his original claim was made in the wrong currency he may seek to amend his claim so as to introduce another currency. The legal principles applied by the courts to determine the currency in which the plaintiff should in fact be compensated are discussed above, paras. 2.20-2.35.

368 R.S.C., O.62, App. 3 Part I, (as amended).

respect of the debt and costs within the time allowed for acknowledging service of the writ.[369]

5.6 As the fixed costs on the writ are normally calculated by reference to a scale on which the amount of the costs varies according to the amount of the claim expressed in sterling, the scale of fixed costs could not be applied to foreign currency claims without some change in practice. The solution employed by the Practice Direction is to require the plaintiff to certify on his writ the rate of exchange current on the business day before the writ was issued. Thus, for the purpose only of ascertaining the amount of fixed costs, the conversion date is the date of the day before, or otherwise nearest to, the date of issue of the writ. This appears to us to be an acceptable solution to the problem of applying these scales of fixed costs to foreign currency claims, especially bearing in mind that the difference between the amount of costs recovered at any particular point on the scale and the next is never very considerable. The same conversion date seems to apply for the purpose of calculating the fixed costs to which the plaintiff is entitled if he enters judgment in default in a claim for a debt or liquidated demand; this is discussed further in paragraphs 5.8-5.9, below.

(3) Fixed costs on summary judgment under R.S.C., Order 14

5.7 The question of fixed costs on a foreign currency

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369 R.S.C., O.6, r. 2(1)(b), as amended by the Rules of the Supreme Court (Writ and Appearance) 1979, S.I. 1979, No. 1716, which came into operation on 3 June 1980.

judgment arises again in the context of R.S.C. Order 14. Order 14 provides a procedure for obtaining summary judgment without proceeding to trial and is available for most actions in the Queen's Bench and Chancery Divisions.[370] Once the defendant has been served with the plaintiff's statement of claim and has given notice of intention to defend the action, the plaintiff may apply under Order 14 for summary judgment on the ground that the defendant has no defence to the claim, and "when the judge is satisfied not only that there is no defence, but no fairly arguable point to be argued on behalf of the defendant, it is his duty ... to give judgment for the plaintiff".[371]

5.8 A plaintiff who succeeds in obtaining summary judgment for a sum of money under Order 14 is entitled to fixed costs, again calculated (in the case of a claim in sterling) by reference to the amount of the judgment debt. The Practice Direction provides for judgment to be entered for a debt or liquidated sum in a foreign currency under Order 14, and that the amount of the fixed costs is to be "calculated on the sterling equivalent of the amount of the foreign currency claimed as indorsed and certified on the writ, unless the court otherwise orders".[372] The proviso appears to recognise that the sterling value of the foreign currency sum claimed may fluctuate between the date of the writ and the date of the judgment and that any fluctuation could take the claim into a different band on the scale of costs. There is no similar proviso in the Practice

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370 The cases in which the Order 14 procedure is not available are set out in R.S.C., O.14, r. 1(2) and (3).

371 Anglo-Italian Bank v. Wells (1878) 38 L.T. 197, 200-201 per Jessel, M.R; see Supreme Court Practice (1979), vol. 1, para. 14/3-4/2.

372 Practice Direction, para. 5 (emphasis added).

Direction in relation to the fixed costs to which the plaintiff becomes entitled when he enters a default judgment.[373] A default judgment may, for example, be entered if the defendant fails to acknowledge service of the writ within 14 days.[374] It is quite possible that fluctuations in exchange rates might occur between the date of issue of the writ and the date of entry of judgment such as would affect the amount of costs the plaintiff could recover, especially since in some cases, for example where service has to be effected out of the jurisdiction, there may be a considerable time lag between issuing the writ and entering judgment.

5.9 It therefore appears that there is an inconsistency between the way in which the Practice Direction treats fixed costs on the entry of a default judgment, and the way in which it treats Order 14 costs. We should not however wish to over-emphasise the importance in real terms of this inconsistency. In practice, the difference between the amount of costs recovered if the claim falls into a higher band on the scale of costs rather than a lower one is very slight. However, it seems to us that the rules relating to entry of judgment in default should be consistent with the practice in relation to Order 14 judgments. The plaintiff should have the opportunity of certifying the rate of exchange current at the date of entering judgment for the purpose of calculating the fixed costs on entry of judgment. In the case of entry of judgment under Order 14 both parties are normally before the court so that any dispute as to the appropriate rate could be resolved by the court, as under the present Practice Direction; where

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373 See para. 5.6, above.

374 R.S.C., O. 13, r. 1(1), as amended.

judgment is entered in default an application could presumably always be made to the court in the event of difficulty, although we find it hard to imagine cases in which this would be necessary.

(4) Payment into court in satisfaction of a debt or damages

5.10 In any action for a debt or damages a defendant may, at any time after he has been served with the writ, pay into court a sum of money in satisfaction of the cause of action in respect of which the plaintiff claims or, where two or more causes of action are joined in the action, a sum or sums of money in satisfaction of any or all of those causes.[375] On making or on increasing a payment into court, the defendant must give notice of the payment in to the plaintiff and any other defendants; within three days of receiving the notice, the plaintiff must send a written acknowledgement of receipt of the notice to the defendant.[376]

5.11 The Rules allow the plaintiff 21 days, from receipt of the notice of payment, in which to accept the payment in.[377] A payment into court can be made or increased after the trial of the action has begun, and in that case the plaintiff may accept the money within two days after receipt of the notice, provided that this is before the judge begins to deliver his judgment.[378] Payment into court is not

375 R.S.C., O. 22, r. 1(1).

376 R.S.C., O. 22, r. 1(2).

377 R.S.C., O. 22, r. 3. The plaintiff may apply for leave to accept the payment in even after expiry of the time for acceptance.

378 Or, in a jury trial, commences his summing up; R.S.C., O. 22, r. 3(2).

possible in arbitrations or appeals; [a] written offer which the court can take into consideration after the hearing has then to be made to serve the same purpose as nearly as may be".[379]

5.12 When money paid into court is not accepted the action is tried in the ordinary way, but an important issue between the parties (although unknown to the judge) will be whether the amount of the judgment will exceed the sum paid into court. If the sum eventually awarded to the plaintiff does not exceed the amount paid in, the defendant in effect turns out to be the successful party and, as such, is prima facie entitled to his costs from the date of payment in. Where there has been a payment into court, the court has an absolute discretion as to costs, but it is a judicial discretion and, in such a case, the defendant can be deprived of his costs only by the proper exercise of judicial discretion upon proper grounds arising out of the litigation or the conduct of it; he cannot be deprived of his costs for no reason[380] or upon insufficient grounds.[381] As Devlin L.J. explained in A. Martin French v. Kingswood Hill Ltd:[382] "An offer of settlement can be made and accepted or refused without the assistance of any rule. The purpose of the rule[383] is to enable the offer to be recorded in such a way that it can be used to affect the order for costs".

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379 A. Martin French v. Kingswood Hill Ltd. [1961] 1 Q.B. 96, 104, per Devlin L.J.

380 Findlay v. Railway Executive [1950] 2 All E.R. 969.

381 e.g. because the judge had considered giving a larger sum than he eventually awarded: Wagman v. Vare Motors Ltd. [1959] 1 W.L.R. 853.

382 [1961] 1 Q.B. 96, 104.

383 i.e. R.S.C., O. 22, r. 1.

5.13 From the plaintiff's point of view the main advantage of the payment into court procedure is that he has the security of knowing that the sum he is being asked to accept in settlement of his claim actually exists and is in court. By contrast, a settlement out of court is contractual in nature[384] and the plaintiff's position is less secure.

5.14 The decision in Miliangos raised a number of questions in relation to the procedure for payment into court, the most obvious of which was whether the defendant to an action for damages or for recovery of a debt in foreign currency should be allowed, if he wished, to pay foreign currency into court instead of being restricted to sterling.[385]

5.15 The Practice Direction allows for payments into court in foreign currency, as follows:

> "In an action for the recovery of a debt or liquidated demand, whether in sterling or in foreign currency, the defendant may, subject to the requirements of the Exchange Control Act 1947, pay into court in satisfaction of the claim... a sum of money in foreign currency..."[386]

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384 See Cumper v. Pothecary [1941] 2 K.B. 58, 67, per Goddard L.J.

385 The question of the currency in which the defendant may pay into court is closely linked with the question of the currencies in which a debtor under a foreign money obligation is entitled to satisfy his creditor. This is discussed above, paras. 2.1-2.3, 3.17-3.19.

386 The payment in will be held by the court in a special account - see Supreme Court Practice (1979), vol. 1, para. 22/1/5. The reference to the Exchange Control Act 1947 would not now seem to be of any practical significance.

Several aspects of this part of the Practice Direction call for comment.

(a) "a debt or liquidated demand"

5.16 The procedure of payment into court is generally available in "any action for a debt or damages"[387] but the Practice Direction provides for payment into court in foreign currency only in cases of debts or liquidated demands. The words "debt or liquidated demand" do not include unliquidated damages in tort or contract, even though the plaintiff may put a definite figure on such damages.[388] In the recent cases of foreign money obligations which have come before them, the courts have been aware that different types of claim may call for different treatment. However, it is now clear that unliquidated damages may be claimed in foreign currency,[389] although a distinction has been drawn between compensation for actual loss and claims for prospective losses.[390] Given that plaintiffs with claims for unliquidated damages may present them in foreign currencies, we take the view

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387 R.S.C., O. 22, r. 1(1).

388 Knight v. Abbott, Page & Co. (1882) 10 Q.B.D. 11. If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, that sum is not "a debt or liquidated demand" but "damages".

389 The Despina R [1979] A.C. 685, and see paras. 2.21-2.29, above.

390 See e.g. The Folias [1979] Q.B. 491, 516 per Lord Denning M.R. and Jean Kraut A.G. v. Albany Fabrics Ltd. [1977] Q.B. 182, 189 per Eveleigh J., referred to in nn. 59 and 60, above.

that defendants to such claims should be permitted to make payments into court in foreign currency. It may be that in practice they already do so, but the Practice Direction seems to require broadening in this respect, if only to clarify the position.

(b) "In an action for the recovery of a debt or liquidated demand, whether in sterling or in foreign currency".[391]

5.17 This part of the Practice Direction suggests that the defendant to a sterling claim may make a payment into court in foreign currency.[392] A defendant might wish to do this if for example the debt was originally a foreign currency debt but the plaintiff had, for his own reasons, chosen to claim in sterling.[393] The Practice Direction states that it lays down the practice for "the making of claims and the enforcement of judgments expressed in a foreign currency".[394] The effect of this general limitation on the scope of the Practice Direction would appear to be that a payment into court in foreign currency may be made in respect of a sterling claim only where the original obligation was a foreign money obligation. We agree with the result and for the avoidance of doubt it should perhaps be stated expressly that foreign currency cannot be paid into court in respect of a purely domestic sterling claim.

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391 (emphasis added.)

392 In accordance with the general principle in Société des Hôtels Le Touquet Paris-Plage v. Cummings [1922] 1 K.B. 451, referred to by Lord Wilberforce in Miliangos v. George Frank (Textiles) Ltd. [1976] A.C. 443, 469.

393 This is not to say that sterling is necessarily the currency in which the plaintiff's claim should properly be expressed: see para. 2.30, above.

394 See Practice Direction, para. 1.

(c) "a sum of money in foreign currency"

5.18 The Practice Direction does not stipulate which foreign currency may be paid into court. The Supreme Court Practice, referring to the Practice Direction, states:

> "It would seem that if the plaintiff claims the payment of a debt or liquidated demand in foreign currency the defendant may make a payment into Court in satisfaction in the same foreign currency..."[395]

This leaves aside the question of the circumstances in which a defendant may pay foreign currency into court in satisfaction of a claim in sterling; and it also does not deal with the possibility of the defendant wishing to pay into court a currency different from the one claimed by the plaintiff. This is perhaps more likely to arise in the case of a claim for unliquidated damages;[396] as we have seen,[397] the Practice Direction does not at present appear to provide for payment into court in such cases.

5.19 We have considered four possible approaches to the problem of the currency in which a defendant should be permitted to make a payment into court. We deal with each in turn.

1. The defendant could be permitted to pay into court any currency he chooses, without restriction.

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395 Supreme Court Practice (1979), vol. 1, para. 22/1/5 (emphasis added).

396 See, for example, The Folias [1979] A.C. 685.

397 See para. 5.16, above.

We do not favour this possibility, since an unrestricted choice would mean that a plaintiff wanting to take out the money in court might well be faced with the prospect of having to accept a sum in what was, for him, an unwanted currency which had no possible relation to his claim. In our view this would be unjustifiable.

2. At the other end of the spectrum, the defendant could be restricted to making a payment into court, at his option, in sterling or in the currency claimed by the plaintiff. However, this would mean that the defendant would not be permitted to pay into court any third currency, even the one in which he contends (correctly as it may turn out) that the plaintiff's loss is properly to be expressed, and in which judgment is ultimately given. In such a case the defendant would be obliged to plead in his defence that any sum to which the plaintiff may be entitled is in the circumstances to be expressed in some currency other than the one claimed by the plaintiff, and the plaintiff may then seek and obtain leave to amend his claim by claiming this currency, at any rate in the alternative. At this point the defendant would under this option admittedly be able to make a payment into court in this currency. However, a significant change in the relative rates of exchange might have occurred in the interim which might be unfair to the defendant; and he should not be restricted in this manner until such time (if ever) when the plaintiff amends his claim.

3. A third possibility would lie between the two so far discussed, and would be to allow the defendant a choice of currencies wider than simply sterling or the currency claimed by the plaintiff, but nevertheless to restrict his choice so as to prevent him from paying into court in a currency which had no apparent relevance to the case whether from his own or the plaintiff's point of view. This possibility, however, gives rise to the difficult problem of determining what form such restriction should take. One possible approach, for example, would be to require the leave of the court for a payment into court in any currency other than sterling or the currency claimed by the plaintiff; in our view, however, such a requirement would be quite unrealistic.

4. The fourth solution, which we favour, and provisionally propose, is that the right balance between the interests of the plaintiff and of the defendant is to be found in a rule that the defendant should be permitted to make a payment into court (apart from the currency claimed by the plaintiff and sterling) in a currency which he alleges to be the currency in which the plaintiff's entitlement (if any) falls to be expressed. This seems the most satisfactory solution to the problems referred to in sub-paragraph 2 above.

5.20 However, we should add in this connection that we recognise that by making a payment into court in a third currency, as discussed above, the defendant would clearly run a considerable risk. The reason is that if the plaintiff does not accept the payment in, but goes on with

the action and ultimately obtains judgment in the currency in which he had claimed, the defendant's payment into court should clearly not be regarded as a good payment in even if it satisfied the quantum of the plaintiff's claim, with the usual attendant consequences as to costs.[398] Since defendants could avoid this risk by paying in the currency claimed or in sterling, it seems unlikely that they would frequently avail themselves of this option. Nevertheless, it seems to us to be wrong in principle to deny this right to them, particularly since it would place no additional administrative burden on the court.

5.21 We invite views on these questions, but our provisional recommendation is that a defendant should be entitled to make payment into court in any one of the following currencies, namely:

(i) the currency claimed by the plaintiff;

(ii) sterling; or

(iii) such third currency as the defendant alleges in his notice of payment into court to be the currency in which the plaintiff's claim should properly be expressed.

5.22 In the case of a payment into court accompanied by a plea of tender before action, the defendant should, in our view, be permitted to pay into court either sterling or the currency in which he pleads that he has made his tender.

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398 The question of costs is discussed below, para. 5.26.

5.23 The Practice Direction is silent as to a conversion date for payments into court; yet if the defendant may make a payment into court in a currency (including sterling) other than the currency (including sterling) in which the plaintiff has made his claim, it is necessary to convert in order to assess the sum paid in against the amount of the plaintiff's claim.[399] There are then two possibilities; either the plaintiff accepts the payment in or he does not. It may be helpful to consider these two possibilities against the background of the following example:

> P claims 10,000 French francs from D. D estimates that P is entitled to 5,000 French francs. He decides to make a payment into court at a time when there are 10 French francs to the pound sterling. He pays £500 into court. A few days later, the pound sterling falls dramatically and is worth only 7.5 French francs.

5.24 The Rules allow the plaintiff 21 days in which to accept the payment into court.[400] The present position appears to be that if the plaintiff decides to accept the payment into court during that period, no problem as to conversion arises; the plaintiff, in accepting the payment in, accepts the defendant's offer as it stands. In effect, therefore, the date of conversion is the date of acceptance; thereafter the risk of any currency fluctuations falls on the plaintiff. From the plaintiff's point of view this may

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399 The present practice does not appear to provide for the defendant to make a payment into court in a currency other than the foreign currency claimed or sterling; see para. 5.18, above.

400 See above, para. 5.11.

have unfortunate results; if, in the example just given, P accepts D's payment into court and the fall in the value of the pound occurs after the date of acceptance but before he receives the money from the court, P will actually receive a much smaller sum, in terms of francs, than he expected. At the time he accepted, the value in francs of the sum in court was 5,000 francs; by the time he receives it, its value has fallen to 3,750 francs. However, the stability of the currency paid into court is arguably one of the factors the plaintiff should take into account in deciding whether to accept the payment into court and, indeed, a factor for the court to consider when it comes to exercising its discretion as to costs if the plaintiff has not accepted the payment in.[401]

5.25 A plaintiff who does not accept a payment into court within the prescribed period of 21 days may nonetheless apply after the expiry of that period for leave to accept the payment in. In deciding whether to grant leave, the court would presumably take into account any fluctuations in exchange rates where appropriate.

5.26 If the plaintiff does not accept the payment into court at all, the question whether he should have done so becomes of vital importance in relation to costs.[402] Although in the last analysis it is always a matter for the discretion of the court, the general rule (as we have seen)[403] is that where the sum eventually awarded does not exceed the amount paid into court the plaintiff has to pay the defendant's costs from the date of payment in. It

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401 See para. 5.26, below.

402 See para. 5.12, above.

403 Ibid.

might be argued that a fixed date for conversion for the purposes of comparing the payment in to the sum awarded by the court would be desirable. Such a rule might make it easier for the plaintiff to decide whether to accept the payment in, and easier for the court to decide on costs. One date which might be chosen is that of the payment into court; in which case assuming, in the example, that P did not accept the payment into court, and was awarded less than 5,000 francs, he would prima facie be liable for D's costs thereafter. It seems inevitable however that any such fixed date rule would work injustice in some cases and our provisional conclusion is that the flexibility of the present rule is to be preferred; if, however, a fixed date is to be chosen, it seems to us that the appropriate date is that of payment into court.

5.27 To summarise, the present position seems to be that, where the plaintiff accepts the payment into court within the prescribed period, he takes the risks of currency fluctuations after the date of acceptance. Where he applies for leave to accept outside the prescribed period, or the question of costs arises because the plaintiff has not accepted a payment into court, the court must exercise its discretion. From the parties' point of view this may mean that it is sometimes difficult to predict the view the court would take of the question whether the payment into court was one which the plaintiff should have accepted; but against this it may be argued that a more certain rule would be likely to produce hard results in some cases. Our provisional view is that the flexibility of the present position is preferable and that no change is desirable. However this is a matter on which we should particularly welcome views.

C. ENFORCEMENT OF A JUDGMENT DEBT

(1) Introduction

5.28 A judgment debt comes into existence when the successful party enters judgment.[404] In many cases the unsuccessful party will comply with the judgment voluntarily, in which case no enforcement proceedings will be required. However, the rules of court again become relevant

(a) where there is money in court which has not been accepted, and

(b) where the creditor has to take enforcement proceedings against the debtor.

5.29 In the following paragraphs we examine the practical aspects of payment out to a successful plaintiff of money in court, and of the enforcement of foreign currency judgments, in relation to three possible forms of judgment:

(a) That the defendant pay the plaintiff the sum in foreign currency or its sterling equivalent calculated at the date of actual payment or the date on which the court authorises enforcement of the judgment, whichever may be the earlier (this is the present rule).[405]

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404 Where unliquidated damages are claimed, these may have to be assessed at a later date.

405 See para. 2.11, above.

(b) That the defendant pay the plaintiff the sum in foreign currency or its sterling equivalent calculated at the date of actual payment.

(c) That the defendant pay the plaintiff the sum in foreign currency or its sterling equivalent converted at the date of judgment.

(2) Payment out of money in court

5.30 Where there is money which has been paid into court but which has not been accepted, it can be paid out only in pursuance of an order of the court. If the plaintiff obtains judgment for a sum greater than that which was paid into court the usual practice is for the court to order the money to be paid out to him towards satisfaction of the judgment debt. Where the currency in which the judgment is expressed is different from the currency paid into court, the question of conversion arises.

5.31 When an order for payment out has been made, the practice is for a Payment Schedule to be drawn up and sent to the Accountant General. This process is usually initiated by the solicitors having carriage of the order; in the Queen's Bench and Family Divisions, they prepare the Payment Schedules which are then transmitted by the entering clerks at the Court Funds Office to the Accountant General. In the Admiralty Registry, the Registry prepares the Payment Schedules which are then sent direct to the Accountant General. The actual payment is subsequently made by the Bank of England[406] on the instructions of the Accountant General.

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406 The Bank acts as the Accountant General's banker for these purposes.

5.32 This procedure was considered in The "Halcyon Skies" (No. 2)[407] where there was a sterling fund in court and part of the judgment was expressed in U.S. dollars. Donaldson J. held that the conversion date for ascertaining the amount to be paid out was "the date when application is made for payment out".[408] In that case, being an Admiralty case,[409] the appropriate date was the date when the solicitors having carriage of the order filed an affidavit certifying the current rate of exchange and requested that a Payment Schedule be drawn up. By analogy, in proceedings in the Queen's Bench or Family Divisions, the appropriate date would presumably be the date on which a Payment Schedule is filed.[410]

5.33 It is likely that some time will elapse between the date of the order for payment out, the date when application is made for the money to be paid out of court and the date when the cheque is actually issued. This makes the determination of the date for conversion a matter which could be of some financial significance. Of the three dates mentioned, the date of issue of a cheque could be regarded as the "actual" date of payment (although there may of course be a further delay before it is in fact presented for payment). This would be a possible conversion date if it is practicable for the Bank of England to effect the conversion after receipt of instructions expressed in terms of the judgment currency. We invite comment on whether this is practicable or not. If it is not, then since the instruction as to the amount to be paid goes from the Accountant General to the Bank of England, the latest possible conversion date would seem to be the date of the Accountant General's

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407 [1977] 1 Lloyd's Rep. 22.

408 [1977] 1 Lloyd's Rep. 22, 28.

409 See para. 5.31, above.

410 Ibid.

instructions to the Bank. This would however have the disadvantage of casting the burden of making the conversion on the Accountant General, and in practice this date seems unlikely to be very far in time from the date of the application for the payment to be made, i.e. the present date for conversion. It appears, therefore, that unless the Bank of England effects the conversion, it would be difficult in practical terms to find a conversion date much closer to the actual date of payment than the date which applies at the moment.

5.34 If the judgment date were adopted for conversion there would be no difficulty with sterling in court. The sum due under the judgment would be converted into sterling at the date of judgment and the sterling sum in court could simply be paid over and deducted. Similarly, if the sum in court is in the foreign currency of the judgment, there would seem to be no objection to the judgment creditor taking the sum in court in the foreign currency and demanding from the debtor the balance of the judgment debt, either in the foreign currency or in sterling converted as at the date of judgment.

(3) Enforcement Proceedings

(i) Conversion under the present rule[411]

(a) Writ of fieri facias (fi. fa.)

5.35 A judgment creditor, seeking to enforce a judgment by a writ of fieri facias (fi. fa.), prepares a request for the writ of fi. fa. to issue and produces it with the

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411 As to which, see paras. 2.11 and 5.29, above.

judgment to the court, which then issues the writ of fi. fa. by sealing it. The writ directs the sheriff to seize the goods of the judgment debtor in execution. The judgment creditor delivers the writ to the under-sheriff; in practice, this is to a firm of solicitors who act for the sheriff. The next step is for the sheriff to send a bailiff to visit the judgment debtor's premises and seize his goods. How soon he does this after the sheriff receives the writ naturally depends upon pressure of work and manpower. Sometimes the debtor pays up to avoid a sale. Otherwise the sheriff must take enough goods to cover the debt and his own expenses and arrange for them to be sold. Generally the sheriff will auction the goods and this takes time to arrange. Thereafter he pays the judgment creditor what is due to him and deducts his own expenses.[412]

5.36 The House of Lords in Miliangos took the view that the latest practicable date for conversion was "the date when the court authorises enforcement of the judgment in terms of sterling".[413] The Practice Direction gives effect to this by requiring the judgment creditor to endorse the praecipe for the writ of fi. fa. with a certificate as to the rate of exchange then current, and the sterling figure for the judgment calculated at that rate. The drawback with this approach is that there are ample possibilities of delay between the date on which the writ of fi. fa. is issued and the date on which payment is actually made. The sheriff is under a statutory duty[414] to retain for 14 days sums which he recovers in excess of £250 before paying them to the judgment creditor; fluctuations may well occur during this

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412 Subject to s. 41(2) of the Bankruptcy Act 1914 and ss. 325-326 of the Companies Act 1948. See below, para. 5.36, n. 414.

413 See para. 2.11, above.

414 Bankruptcy Act 1914, s. 41(2); Companies Act 1948 s. 326; (each as amended by the Insolvency Act 1976, s. 1(1) and Sch. 1, Part I.)

period to the creditor's disadvantage. Then the sheriff may experience difficulty in finding the debtor; the debtor may move house or, at the time of the sheriff's visit, have insufficient goods on which to levy execution. Even if matters proceed smoothly, some delay whilst the auction is arranged is inevitable. The debtor may also apply to the court for a stay of execution, in which case he may be granted time to pay or to put his affairs in order.[415]

5.37 One possible way of strengthening the judgment creditor's position under the present conversion rule might be to provide a procedure which would allow him to apply for the conversion rate to be updated in appropriate cases. However, we doubt whether this would be practicable. Where there is more than one creditor, the question of priority between creditors arises. The sheriff is under a duty[416] to note the date and hour when he receives each writ of fi. fa., and that determines priority between creditors. If a creditor whose judgment was originally expressed in foreign currency could withdraw his writ of fi. fa. for the conversion rate to be updated, the question would arise as to how this should affect his priority. As it would be in his interest to do this only if he could thereby increase the amount due to him under the writ, such a procedure would inevitably prejudice creditors below him in the order of priority. It may therefore be that the only fair solution is for the creditor to be allowed to withdraw his writ of fi. fa. and issue a new one at the current conversion rate, taking the risk of losing his original place in the order of priority. Such a solution would also avoid any practical difficulties which might arise if a creditor were permitted temporarily to withdraw his writ of

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415 R.S.C., O. 47, r. 1.

416 Supreme Court Act 1981, s. 138, replacing Sale of Goods Act 1893, s. 26.

fi. fa. in order to have the conversion rate updated. It would, however, leave the creditor bearing the cost of the discontinued execution, which might be considerable.

5.38 The possibility of exchange rate fluctuations between the date on which the process of enforcement of the judgment by writ of fi. fa. is started and the date on which the sum owing is paid gives rise to a further question. After the judgment debt has been converted into sterling for enforcement purposes, is it still open to the debtor to discharge the judgment debt by paying the amount of foreign currency specified in the judgment? Let us take as an example a judgment for 9000 French francs, worth, on the date when the court authorises enforcement of the judgment in terms of sterling, £1000. The writ of fi. fa. is issued for £1000 but after the date of issue of the writ of fi. fa. the franc falls to ten francs to the pound. If at this stage the debtor may discharge the judgment debt by a payment of 9000 francs, he will be paying, in terms of sterling, only £900, i.e. £100 less than the £1000 for which the writ of fi. fa. was issued. It is not at all clear from Miliangos or the ensuing body of case law what the present state of the law is. If we consider first of all the position of the sheriff seeking to execute a writ of fi. fa., his instructions are to recover a sum of money in sterling; under section 12 of the Judgments Act 1838 he is empowered to seize money or bank notes; however, whether this would include foreign currency and, if so, whether he would pass it on to the judgment creditor or convert it himself into sterling is not clear. Presumably it would be so converted and deducted from the sterling sum which, once enforcement proceedings have been initiated, represents the original foreign currency judgment. However this may be, in our view it would not be practicable for the sheriff to do other than that which he is now instructed to do in the writ, namely recover a sum of money in sterling. But this still leaves for discussion the

question whether the judgment debtor may, by paying the sum in foreign currency stipulated in the judgment, satisfy the judgment notwithstanding that the enforcement procedure has already been set in motion and the conversion date into sterling has now passed.[417] In the example given above, can the debtor satisfy his liability by the payment to the creditor of 9000 francs even though that sum is now worth fewer pounds than are stated in the writ of fi. fa.? We find this a difficult problem to resolve because there are disadvantages with any solution. To allow the judgment to be satisfied by payment of the foreign currency after the start of the execution process and conversion of the debt into sterling permits the judgment debtor to seek to take advantage of later fluctuations in the exchange rates and gives him the incentive to delay should the currency in which the judgment debt is expressed happen to be falling against sterling. To deny the debtor the right to satisfy the judgment in the terms in which it was given, namely foreign currency, seems to run counter to the view expressed in Miliangos that "[t]he creditor has no concern with pounds sterling: for him what matters is that a Swiss franc for good or ill should remain a Swiss franc".[418] We have come to the provisional conclusion that this latter approach should be followed and that the debtor should be allowed to discharge his debt and satisfy the judgment by payment in the foreign currency notwithstanding that the date for conversion into sterling has passed. We should welcome views on this problem and on the related problem raised in paragraph 5.37, above.

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417 This problem may arise whenever enforcement of a judgment in foreign currency is sought. It is not limited to enforcement by means of the writ of fi. fa. but can also arise in the context of the other methods of enforcement discussed below, paras. 5.39-5.49.

418 [1976] A.C. 443, 466 per Lord Wilberforce.

(b) Garnishee proceedings and charging orders

5.39 The judgment creditor can seek to enforce a judgment by making an application to attach a debt (or a sufficient part of it) owed to the judgment debtor. If, for example, C has obtained judgment against D for £500 and D is in credit with X Bank[419] to the extent of £600, C can apply to garnish the account to the extent of £500. C supports his application to the court by an affidavit stating inter alia the amount of the judgment debt remaining unpaid and that to the best of his information or belief X Bank is indebted to D.[420] The first order granted on the application can only be an order nisi, specifying the date for the next hearing and, in the meantime, attaching a sufficient part of the debt.[421] C must then serve the bank (known as the garnishee) with the order nisi and, once the bank has been served, it is bound to hold the money "frozen" pending the final outcome. If, at the second hearing, the bank does not appear or does not dispute that it holds D's money, the bank may be ordered by the court to pay the appropriate sum over to C.[422] The procedure for obtaining a charging order on a debtor's land[423] is very similar and takes effect as though the debtor had created an equitable charge over the land in favour of the judgment creditor.

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419 The garnishee is commonly, but not necessarily, a bank.

420 R.S.C., O. 49, r. 2.

421 R.S.C., O. 49, r. 1(2).

422 R.S.C., O. 49, r. 4.

423 The procedure for charging orders is now governed by the Charging Orders Act 1979, which implemented the Law Commission's Report on Charging Orders (Law Com. No. 74, 1976). Under that Act a Charging Order can be obtained not only in respect of land, but also in respect of Government stock, shares, funds in court, concurrent interests in land and beneficial interests under settlements.

5.40 There appear to be four situations in which problems relating to foreign money may have to be taken into account in the context of garnishee proceedings. The first case that may arise is where there is a judgment in foreign currency which the judgment creditor wishes to enforce by garnishee proceedings by attaching a sterling debt. We believe that this will be by far the most usual case, and the Practice Direction in effect pinpoints the date specified in the affidavit in support of the application for a garnishee order nisi as the notional date of payment, in the Miliangos sense, i.e. the date on which enforcement is authorised and on which the foreign currency of the judgment must be converted into sterling. There could well be a lapse of time between this date and the date on which the garnishee is served with the order nisi and the money becomes "frozen", and there will be a longer lapse of time between this date and the date on which the money is paid. During these periods currency fluctuations may obviously take place. The justification for conversion as at this date appears to be that, just as the sheriff must know how much of a debtor's property to seize under a warrant of execution, so must the garnishee be told how much of the debtor's money to "freeze". A line must be drawn somewhere, and the making of an order nisi is the last stage at which the court is involved before the money becomes "frozen". It is arguable that the court should make the garnishee order nisi in foreign currency and leave it to the garnishee to make the conversion, but it might be thought unreasonable to expect a garnishee other than a bank to calculate the necessary currency conversions.[424] It would perhaps be

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424 It seems probable that where the debt attached is a sterling debt the garnishee is more likely not to be a bank than where the debt attached is a foreign currency debt. Attachment of foreign currency debts is considered in the following paragraphs.

theoretically possible for the court to distinguish between different types of garnishee when making the garnishee order. However, the solution adopted by the Practice Direction appears to us to be the most practicable.

5.41 The second situation is the converse of that discussed in the preceding paragraph and arises where the plaintiff has a judgment in sterling but seeks a garnishee order to attach a foreign currency debt owed to the defendant in England, an event likely to be far more common since the lifting of exchange controls. It seems likely that in practice the debt in question would normally be a foreign currency bank account, and the Court of Appeal, in Choice Investments Ltd. v. Jeromnimon,[425] has made it clear that a foreign currency account may be attached in such circumstances in order to satisfy an English sterling judgment. A procedure for the conversion of the sterling sum expressed in the garnishee order nisi into the currency of the bank account was suggested by Lord Denning M.R. On receipt of the order nisi, the bank should convert the sterling sum into the foreign currency and attach the appropriate sum of foreign currency to meet the sterling judgment debt and costs. On the making of the order absolute, the bank must pay into court, or to the judgment creditor, the sterling equivalent of the attached amount of currency or of the judgment debt and costs, whichever be the lesser. This means that for the purpose of the garnishee proceedings the limit of the judgment debtor's liability in terms of the foreign currency is settled at the time of the bank's conversion on receipt of the order nisi. In our view, this solution would appear to be both just and practicable.

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425 [1981] 1 Q.B. 149.

5.42 The third situation to be considered is also covered by the Practice Direction. Where the judgment creditor desires to attach a debt due to the judgment debtor in the same foreign currency as that in which the judgment debt is expressed, a garnishee order may be made to attach that debt and the garnishee order will be expressed in terms of that foreign currency. In this situation no question of conversion will arise.

5.43 The fourth situation is really a combination of the earlier ones and is not covered expressly by the Practice Direction. It may be the case, for example, that the judgment debtor has a foreign currency bank account but in a currency other than that in which judgment has been expressed. The recent decision of the Court of Appeal[426] makes it clear that a foreign currency account may be attached by a garnishee order; and there is no doubt that a garnishee order may be used to enforce a judgment expressed in a foreign currency. What is not clear is whether in this fourth situation the courts will make the garnishee order in the foreign currency of the judgment, or in the foreign currency of the bank account, or require it to be made in sterling. The significance of the choice relates to the conversion date. If the order is made in sterling, it will be expressed to be for such specified sum of sterling as was the equivalent of the foreign currency judgment debt at the date specified in the affidavit in support of the application for the order nisi. There will then have to be a further conversion by the garnishee from sterling into the foreign currency of the bank account in question. It might be more practicable to make the garnishee order in terms of the foreign currency of the judgment and then require the bank to convert that currency into the

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426 Choice Investments Ltd. v. Jeromnimon, discussed above, para. 5.41.

currency of the bank account, without going through the intermediate stage of conversion into and out of sterling.[427] Alternatively, the judgment creditor might be permitted to apply for a garnishee order expressed in terms of the currency of the relevant bank account converted from the currency of the judgment as at the date of his application. Here again the question arises whether it is the court or the garnishee who should make any necessary currency conversion. We should welcome views on these possible solutions.

5.44 There remains for consideration the issue already discussed in the context of the writ of fi. fa.,[428] of the effect of payment of the debt in the foreign currency specified in the judgment after that sum has been converted into sterling for the purposes of the issue of a garnishee order nisi. We expressed the provisional view in our discussion of the writ of fi. fa. that the debtor should be allowed to discharge his debt and satisfy the judgment by payment in the foreign currency notwithstanding that the date for conversion into sterling had passed, and we take the same view with regard to garnishee proceedings.

5.45 Turning to charging orders, there is no reported case on the use of charging orders to enforce judgments expressed in foreign currency. The Practice Direction indicates that conversion into sterling should be effected on principles similar to those applicable to a writ of fi. fa. There are undoubted merits in that approach, both of

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427 Support for such an approach may be found in the dictum of Lord Denning M.R. in Choice Investments Ltd. v. Jeromnimon, [1981] 1 Q.B. 149, that "[t]he judgment creditor may have a judgment in Swiss francs, and then find that his debtor has a credit at the bank in United States dollars. I see no reason why a garnishee order nisi should not be made to attach so many U.S. dollars as would be needed to meet the judgment".

428 See para. 5.38, above.

simplicity and finality. We wonder, however, whether there is not a danger that to settle on the date of the making of the charging order as the appropriate conversion date could lead to a very long time-lag between that date and the payment of the debt or the sale of the property charged. It may for good commercial reasons be in the interest of both debtor and creditor to allow a charging order to run for a considerable period. We should therefore welcome views on the question whether it would be desirable to permit charging orders to be expressed in terms of foreign currency, with the date for conversion into sterling being the date of voluntary payment of the debt or of sale by the creditor of the property charged after obtaining a court order for sale.

(c) Attachment of Earnings

5.46 Attachment of earnings as a method of enforcing a judgment is available in the county court only; but a High Court judgment may be enforced by obtaining an attachment of earnings order from the county court.[429] The application for attachment of earnings is issued and served on the debtor who is required to supply evidence as to his means. If the court makes the order sought it operates as an instruction to the debtor's employer to make deductions from the debtor's earnings and to pay the amounts deducted to the collecting officer of the court, who pays the sums collected over to the judgment creditor from time to time until the debt is satisfied.

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429 Attachment of Earnings Act 1971, ss. 1(2)(b) and 2(c)(i); C.C.R. O. 25, rr. 77-94.

5.47 In deciding what deductions to order, the court will look at the size of the debt and the debtor's earnings, resources and needs. The order specifies the normal deduction rate but also the "protected earnings rate" which is the figure below which the debtor's "take home" pay must not be reduced by the deductions. It is consequently essential for the court to have the judgment debt converted into sterling at this point so that all parties can estimate how long it will be before it is satisfied by the deductions.

5.48 The current practice in the county court appears to be to follow the Practice Direction, with suitable amendments, which would mean in the case of an attachment of earnings application that the judgment creditor would have to state the current rate of exchange and value of the judgment debt in sterling in his affidavit in support of his application. There is inevitably a delay between the date of that affidavit and the date of the hearing of the application, but it is not clear whether either party can apply to have the rate adjusted to bring it up to date at that stage. Once the order is made, it may of course be years before sufficient deductions have been made to discharge the sterling value of the judgment debt, and the relationship which the original foreign money judgment will bear to the sterling sum eventually recovered at the time when the creditor receives the final instalment must be entirely a matter of chance. At first sight this suggests that it ought to be possible for the rate of exchange to be updated during the period for which the attachment of earnings order is in effect. On reflection, however, we think this would be undesirable. Once the debt has been converted into sterling, at the rate applicable at the date of the application, both parties will know the period of time for which the deductions are likely to be made. For this period to vary according to fluctuations in the exchange rate would in our view be impracticable and would

create uncertainty. Our provisional view is therefore that there should be no change in what appears to be the present practice of taking the date of the application for an attachment of earnings order as the appropriate date for conversion of the judgment debt into sterling.

(d) Equitable execution

5.49 All divisions of the High Court have jurisdiction to appoint a receiver by way of equitable execution, or to make a charging order over a fund in which the debtor has an interest, or in appropriate cases to grant an injunction to enforce a judgment. These methods are rarely used but the appointment of a receiver is by far the most common of them. A receiver can be appointed only in respect of a specific item or items of property; for example, rents accruing but not accrued to the debtor, or the income of a trust fund. The receiver will usually collect periodical income of some sort so that, as far as a date for conversion is concerned, similar considerations arise as in the case of attachment of earnings.[430]

(e) Wholly or partially unsuccessful enforcement proceedings

5.50 The conversion problem posed by wholly or partially unsuccessful enforcement proceedings can best be explained by way of an example. A judgment creditor applies for a garnishee order nisi against the judgment debtor's bank. The debt is converted into sterling at the date of the order nisi, in accordance with the current practice. However, before the bank has been served with the order, the debtor withdraws his money, so the proceedings fail.

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430 See paras. 5.46-5.48, above, and paragraph 13 of the Practice Direction.

The creditor then applies for a writ of fi. fa. Can he up-date the conversion of his foreign currency judgment, or is he fixed with the conversion rate at the date when the court first authorised enforcement of his judgment? This is a problem which arises under the present Miliangos rule; it would not arise if the conversion date were the date of actual payment or the date of judgment. Oliver J. had to consider a similar question in Re Dynamics Corporation of America.[431] He discussed the case of a creditor who seeks unsuccessfully to levy execution and subsequently petitions to wind up the debtor company and said:

> "... I cannot conceive that the House of Lords or the Court of Appeal, or anyone else, would consider that his proof in the subsequent liquidation would have to be limited to the amount calculated at the rate of exchange prevailing at the date when he swore the affidavit leading to the unsuccessful execution, whilst every other foreign creditor would prove for a higher amount based upon a subsequent and lower rate of exchange."[432]

5.51 Common sense suggests that it is equally difficult to imagine a judgment creditor, who makes one unsuccessful attempt to enforce his judgment and tries again, being held to the rate of conversion which applied at the time of his first attempt. Arguably, however, such a rule was laid down by Miliangos; and Oliver J's observations may be regarded as merely referring to an exception for the particular case of a subsequent liquidation. In our view a judgment creditor ought not, in any case, to be held to the rate of conversion applicable at the time of his first unsuccessful attempt to enforce the judgment.

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431 [1976] 1 W.L.R. 757.

432 Ibid., p. 774.

5.52 A related question arises where the judgment creditor seeks to enforce the judgment by writ of fi. fa. but the debtor applies for a stay of execution.[433] The present position is that the conversion rate is that in force on the date of initiation of the process of enforcement, i.e. normally the date when the writ of fi. fa. is issued, because it is that enforcement of which a stay of execution is granted. The question remains whether it is desirable for the creditor to be fixed with that conversion rate or whether, for example, the terms on which execution is stayed might provide for an updating of the rate. Our provisional conclusion is that no alteration of the present position is needed. The judgment creditor is not without remedy where there has been a fluctuation in exchange rates because he can always withdraw his writ and issue a new one. We should welcome views on this question and on the view we express in the previous paragraph.

(ii) Conversion at the actual date of payment

5.53 It was generally assumed by the House of Lords in Miliangos that it would not be practicable to choose the actual date of payment for conversion.[434] In the paragraphs which follow this assumption is examined in relation to the main methods of enforcing a foreign currency judgment.

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433 Under R.S.C., O. 47, r. 1.

434 [1976] A.C. 443, 501 per Lord Fraser: "... theory must yield to practical necessity to this extent that, if the judgment has to be enforced in this country, it must be converted before enforcement".

(a) Writ of fieri facias

5.54 In theory there appears to be no reason why the writ of fi. fa. to enforce a foreign currency judgment should not show the judgment debt in foreign currency and cast on to the sheriff the burden of converting it into sterling on the actual date of payment.[435] However, although there may be instances where this might be possible, in general it seems clear that it would be impracticable, especially in view of the inherent delays in the process of execution, and the fact that the sheriff would have to be in constant touch with a bank in respect of what might be a quite obscure currency.

(b) Garnishee proceedings and charging orders

5.55 Where the judgment debt is expressed in foreign currency and the debt to be attached is expressed in sterling, the present practice is to convert the foreign currency of the judgment into sterling at the date of the order nisi.[436] The creditor does not actually receive the sum of money attached until the court has ordered the garnishee (at a second later hearing) to pay the money over. However, the very latest date at which conversion could be carried out must be the date on which the garnishee receives the order nisi and "freezes" the debtor's money, because the garnishee must know how much sterling to "freeze". The issues which arise in this context seem to us to be identical with those which arise in the context of conversion under the present rule, and which have been considered above at paragraph 5.40.

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435 See as to the role of the sheriff as a "public functionary" Hooper v. Lane (1857) 6 H.L. Cas. 443, 549-550, per Lord Cranworth L.C., 10 E.R. 1368, 1410, referred to in Re a debtor (No. 2 of 1977), Ex parte the debtor v. Goacher [1979] 1 W.L.R. 956, 961.

436 See para. 5.40, above.

(c) Attachment of Earnings

5.56 It is very difficult to conceive of a conversion date for attachment of earnings which could be made to work in practice and which is later than the date when the order is made. To convert each sterling deduction from salary into the foreign currency of the judgment on the date it is made would be a complicated procedure and a burden to the court; moreover, if over the period of the debt collection, sterling happened to be falling against the currency in which the judgment is expressed, it would take the debtor much longer than anticipated to satisfy the judgment debt; although of course the position would be reversed if sterling were appreciating over the period of collection. It seems in any event clear to us that any such system would be too complex and time-consuming to be of any practical value.

(d) Equitable execution

5.57 Considerations similar to those which apply in the case of the attachment of earnings procedure also apply to equitable execution.

(iii) Conversion at the date of judgment

5.58 Another alternative to the present form of judgment would be to order the judgment debtor to pay the judgment creditor the sum due under the judgment in foreign currency, or its sterling equivalent converted at the date of judgment. The objections to such a rule are not on the whole procedural. From the procedural point of view it is convenient to value the judgment debt in sterling at an early stage and that its sterling value should remain constant thereafter. This would have the consequence that it could be enforced like any ordinary English judgment.

5.59 The main objection to the judgment date rule would appear to be that it is further in time from the ideal conversion date, i.e., the actual date of payment, than the date chosen by the House of Lords in Miliangos.[437] The choice between the present rule and the judgment date rule as a matter of substantive law is considered above.[438]

(iv) Conclusion

5.60 By and large, our examination of the present procedures relating to the satisfaction of judgments expressed in foreign currency[439] leads us to support the view of the House of Lords in Miliangos that the latest practicable date for conversion is the date on which the court authorises enforcement of the judgment in terms of sterling.[440] This approach accepts that the philosophy behind the decision in Miliangos, that "[t]he creditor has no concern with pounds sterling: for him what matters is that a Swiss franc for good or ill should remain a Swiss franc",[441] must in part give way in the face of the practical considerations relating to the satisfaction of judgment debts. In relation to the payment out of money in court, the present practice appears to be satisfactory. We have seen that, where it becomes necessary to institute enforcement proceedings, the present rule does not in practice ensure

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437 In Miliangos, Lord Wilberforce, when considering the judgment date as a possible conversion date, remarked that it might subject the creditor to considerable currency risk, particularly where there was an appeal: [1976] A.C. 443, 469.

438 Para. 3.15.

439 Paras. 5.28-5.52, above.

440 See para. 2.11, above.

441 [1976] A.C. 443, 466, per Lord Wilberforce.

that the creditor actually receives the approximate equivalent in sterling of his foreign currency judgment; the delays inherent in the process of enforcement make it impossible to guarantee this. However, our consideration of alternative conversion dates[442] leads us to the view that where enforcement is necessary the actual date of payment is not, in practical terms, a real alternative to the present conversion date and that the date of judgment, though it has attractions from the point of view of procedure, does not accord with the Miliangos philosophy.

5.61 Finally it should be mentioned for completeness that the question of a conversion date would not arise after proceedings for its enforcement, where a foreign currency judgment is satisfied in the foreign currency in which it is expressed.[443] However, this seems unlikely in all but a very few cases, though it could arise where the judgment debtor happens to have a debt in the foreign currency concerned which the judgment creditor is able to attach.[444]

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442 Paras. 5.53-5.59, above.

443 As to whether this is possible, see para. 5.38, above.

444 See para. 5.42, above.

PART VI: SUMMARY OF PROVISIONAL CONCLUSIONS

6.1 We indicated in Part I of this Working Paper that our work has been carried out on a moving staircase of judicial development. In our comments in Parts II to V we have welcomed this development both in principle and as to many of its details, though there are a number of procedural matters which may require amendment or clarification by means of Practice Directions or rules of court. There are, however, some substantive issues which have not yet been fully worked out by the courts and there are also a small number of relatively minor areas in which we believe the present state of the law to be not entirely satisfactory. We have reached the provisional conclusion that it would be inappropriate, at the present stage of judicial development of this whole field of law, to propose specific legislation to deal even with the minor areas where the law is, in our view, unsatisfactory. We appreciate that in a Working Paper it is unusual for us not to make provisional proposals for reform by legislation where we have found defects in the present law, and we would therefore particularly welcome comments on our conclusion that isolated legislative activity in this field is at present undesirable.

6.2 Our provisional conclusions relate to the matters discussed in Parts III, IV and V, as follows.

Part III: A Reappraisal of the Present Substantive Law: Proposals for Reform

Major Issues of Policy

1. The principle underlying the decision in Miliangos and the consequences which flow from it are greatly to be preferred to the rules which it superseded.

(paragraph 3.7)

2. Legislative intervention is not required to determine the question whether a plaintiff should be able to obtain judgment in sterling in cases where the relevant obligation is properly to be expressed in a foreign currency; the matter can be left for judicial decision.

(paragraph 3.11)

3. The present rule that conversion of a foreign currency judgment into sterling is to be effected at the date of actual payment or the date on which the court authorises enforcement of the judgment, whichever is the earlier, provides the best practical implementation of the Miliangos philosophy, and should therefore be retained as the general rule.

(paragraphs 3.12-3.16)

4. The parties to an agreement should be free to agree:

(a) the date and rate of any conversion; and

(b) that payment in England should be made in a particular foreign currency alone, that is, with no option for the debtor to pay in sterling.

(paragraph 3.19)

5. It should be possible to obtain and enter judgment in a foreign currency alone (in which case the judgment debtor would not have the option of satisfying the judgment in sterling); but a successful plaintiff should not have a right to judgment in that form without leave of the court.

(paragraph 3.23)

Matters of Detail

Arbitral Awards

6. Where, on an application made under section 26(1) of the Arbitration Act 1950, the leave of the court has been given to enforce an award as if it were a judgment,

(a) if judgment is actually entered, such judgment should be expressed in the form approved in Miliangos in accordance with proposal 3 above;

(b) if judgment is not actually entered, then for the purpose only of calculating conversion into sterling, judgment should be presumed to have been entered in the form approved in Miliangos.

(paragraph 3.26)

7. We propose that, in an action at common law brought on an arbitral award expressed in foreign currency, judgment should be given in the form approved in Miliangos.

(paragraph 3.27)

Set-off

8. Views are invited on the problem of set-off where different currencies are involved; we canvass three possible solutions, and provisionally favour one which would exclude the operation of set-off in this situation.

(paragraphs 3.29-3.35)

Limitation of a shipowner's liability under section 503 of the Merchant Shipping Act 1894

9. (a) Where the damages in foreign currency, when converted into sterling as at the date of judgment, do not exceed the statutory limit, judgment should be expressed in that

currency in accordance with the form approved in Miliangos.

(b) Where the damages in foreign currency, when converted into sterling as at the date of judgment, are higher than the statutory limit, the defendant should be required to pay the amount of the statutory limit expressed in sterling or (at his option) such sum in the relevant foreign currency as is the equivalent of the statutory limit at the date of actual payment or the date when the court authorises enforcement of the judgment, whichever is the earlier.

Views are invited as to whether (b) is practicable.

(paragraph 3.37)

Order for an account

10. Where the constituent items of the account are expressed in different currencies, no problem arises save where the court may have to choose a date on which to convert the different currencies into the one in which the final balance of the account is to be expressed. We think that this problem should be solved along the same lines as those to be applied in the case of set-off. (See proposal 8, above).

(paragraph 3.38)

Claims to share in a fund

(1) On the liquidation of a company and on bankruptcy

11. (a) In the case of a compulsory liquidation of an insolvent company the date of conversion into sterling should, as at

present, be the date of the winding-up order.

(paragraphs 3.39-3.43)

(b) On a bankruptcy, a similar rule should apply; and the closest equivalent to the date of the winding-up order seems to be that on which the receiving order is made.

(paragraphs 3.39-3.43)

(c) Whatever may be held to be the corresponding date in the case of the voluntary winding-up of an insolvent company, the matter should be left for judicial decision.

(paragraph 3.44)

(d) No special rule, different from the proposals in (a) to (c) above, is required in the case of the winding-up of companies and of bankruptcies where in either case it subsequently transpires that there is no insolvency; but the development of the appropriate rule should be left for judicial decision.

(paragraphs 3.45-3.47)

(2) Section 504 of the Merchant Shipping Act 1894

12. Where section 504 of the Merchant Shipping Act 1894 applies, any necessary conversion into sterling, in the case where the total amount of all the claims exceeds the statutory limit of liability expressed in sterling, should be effected as for the liquidation of an insolvent company, with the substitution of the date of the decree of limitation for that of the winding-up order; but the matter should be left for judicial decision.

(paragraph 3.50)

(3) Other claims to share in a fund

13. In the case of a payment out of a fund (whether a foreign currency fund or not, and whether the fund is in court or not) amounts found to be due should be expressed in the appropriate currency and conversion effected as near to the date of actual payment as is practicable.

(paragraph 3.52)

14. Where there is or may be a doubt as to whether the fund is sufficient to meet every claim on it, a date should be fixed as at which claims are to be valued and any necessary conversion effected. What that date should be will depend on the circumstances of the case but should be left for judicial determination.

(paragraph 3.53)

Foreign Judgments

15. (a) On the basis that the Miliangos principle will be applied by the courts to the recognition of foreign judgments, we believe the present position to be satisfactory.

(b) No difficulty is likely to arise from the fact that the E.E.C. Judgments Convention is silent on the matter of conversion.

(paragraphs 3.55-3.56)

Maintenance Orders

16. No change is necessary in the practice which has been adopted for conversion into sterling of maintenance orders of an English court expressed in a foreign currency.

(paragraph 3.58)

17. (a) In principle, the same basis of conversion into sterling ought to apply to foreign maintenance orders registered in England as to foreign judgments which it is sought to enforce here. Views are invited as to whether the practical or administrative problems which might be created by amendment of the present rule as to maintenance orders contained in section 16 of the Maintenance Orders (Reciprocal Enforcement) Act 1972 are such as to outweigh the consideration that the rules governing all conversions of foreign money obligations into sterling ought to be based on the same principle.

(paragraph 3.61)

(b) If it is impracticable to amend the present statutory rule, then a similar rule should be introduced for determining the conversion date in the case of maintenance orders recognised under the 1968 E.E.C. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.

(paragraph 3.62)

Compensation for loss sustained by a creditor in consequence of failure to pay on the due date

18. We invite comments on the question of compensation for loss resulting from currency fluctuations sustained by a creditor in consequence of failure to pay a debt on the due date. However, we see no reason for excluding compensation for such loss, if it is specific and foreseeable, from the ambit of an award of special damages.

(paragraphs 3.64-3.68)

Should the court be empowered to give judgment in foreign currency in claims for damages in contract or in tort for (i) loss of future profit or (ii) death or personal injury?

19. The issues involved in these questions can be most appropriately resolved by the process of judicial development.

(paragraph 3.70)

Pecuniary Legacies

20. The conversion into sterling of legacies expressed in foreign currency should continue normally to be made as at the end of the executor's year.

(paragraph 3.72)

Matters which have not arisen for decision after Miliangos, and do not in our view give rise to problems

21. The following matters do not give rise to problems:

(1) Salvage awards

(2) An order for an account (save as mentioned in paragraph 3.38)

(3) A claim for restitution against a defaulting trustee

(4) Declaratory judgments

(5) Bills of Exchange

(6) The redemption of a mortgage securing a loan in foreign currency

(7) Maintenance orders made in foreign currency by an English court.

(paragraphs 3.73-3.79)

Part IV: Interest

22. It is at present the law that the right to claim interest on the basis of a contractual term is a matter of substance for the lex causae. This is probably also the case when interest on a debt is claimed as damages, or where interest is claimed on a sum payable as damages for breach

of contract or for tort. There should be no change in this rule.

(paragraph 4.11)

23. The court, when exercising its discretion under the Law Reform (Miscellaneous Provisions) Act 1934, should award interest to the plaintiff at the rate applicable in the context of the currency of judgment.

(paragraph 4.21)

24. Where interest is claimed by virtue of a term in a contract, the validity of such a term and the rate at which interest is to be paid should, as at present, be governed by the proper law of the contract.

(paragraph 4.22)

25. We seek views as to whether the law governing the rate of interest on damages should be the law of the forum, the lex causae or some other law; our tentative view is that the rate of interest should be determined by reference to the law of the forum.

(paragraph 4.28)

Part V: Practical Implications

Making the claim

26. The adaptation of existing procedures by the Practice Direction for the purpose of making claims in foreign currency appears to be generally satisfactory subject to the points made below which affect its operation.

(paragraph 5.4)

Fixed Costs

27. The rules in the Practice Direction as to fixed costs in the case of default judgments should in principle correspond with the rules which apply to Order 14 costs.

The plaintiff should have the opportunity of certifying the rate of exchange current at the date of entering judgment for the purpose of calculating the fixed costs on entry of judgment.

(paragraph 5.9)

Payment into Court

28. Defendants to actions for unliquidated damages, (to whom no reference is made in the Practice Direction), as well as defendants to actions for debts or liquidated demands, should be permitted to make payments into court in foreign currency.

(paragraph 5.16)

29. It should be stated expressly that foreign currency cannot be paid into court in respect of a purely domestic sterling claim.

(paragraph 5.17)

30. Except in the case referred to in proposal 31 below, in the case of a foreign money obligation the defendant should have the option of paying into court in

(a) the currency claimed by the plaintiff; or
(b) sterling; or
(c) such third currency as the defendant alleges in his notice of payment into court to be the currency in which the plaintiff's claim should properly be expressed. (The defendant would take the risk that the court might not give judgment in that currency).

(paragraph 5.21)

31. In the case of a payment into court accompanied by a plea of tender before action, the defendant should be

permitted to pay into court either sterling or the currency in which he pleads that he has made his tender.

(paragraph 5.22)

32. We seek views on our provisional conclusion that the flexibility of the present practice as to the date of conversion of money paid into court is preferable to the adoption of a fixed date for such conversions.

(paragraphs 5.26-5.27)

Enforcement of a Judgment Debt

Payment out of money in court

33. The date used for conversion under the existing procedure (namely the date of the application for payment out) appears to be as close as is practicable to the actual date of payment; however, if the Bank of England can effect the conversion, it might be possible to substitute the date on which the cheque is issued. Views are invited as to whether the latter is practicable.

(paragraph 5.33)

Enforcement Proceedings

(i) On the basis of conversion at the actual date of payment

34. Our provisional view is that conversion as at the actual date of payment (although theoretically the "ideal" date) would in many cases be impracticable.

(paragraphs 5.53-5.57)

(ii) On the basis of conversion at the date of judgment

35. The date of judgment is not a satisfactory alternative because it is further from the "ideal" conversion date (namely the actual date of payment) than the date

selected under the present rule.

(paragraphs 5.58-5.59)

(iii) On the basis of conversion under the present rule (namely at the date of actual payment or the date the court authorises enforcement, whichever is the earlier)

36. We favour the existing rule on the ground that it provides the latest practicable date for conversion.

(paragraphs 5.60-5.61)

(a) Writ of fieri facias

37. Views are invited as to whether a judgment creditor who has obtained a foreign currency judgment and issued a writ of fi.fa. should be permitted:

(a) thereafter from time to time to update the conversion rate used for the purposes of the latter; or

(b) to withdraw his writ of fi.fa. and issue a new one at a more recent conversion date, taking the risk of losing his original place in the order of priority.

We doubt whether solution (a) would be practicable, and we tentatively favour solution (b).

(paragraph 5.37)

38. Views are invited on our provisional conclusion that a debtor should be allowed to satisfy a foreign currency judgment by payment in the foreign currency notwithstanding that a process of enforcement has already been set in motion for the purposes of which a conversion into sterling has been made.

(paragraph 5.38)

(b) Garnishee Proceedings and Changing Orders

39. Where it is sought to attach a foreign currency bank account in England pursuant to a sterling judgment, the procedure for conversion suggested by Lord Denning M.R. in Choice Investments Ltd. v. Jeromnimon [1981] 1 Q.B. 149 appears satisfactory.

(paragraph 5.41)

40. We propose no change in the present position under the Practice Direction in the cases of

(a) a judgment in foreign currency, and a sterling debt; or

(b) a judgment in the same foreign currency as that of the debt in question.

(paragraphs 5.40, 5.42)

41. Where it is sought to attach a foreign currency bank account in England pursuant to a judgment expressed in a different foreign currency, we seek views as to whether, for example, the court should make the garnishee order:

(a) in the foreign currency of the judgment; or

(b) in the foreign currency of the bank account; or

(c) in sterling.

(paragraph 5.43)

42. As with the writ of fi.fa., we are of the provisional view that the debtor should be permitted to discharge his debt by paying the foreign currency specified in the judgment even after that sum has been converted into sterling for the purposes of a garnishee order nisi.

(paragraph 5.44)

43. We seek views as to whether it would be desirable to permit charging orders to be expressed in terms of

foreign currency, the date for conversion into sterling being the date of voluntary payment of the debt or of the sale by the creditor of the property charged pursuant to a court order.

(paragraph 5.45)

(c) Attachment of Earnings

44. There should be no change in what appears to be the present practice of taking the date of the application for an attachment of earnings order as the appropriate date for conversion of the relevant judgment debt into sterling.

(paragraph 5.48)

(d) Equitable Execution

45. The considerations which are relevant in the case of attachment of earnings also apply to a receivership by way of equitable execution.

(paragraph 5.49)

(e) Wholly or partially unsuccessful enforcement proceedings

46. Views are invited on our provisional conclusion that in a second or subsequent attempt to enforce a judgment, a judgment creditor ought not to be held to the rate of conversion which applied at the time of any previous but unsuccessful attempt to enforce the judgment.

(paragraph 5.51)

47. Views are invited on our provisional conclusion that no provision should be made for updating the conversion rate where a judgment creditor seeks to enforce a judgment by writ of fi.fa., but the debtor applies for a stay of execution.

(paragraph 5.52)

APPENDIX A

JOINT WORKING PARTY ON FOREIGN MONEY LIABILITIES

Dr P.M. North	(Law Commission) Chairman
Mr A.E. Anton, C.B.E.	(Scottish Law Commission)
Mr R.D.D. Bertram	(Scottish Law Commission)
Mr R. Brodie	(Scottish Courts Administration)
Mr R. Cassels	(Royal Bank of Scotland)
Mr A. Cope	(Law Commission)
Mr R.J. Dormer	(Law Commission)
Miss N. O'Flynn	(Department of Trade)
Mr A. Parry	(Foreign and Commonwealth Office)
Mr P.K.J. Thompson	(Lord Chancellor's Department)

APPENDIX B

LIST OF THOSE COMMENTATORS ON WORKING PAPER NO. 66 (1976) WHO COMMENTED ON INTEREST ON FOREIGN MONEY OBLIGATIONS

City of London Solicitors Company
Robert Justice
The Law Society
London Maritime Arbitrators Association
Senate of the Inns of Court and the Bar

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