The Law Commission

(LAW COM. No. 124)

PRIVATE INTERNATIONAL LAW

FOREIGN MONEY LIABILITIES

REPORT ON A REFERENCE UNDER SECTION 3(1)(*e*)
OF THE LAW COMMISSIONS ACT 1965

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FOREIGN MONEY LIABILITIES

CONTENTS

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THE LAW COMMISSION

PRIVATE INTERNATIONAL LAW

Item XXI of the Third Programme

FOREIGN MONEY LIABILITIES

To the Right Honourable The Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor of Great Britain

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 made to the Scottish Law Commission. These terms of reference were mainly directed to the question whether the United Kingdom should accede to the Council of Europe Convention on Foreign Money Liabilities (1967), and early in 1972 both we and the Scottish Law Commission were asked by the Foreign and Commonwealth Office to advise also on the question of United Kingdom participation in the Council of Europe Convention on the Place of Payment of Money Liabilities (1972). In 1981 the two Commissions submitted a joint report,[1] recommending that the United Kingdom should not become a party to either Convention.[2] However, our terms of reference also cover the question whether our own law is in need of reform in the general field of foreign money liabilities, and that question forms the subject matter of this report.

1.2 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 gave to the Commission in the preparation of its working paper on this topic.

1.3 Since 1972, when we were first invited to consider the question, our law in the field of foreign money liabilities has been transformed by

[1] Law Com. No. 109; Scot. Law Com. No. 66.

[2] The Government subsequently indicated its acceptance of the Commissions' recommendations: see Hansard (H.C.), 23 December 1981, vol. 15, Written Answers, col. *420*.

[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 B.

a number of judicial decisions. At that time there existed a long-standing rule that the courts could give judgment only 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 a foreign law. They made it possible generally for judgments to be expressed in foreign currency, leaving it for 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.

1.4 The task of dealing with our terms of reference against this background therefore confronted the Joint Working Party and ourselves with what we have described as " 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 took the view by 1981 that this stage had been reached and in that year we published, in accordance with our usual practice, a working paper[5] by way of consultation, containing our provisional conclusions on which we invited comment. We made the decision to proceed at that time for two main reasons. First, the broad repercussions of *Miliangos* had by then been worked out by the courts and there appeared to be something of a lull in further development. Secondly, there still remained issues which required consideration, both as the result of *Miliangos* and independently, which might well fall to be dealt with by our courts after publication of our working paper; and we thought that its contents might be of assistance to the court in resolving such issues.

1.5 Our working paper comprised a survey and reappraisal of both the law and the procedure across the field of foreign money liabilities. However, we explained in the working paper that extensive judicial activity had taken place in this field since our terms of reference were formulated and this process was continuing. We formed the provisional view that it would be inappropriate to propose specific legislation even in respect of matters that had not yet arisen for determination or of those few relatively minor aspects of the law which in our view were not entirely satisfactory.[6] This approach, on which we invited comment, especially from those with practical experience of the operation of the law in this area, was in general supported on consultation; and, except as to one point relating to interest on judgment debts,[7] we do not recommend the enactment of primary legislation in this field, though implementation of some of our detailed

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

[5] Working Paper No. 80.

[6] *Ibid.*, para. 1.7.

[7] See Part IV, below.

recommendations in the field of procedure in Part V of this report may require amendment of the rules of court. So far as our consultation in general is concerned, we received a number of comments, some of them of a detailed nature;[8] and we are very grateful for the assistance that we have received in this respect.

1.6 The working paper contained a full examination of the present law in relation to foreign money liabilities.[9] There has, in the event, been little judicial development in this area of law and procedure since the publication of the working paper. We do not intend, therefore, in this report to do other than provide a general survey of the law, taking into account, where relevant, such few recent developments as there have been. As we have indicated above, we do not recommend the enactment of general legislation in this field. This might be seen as a justification for an extremely short report. We have not adopted this approach. We thought it desirable to make publicly available both our views, and those of persons who have commented to us, on a number of issues relating to foreign money liabilities, especially those which have not so far been fully developed by the courts.

[8] A list of the organisations and individuals who submitted comments on Working Paper No. 80 is set out in Appendix C.

[9] Part II.

PART II

AN OUTLINE OF THE PRESENT LAW

A Debts Payable in England in Foreign Currency

2.1 Under English internal law, 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[10] or in sterling.[11] 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;[12] and 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.[13]

2.2 It has not been established whether or not the principles referred to in the preceding paragraph are limited to contracts governed by English law. In principle, however, it would seem that, as English law is that of the place of payment, the rules should extend to contracts whose proper law is foreign,[14] save where the manner of payment goes to the substance of the parties' obligations.[15]

B Judgments in Foreign Currency

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

2.3 The former procedural rule applicable to the enforcement by action of a foreign-currency obligation was that the claim, the judgment and any

[10] *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).

[11] *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.

[12] *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.

[13] 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 which 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.).

[14] 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.

[15] Thus, there may be 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.

process of execution of such judgment in this country had to be in sterling[16] and, in accordance with the "breach-date" rule, the sterling sum for which judgment was given had to be converted from the relevant foreign currency at the rate of exchange obtaining on the day when the obligation became due and payable.[17] For convenience, we sometimes refer to the rule that judgment should be given only in sterling as "the sterling-judgment" rule, and when we wish to refer simultaneously to that principle and the breach-date rule, the expression "sterling-breach-date rule" is used.

(2) The new approach: judgment in foreign currency

2.4 In 1969 Lord Denning M.R. strongly criticised the sterling-breach-date rule in a dissenting judgment in *The Teh Hu*,[18] pointing out that the rule had become unsatisfactory because sterling was no longer the most stable currency in the world. In the *Jugoslavenska* case[19] the Court of Appeal upheld an award by English arbitrators expressed in a foreign currency. This development was followed by *Schorsch Meier G.m.b.H.* v. *Hennin*[20] in which the Court of Appeal held that judgment for an agreed sum in foreign currency due under a contract should be given in the form: "It is this day adjudged that the defendant do pay to the plaintiff [X Deutschmarks] or the sterling equivalent at the time of payment", explaining, however, that such a judgment would be given only in the case where the plaintiff claimed in a foreign currency. The most significant development occurred shortly afterwards, when in *Miliangos*[21] the House of Lords by a four-to-one majority[22] adopted a similar approach and the form of judgment suggested by Lord Denning M.R. in the *Schorsch Meier* case was specifically approved.[23] Lord Wilberforce explained that the reference in that form of judgment to ". . . the sterling equivalent at the time of payment" signified that conversion into sterling should be effected at the rate of exchange obtaining on the date of actual payment or, failing such payment, on the date at which the court should authorise enforcement of the judgment.[24]

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[16] *Manners* v. *Pearson & Son* [1898] 1 Ch. 581, 587 (C.A.) (*per* Lindley M.R.) is the *fons et origo* of the rule. This principle was apparently applied also to arbitration awards in England: see *The Teh Hu* [1970] P. 106, 129 (*per* Salmon L.J.).

[17] See, for example, *Re United Railways of Havana and Regla Warehouses Ltd.* [1961] A.C. 1007 (a debt); *Di Fernando* v. *Simon, Smits and Co. Ltd.* [1920] 3 K.B. 409 (damages for breach of contract); *The Volturno* [1921] 2 A.C. 544 (damages for tort).

[18] [1970] P. 106.

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

[20] [1975] Q.B. 416.

[21] [1976] A.C. 443.

[22] Lord Simon of Glaisdale, in a powerful dissenting speech, expressed the view that such a change could be instituted in a satisfactory form only by the introduction of legislation after a wide-ranging review of the issues. In our opinion, however, Lord Simon's objections to the abrogation of the former rule by judicial decision have proved not to be well founded and the general judicial development of the *Miliangos* rule (see, e.g., para. 2.6, below) has been satisfactory.

[23] *Ibid.*, 468 (*per* Lord Wilberforce).

[24] Accordingly, unless the context otherwise requires, the term "time of payment" or "date of payment" is used in this report in the specialised sense explained by Lord Wilberforce.

(3) **The principle underlying *Miliangos***

2.5 Although the former sterling-breach-date rule and the rule approved in *Miliangos* which has supplanted it are of a procedural character,[25] the approach adopted in that case has created a completely new principle governing the treatment by the courts of foreign-currency obligations—namely, that the foreign currency in question, and not sterling, should be the standard by which the amount to be paid by the judgment debtor is to be determined. Thus, in *Miliangos* itself, Lord Wilberforce explained that the creditor had no concern with pounds sterling; for the creditor what mattered was that a Swiss franc (the relevant foreign currency in that case) "*for good or ill* should remain a Swiss franc".[26] Accordingly, if in the case of a foreign-currency debt the value of the currency in question should fall as against sterling, the creditor will today be awarded a smaller sum, in terms of sterling, than he would have received under the sterling-breach-date rule; in the converse situation he will receive a larger amount.

(4) **The judicial development of the *Miliangos* principle**

2.6 The decision in *Miliangos* itself was specifically limited not only to debts (as distinguished, in particular, from claims for damages for breach of contract or tort) but also to contracts governed by a foreign system of law and as to which the relevant foreign currency was that of the foreign country in question (or perhaps of another foreign country).[27] However, decisions since *Miliangos* have established that the scope of the principle approved in that case extends to contracts governed by English law;[28] to claims for damages for breach of contract;[29] to claims in tort, both for damage to property[30] and for personal injuries;[31] and to claims for a restitutionary award under the Law Reform (Frustrated Contracts) Act 1943.[32]

(5) **The principles whereby the currency of the loss is to be ascertained**

(*a*) *Debts and liquidated damages*

2.7 In many cases the "money of account", the currency in which an obligation is measured (which "tells the debtor how much he has to pay"[33])

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[25] In *Miliangos* Lord Wilberforce specifically categorised the sterling-breach-date rule as procedural: [1976] A.C. 443, 465. The rule is accordingly applicable irrespective, in relation to contracts, of what in a particular case the proper law of the contract or the law of the place of payment might be or, in respect of torts, of the law of the place where the tort was committed.

[26] [1976] A.C. 443, 466. (Emphasis added.)

[27] *Ibid.*, at p. 468, *per* Lord Wilberforce. The question whether the new approach should be extended to claims for damages was expressly "left open for future discussion".

[28] *Federal Commerce and Navigation Co. Ltd.* v. *Tradax Export S.A.* [1977] Q.B. 324 (reversed subsequently but on grounds not bearing on this point: [1978] A.C.1); *Services Europe Atlantique Sud* (*SEAS*) v. *Stockholms Rederiaktiebolag Svea* [1979] A.C. 685 (referred to hereafter as "*The Folias*").

[29] *The Folias* [1979] A.C. 685.

[30] *The Despina R* [1979] A.C. 685.

[31] *Hoffman* v. *Sofaer* [1982] 1 W.L.R. 1350. (In the event, judgment was given in sterling pursuant to an agreement between the parties which they arrived at after the court had intimated that it would give judgment for part of the claim in foreign currency.)

[32] *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) and by the House of Lords ([1982] 2 W.L.R. 253).

[33] *Woodhouse A.C. Israel Cocoa Ltd. S.A.* v. *Nigerian Produce Marketing Co. Ltd.* [1971] 2 Q.B. 23, 54 (*per* Lord Denning M.R.).

and the " money of payment ", the currency in which the obligation is to be discharged (which " tells the debtor by which means he is to pay "[34]), are the same currency; and in such cases judgment will be given in the foreign currency in question. However, where the moneys of account and of payment are different currencies, it seems that the loss will be measured, and judgment accordingly given, in the currency of account.[35]

(*b*) *Unliquidated damages*

(i) Damages for breach of contract

2.8 The principles which the court should apply for the purpose of determining the currency in which to award damages for breach of contract were laid down by Lord Wilberforce in *The Folias*.[36] He explained[37] first that, where the proper law of the contract was English,[38] a judgment should be given in the currency which was expressly or impliedly designated in the contract as the currency of account and payment. However, if the contract did not indicate the intention of the parties as to the currency in which damages for breach were to be payable, such damages should be given in the plaintiff's currency—that is to say, the currency in which the loss " was felt by the plaintiff " or which " most truly expresses his loss ", as distinguished from the currency in which the loss first arose. Thus, in *The Folias* itself, which concerned a charter-party governed by English law, the cargo arrived damaged and the plaintiffs, French charterers carrying on business in Paris, had to pay to the Brazilian cargo receivers a sum of money in Brazilian cruzeiros, which the charterers purchased with French francs, their normal business currency; and it was held that the shipowners' liability to pay damages to the plaintiffs should be expressed in the latter currency. Finally, Lord Wilberforce emphasised that the principle of giving judgment in the currency in which the loss was felt by the plaintiff was of a very flexible character according to the circumstances of each case.

(ii) Damages in tort

2.9 A similar approach to that outlined in the preceding paragraph was adopted by Lord Wilberforce in *The Despina R*[39] in relation to damages in tort. In that case a collision had occurred in Chinese waters between *The Despina R* and another vessel, in which the latter was damaged. The

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[34] *Ibid.*

[35] *George Veflings Rederi A/S* v. *President of India* [1978] 1 W.L.R. 982, in which Donaldson J. regarded the money of payment as sterling, and the money of account as U.S. dollars, and gave judgment in the latter currency. On appeal, the Court of Appeal held that the U.S. dollar was both the money of account and the money of payment: [1979] 1 W.L.R. 59. The suggestion by Robert Goff J. in *B.P. Exploration Co. (Libya) Ltd.* v. *Hunt (No. 2)* [1979] 1 W.L.R. 783, 840–841, that where the creditor fails to pay on the due date the currency of payment thereafter becomes the measure of the debtor's liability appears to be inconsistent with the principle on which *Miliangos* is based: see para. 2.5, above.

[36] [1979] A.C. 685, in which the decision of Eveleigh J. in *Jean Kraut A.G.* v. *Albany Fabrics Ltd.* [1977] Q.B. 182 was approved. *The Folias* was followed by Lloyd J. in *The Food Corporation of India* v. *Carras (Hellas) Ltd. (The Dione)* [1980] 2 Lloyd's Rep. 577.

[37] [1979] A.C. 685, 700–703.

[38] The question of the currency in which damages for breach of contract should be awarded falls to be determined as a substantive issue and in principle it ought therefore to be decided in accordance with the proper law of the contract. This proposition appears to be implicit in Lord Wilberforce's speech.

[39] [1979] A.C. 685.

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 was a U.S. dollar account there. Although the expenses of repair had been incurred in various currencies, it was held that judgment should be given in U.S. dollars as the "plaintiff's currency"—i.e. the currency in which the loss was effectively felt or borne by the plaintiff, rather than in the currencies in which the loss was immediately sustained. As in *The Folias,* Lord Wilberforce referred to the flexible character of this principle, emphasising that in some cases the plaintiff would be unable to establish that he would in the normal course of events use, and be expected to use, the currency, in which he normally conducted his operations, and that in such cases the plaintiff's loss would be felt in the currency in which it immediately arose.[40]

2.10 The principles laid down by Lord Wilberforce in *The Despina R* were applied subsequently in an action[41] for damages for personal injury sustained by the plaintiff, a United States national, in consequence of negligent medical treatment received while on holiday in this country; and since the plaintiff's losses were closely linked with U.S. dollars, the currency of his country, Talbot J. indicated that he would give judgment in respect of those losses in that currency.[42] However, damages under the head of pain, suffering and loss of amenity were given in sterling, on the ground that that part of the claim would be impossible to assess in dollars.[43]

(*c*) *Restitutionary awards*

2.11 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.[44] 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).*[45] 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 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

[40] [1979] A.C. 685, 698. English law was applied by the House of Lords without considering the significance of the fact that the tort had occurred in foreign waters. However, it would seem that, by analogy with the principle applied to the award of damages for breach of contract (see para. 2.8 and n. 38, above), the rules laid down in *The Despina R* apply only where English law is the *lex causae.* As to the particular facts of that decision, there was no proof of the foreign law, and in general English law is applied in the absence of such proof.

[41] *Hoffman* v. *Sofaer* [1982] 1 W.L.R. 1350.

[42] In the event, however, the parties subsequently agreed that judgment should be entered in sterling: *ibid.*, 1358.

[43] *Ibid.*, 1357. And previously in *Jean Kraut A.G.* v. *Albany Fabrics Ltd.* [1977] Q.B. 182, 189, Eveleigh J. stated 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".

[44] 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.

[45] [1979] 1 W.L.R. 783, 837–845 (aff'd. [1981] 1 W.L.R. 232 (C.A.) and [1982] 2 W.L.R. 253 (H.L.)).

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*) The award must be related to the benefit obtained by the defendant rather than to the expense incurred by the plaintiff.[46]

(*b*) Where the benefit consists of money, the award should generally take the form of an award for repayment in the same currency as that in which it was originally paid to the defendant.[47]

(*c*) Where the benefit takes a form other than that of money (for example, goods or services) the award should be made in the currency in which the defendant's benefit can be "most fairly and appropriately valued",[48] following the approach applied to claims in tort and contract respectively in *The Despina R*[49] and *The Folias*.[50]

(*d*) Where, as is frequently the case, there is a contract between the parties which identifies the currency in which the benefits are to be valued and paid for, that currency will often be chosen by the court.[51]

(*d*) *Set-off*

(i) Set-off in general

2.12 The application of the principle underlying *Miliangos* to cases of set-off gives rise to the following question—namely, 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 so as to reduce or extinguish the amount for which A is to have judgment? This difficult problem does not appear to have arisen directly for judicial decision. However, in *The Despina R*[52] Brandon J. suggested at first instance, in relation to damage caused by a collision between two ships in a "both-to-blame" situation (where the rule is that one judgment is given, for the difference between the two claims), that conversion should be effected at the date of judgment (or at the date when the amounts of the two liabilities were established by agreement).

(ii) Limitation by a shipowner of liability by way of defence

2.13 Section 503 of the Merchant Shipping Act 1894 (as amended) empowers a shipowner in certain cases to set up by way of defence to

[46] [1979] 1 W.L.R. 783, 841.

[47] *Ibid.*, at p. 840.

[48] *Ibid.*

[49] [1979] A.C. 685; see para. 2.8, above.

[50] [1979] A.C. 685; see para. 2.9, above.

[51] [1979] 1 W.L.R. 783, 840. Robert Goff J. pointed out, however, that there was no presumption to this effect. He went on to suggest that in general an award should be expressed in the money of account under the contract, but not where the contract envisaged an appreciable delay between the due date of the debt and the date of payment. It would seem, however, that this distinction is inconsistent with the principle underlying *Miliangos*.

[52] [1978] Q.B. 396, 414–416.

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 the sterling sum per ton is now fixed from time to time by statutory instrument in sterling, calculated by reference to "gold francs".[53] Before *Miliangos* the amount of gold francs which represented the limit of a shipowner's liability was converted into sterling at the statutory rate for the time being in force when the limit of liability "[fell] to be ascertained"[54] by the Admiralty Registrar.[55] On the other hand, the loss for which the shipowner was liable was, in accordance with the breach-date rule, calculated by reference to the date when it was incurred.

2.14 In the light of *Miliangos* the question arises as to the form in which judgment should be given in the common situation where damages in foreign currency exceed the statutory limit of liability in sterling. In *The Despina R*[56] Brandon J. at first instance provisionally suggested that this problem, which is akin to that of set-off in general, should be resolved by giving judgment in sterling for the amount of the limit.[57] Presumably he had in mind that the relative rates of exchange at the date of judgment were to be applicable.

(e) An order for an account to be taken

2.15 Two issues arise as to an order for an account to be taken in the context of foreign money liabilities. The first relates to the currency in which the court would order that the balance found to be due should be paid. Although there appears to be no direct authority on this position, we have little doubt that such an order could take a similar form, in an appropriate case, to that approved in *Miliangos*.[58]

2.16 The second issue arises where the constituent items of the account are expressed in different currencies. In those circumstances the court

[53] 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. Section 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.

[54] *The Mecca* [1968] P. 665, 668.

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

[56] [1978] Q.B. 396.

[57] *Ibid.*, at p. 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": Sched. 4, Part I, 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.

[58] The only authority appears to be the decision of the Court of Appeal in *Manners* v. *Pearson & Son* [1898] 1 Ch. 581, which is generally regarded as the modern source of the sterling-judgment rule (at p. 587, *per* Lindley M.R.). Although the majority did not apply the breach-date principle, and held that conversion into sterling should take place at the rate obtaining when the amount due was ascertained by taking the whole account, the dissenting judgment of Vaughan Williams L.J., who held that conversion into sterling should take place as at the date on which each payment became due, was cited with approval in many subsequent cases.

will have to select a date as at which the final balance of the account is to be expressed. This question, as to which there appears to be no direct authority, is essentially similar to the one that arises in relation to set-off,[59] involving as it does the necessity for the court to convert an obligation expressed in one currency into another at the date of the order.

(f) An order for restitution against a defaulting trustee

2.17 The breach-date rule did not, it seems, extend to a claim for restitution against a trustee who in breach 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.[60] This principle was applied in 1966, in *Re Dawson*,[61] 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 breach-date rule did not extend to this category of claim,[62] and 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.

2.18 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",[63] 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.[64]

2.19 The approach adopted in *Re Dawson*[65] to the question of 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 report.

(g) The redemption of a mortgage securing a foreign-currency loan

2.20 The sterling-breach-date rule did not apply to an action brought to enforce the redemption of a loan expressed in a foreign currency. Accordingly in a successful action of this kind the defendant will be

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[59] See para. 2.12, above.

[60] *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.

[61] [1960] 2 N.S.W.R. 211.

[62] *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.

[63] [1966] 2 N.S.W.R. 211, 220.

[64] *Ibid.*

[65] [1966] 2 N.S.W.R. 211.

ordered to permit redemption of the loan upon repayment of the relevant sums in respect of principal and interest expressed in the foreign currency in question (and of his costs in sterling).[66]

(h) Declaratory judgments

2.21 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.[67]

C Claims to Share in a Fund

(1) Bankruptcy and liquidation

2.22 Where an insolvent company is put into liquidation, foreign-currency debts are converted into sterling, in the case of a voluntary liquidation, as at the date of the resolution to wind up the company[68] or, where the liquidation is compulsory, as at the date of the winding-up order.[69] Brightman L.J. explained in the course of his judgment in *Re Lines Bros. Ltd.*[70] that:

> "The liquidation of an insolvent company is a process of collective enforcement of debts for the benefit of the general body of creditors. Although it is not a process of execution, because it is not for the benefit of a particular creditor, it is nevertheless akin to execution because its purpose is to enforce, on a pari passu basis, the payment of the admitted or proved debts of the company. When, therefore, a company goes into liquidation a process is initiated which, for all creditors, is similar to the process which is initiated, for one creditor, by execution. If the commencement of the process of execution is the correct date for the conversion of a foreign currency debt in the case of a defendant whose

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

[67] 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.

[68] *Re Lines Bros. Ltd.* [1983] Ch. 1.

[69] *Re Dynamics Corporation of America* [1976] 1 W.L.R. 757. The dicta of Lord Wilberforce and Lord Cross of Chelsea in *Miliangos* ([1976] A.C. 443, at pp. 469 and 498 respectively) that the appropriate date was that on which the creditor's claim in terms of sterling was admitted by the liquidator were referred to, but not followed, in this case and the decision referred to in n. 68, above.

[70] [1983] Ch. 1, 20.

affairs are under his own control, it seems to me entirely consistent that the date of liquidation should be the due date for conversion in the case of a company whose affairs are committed to a liquidator."[71]

A similar principle presumably applies to the proof of a foreign-currency claim on a bankruptcy; the corresponding date would appear to be that of the receiving order.

2.23 There is no direct authority as to the rule governing the situation in which the debtor is solvent, but it was suggested, obiter, in the *Lines Bros.* case that in those circumstances it might well be that a foreign-currency creditor is entitled to be paid the balance of his full contractual debt before the shareholders receive anything.[72] However, for the purpose of determining whether the company is or is not solvent for this purpose, the values of the foreign-currency claims are not recalculated; in other words, the sterling dividends received from time to time as the process of winding-up proceeds are not reconverted into the relevant foreign currency as at the respective dates of payment.[73]

(2) The limitation by a shipowner of his liability

2.24 Section 504 of the Merchant Shipping Act 1894[74] (as amended) 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. If the damages claimed by any claimant are proved in a foreign currency, the question arises as to the date on which conversion into sterling should take place. Brandon J. expressed the view in *The Despina R*[75] that the situation was "a form of statutory insolvency" and that accordingly the rule should be similar to that applicable to debts proved in the winding-up of a company.[76]

(3) Pecuniary legacies

2.25 Where a pecuniary legacy is expressed in the will in foreign currency, the question arises whether or not the legacy should be converted into sterling. There appears to be no authority on the matter since *Miliangos.* Such earlier authority as there is suggests that no conversion is necessary where the legatee resides abroad.[77] Where, however, the legatee

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[71] The valuation in sterling of any set-off falls to be made as at the same date as that on which the foreign-currency debt is converted: *Re Dynamics Corporation of America* [1976] 1 W.L.R. 757, 775.

[72] [1983] Ch. 1, 21 (*per* Brightman L.J.).

[73] *Ibid.*, 21–22. This is because, as soon as it is ascertained that there is a surplus, the creditor whose debt carries interest is remitted to his rights under the contract and is entitled to "post-liquidation interest", and if the rule were otherwise a sterling creditor entitled to such interest might have that right diminished because of movements in exchange rates.

[74] Sect. 504 will be replaced by s. 17 of the Merchant Shipping Act 1979 when the latter section is brought into force.

[75] [1978] Q.B. 396.

[76] *Ibid.*, 415–416. See paras. 2.22–2.23, above. The date in Admiralty limitation proceedings corresponding to the date of the winding-up order or of a resolution to wind up would be the date of the decree of limitation: [1978] Q.B. 396, 416.

[77] F. A. Mann, *The Legal Aspect of Money*, 4th ed., (1982), pp. 317–318. 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 elsewhere: *op. cit.*, pp. 317–8.

lives in the United Kingdom, or where the will provides for the legacy to be retained in this country, 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 year ").[78]

(4) Other claims to share in a fund

2.26 There appears to be no reported decision since *Miliangos* indicating what principle governs claims to share in a fund other than on bankruptcy or liquidation or under section 504 of the Merchant Shipping Act 1894 (as amended). Even before *Miliangos*, however, the breach-date rule was held not to extend to such claims,[79] since no money judgment was involved.[80] Thus in *Re Chesterman's Trusts*[81] 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.

D Interest and Compensation for Late Payment

(1) Interest

2.27 The purpose of an award of interest by the court is to compensate the plaintiff for being kept out of the use of the money due to him until the date of judgment,[82] as distinguished from compensation for a loss sustained in consequence of late payment.[83] It should be borne in mind that in this Part of the report we are not concerned with interest after judgment has been given. We consider that issue in Part IV below.

2.28 Two separate legal issues concerning interest arise in the context of foreign money obligations.[84] They are: the determination, first, of the

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[78] *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. 567. There is, however, authority for the view that the rate of exchange applicable to annuities is that obtaining on the date of each payment: *Kornatzki* v. *Oppenheimer* [1937] 4 All E.R. 133, where an annuity expressed in sterling was to be paid in Germany in German currency.

[79] *Re Chesterman's Trusts* [1923] 2 Ch. 466.

[80] *Ibid.*, 474 (*per* Russell J. at first instance), 479 (*per* Lord Sterndale M.R.) and 485 (*per* Warrington L.J.).

[81] [1923] 2 Ch. 466.

[82] *Pickett* v. *British Rail Engineering Ltd.* [1980] A.C. 136, 151 (*per* Lord Wilberforce), 158 (*per* Lord Salmon), 164 (*per* Lord Russell of Killowen) and 173 (*per* Lord Scarman), disapproving the dictum of Lord Denning M.R. in *Cookson* v. *Knowles* [1977] Q.B. 913, 921 that, as damages awarded for non-pecuniary loss in a claim concerning personal injuries were now normally subject to increase to take account of inflation, there was no occasion to award interest as well.

[83] We consider the question of compensation for such loss in paras. 2.34–2.35, below.

[84] We pointed out in Working Paper No. 80, at para. 4.1, that the Lord Chancellor had announced in December 1980 that the Government did not intend to implement the main recommendation in our Report on Interest (Law Com. No. 88 (1978), para. 63) that a statutory right of interest on contract debts should be introduced; we went on to explain that accordingly we did not deal in the working paper with the question, which we raised in that Report, whether the scheme which we had recommended should extend to foreign-currency debts governed by English law.

law to be applied to decide whether interest is payable at all, and secondly, of the law by which the rate at which any interest is to be paid is determined. We examine each issue in turn.

(a) The right to interest until the date of the judgment or the award

2.29 The right to recover interest on a contractual debt by virtue of an express or implied term of the contract is a matter which is governed by the proper law of that contract.[85] If that law is foreign, then the court will have to determine whether or not, under the foreign law, a creditor is entitled to interest, as of right, on an overdue debt.[86] 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.[87] The court does, however, have a discretion to include interest in any sum for which judgment is given, or which is paid after the commencement of proceedings but before the judgment date.[88]

2.30 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.[89] 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 so to claim is determined by the proper law of the contract,[90] but 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 to be determined not by the *lex fori,* but rather by the law, or laws, governing tortious liability.[91] 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

[85] *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.

[86] 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.

[87] *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: see para. 2.34, below.

[88] Supreme Court Act 1981, s. 35A (added by the Administration of Justice Act 1982, s. 15(1) and Sched. 1, Part I). This section replaces, with amendments, section 3 of the Law Reform (Miscellaneous Provisions) Act 1934. A similar power is conferred upon arbitrators: see the 1982 Act, s. 15(6) and Sched. 1, Part IV (which adds a new section, 19A, to the Arbitration Act 1950).

[89] See Dicey and Morris, *The Conflict of Laws,* 10th ed., (1980), pp. 905–906.

[90] *Miliangos* v. *George Frank (Textiles) Ltd. (No. 2)* [1977] Q.B. 489, 496–497; 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. 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 (aff'd. [1981] 1 W.L.R. 232 (C.A.) and [1982] 2 W.L.R. 253 (H.L.)) 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.

[91] *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.

actionable as a tort under the law of the forum, i.e., English law.[92] The effect of this double-barrelled rule is that a plaintiff has no right to 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 35A of the Supreme Court Act 1981. 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 discretion under that 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.[93]

(b) The rate of interest

2.31 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, on the one hand, by the law governing the right to interest, i.e., the *lex causae* or, on the other, by the law of the forum as being a matter which is 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,[94] but also whether compound interest[95] or interest on interest[96] is payable and the rate at which interest is to be paid.[97]

2.32 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. There is no authority on the rate to be applied in a tort case; and the authorities conflict in relation to contractual claims for interest as damages. On the one hand, it has been suggested that the rate of interest is always a matter for determination by English law as the *lex fori*[98] and, on the other hand, that the issue should be governed by the proper law of the contract.[99] It should be borne in mind, however, that where English law is applicable either (on one view) because it is the law of the forum or, in the case of a contract whose

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

[93] Supreme Court Act 1981, s. 35A (2). See n. 88, above.

[94] See para. 2.30, above.

[95] *Fergusson* v. *Fyffe* (1841) 8 Cl. & Fin. 121, 140; 8 E.R. 49, 56.

[96] *Montreal Trust Co.* v. *Stanrock Uranium Mines Ltd.* (1965) 53 D.L.R. (2d) 594.

[97] 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.

[98] *Miliangos* v. *George Frank (Textiles) Ltd. (No. 2)* [1977] Q.B. 489, 497 (Bristow J.). 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. This view is supported in Cheshire and North, *Private International Law*, 10th ed., (1980), pp. 712–713.

[99] *Helmsing Schiffahrts G.m.b.H. & Co. K.G.* v. *Malta Drydocks Corporation* [1977] 2 Lloyd's Rep. 444 (Kerr J., who expressed the view that the issue required further consideration at a higher level). However, no reference was made by the Court of Appeal to this question when both this decision and *Miliangos (No. 2)* subsequently fell for consideration in *Shell Tankers (U.K.) Ltd.* v. *Astro Comino Armadora S.A.* (*The "Pacific Colocotronis"*) [1981] 2 Lloyd's Rep. 40, 45. See para. 2.33, below. The proper law approach is favoured in Dicey and Morris, *The Conflict of Laws*, 10th ed., (1980), Rule 166(1), pp. 903–908, esp. at p. 906.

proper law is English, on the ground that it is the *lex causae*, that as we explain in paragraph 2.33 below, the internal English rate of interest is not necessarily applied in the particular case.

2.33 The relevant rule of English law as to the rate of interest is to be found in section 35A of the Supreme Court Act 1981, to which we have referred in paragraph 2.30 above, which confers a general judicial discretion as to simple interest. As for the principles which should guide a judge in the exercise of that discretion, it has now been made clear[100] by the Court of Appeal that, where judgment is given in a foreign currency, the interest should, prima facie, be awarded at the rate applicable to that currency.[101]

(2) Compensation for late payment

2.34 So far as sterling claims are concerned, there is a long-established principle that (apart from any question of interest) in general only nominal damages are recoverable for failure to pay money.[102] However, the rule has been the subject of both judicial[103] and academic[104] 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.[105] Furthermore, there are exceptions to the rule; for example, a banker may be liable for substantial damages if he wrongfully fails to honour his customer's cheques;[106] and it has been suggested judicially that the rule does not apply where substantial damages are within the contemplation of the parties.[107] Support for this approach has recently been provided by the Court of Appeal in *Wadsworth* v. *Lydall*,[108] where it was 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 party to the contract to pay money due under the contract, provided that the loss had been foreseeable by the debtor.[109]

2.35 In the context of foreign-currency liabilities, the question of compensation for late payment arose in *Ozalid Group (Export) Ltd.* v.

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[100] In *Shell Tankers (U.K.) Ltd.* v. *Astro Comino Armadora S.A.* (*The "Pacific Colocotronis"*) [1981] 2 Lloyd's Rep. 40, 45–47. Previously, in *Miliangos* (*No. 2*) [1977] Q.B. 489, 497, a similar principle was stated by Bristow J. to be applicable, but without the qualification that it was only of a prima facie character.

[101] However, this prima facie rule was displaced, for example, in *Helmsing Schiffahrts G.m.b.H. & Co. K.G.* v. *Malta Drydocks Corporation* [1977] 2 Lloyd's Rep. 444 (Kerr J.). This decision was referred to without disapproval in *The "Pacific Colocotronis"* [1981] 2 Lloyd's Rep. 40, 45–47.

[102] *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.* [1893] A.C. 429.

[103] 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.

[104] For example, Treitel, *The Law of Contract*, 5th ed., (1979), p. 734; Beale, *Remedies for Breach of Contract*, (1980), pp. 168–170.

[105] *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.).

[106] *Rolin* v. *Steward* (1854) 14 C.B. 595; 139 E.R. 245.

[107] *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.). This view is favoured in *McGregor on Damages*, 14th ed., (1980), para. 847 and in Mann, *The Legal Aspect of Money*, 4th ed., (1982), pp. 109–110.

[108] [1981] 1 W.L.R. 598.

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

African Continental Bank Ltd.,[110] a case in which the debtor delayed in making payment of money due under a contract for some weeks after the due date. The money of account and the money of payment under the agreement, which was governed by English law, was the U.S. dollar; and, as a consequence of the debtor's delay in making payment, the creditors sustained loss owing to a fall in the value of the U.S. dollar against sterling, the creditors' currency, between the due date and the date of actual payment. That loss was foreseeable by the debtor. It was held that the creditors were entitled to compensation in respect of that loss.[111] Although no reference was made in *Wadsworth* v. *Lydall*[112] to *Ozalid*, it would seem that the latter decision constitutes the application of a similar principle.

2.36 For completeness, we would draw attention to the Council of Europe Convention on Foreign Money Liabilities (1967). This Convention 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 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". In 1981 we submitted a Report,[113] jointly with the Scottish Law Commission, on the 1967 Convention and on the 1972 Place of Payment of Money Liabilities Convention. In that Report, we criticised the 1967 Convention, and in particular the rules in Articles 4 and 7 of the Annex; and 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 (as distinguished from being recoverable in those cases where there is a specific and foreseeable loss).[114] Our recommendation in the Report that the United Kingdom should not become a party to either Convention has been accepted by the Government.[115]

E Foreign Judgments

2.37 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.

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[110] [1979] 2 Lloyd's Rep. 231 (Donaldson J.).

[111] The damages included expenses incurred by the plaintiff creditors in an attempt to obtain payment before issuing proceedings.

[112] See para. 2.34, above.

[113] Law Com. No. 109; Scot. Law Com. No. 66.

[114] See para. 2.34, above. For one reason why we arrived at this conclusion, see para. 3.60, below.

[115] See *Hansard* (H.C.), 23 December 1981, vol. 15, Written Answers, col. *420*.

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

2.38 A foreign judgment gives rise to a cause of action at common law on which a judgment may be given by an English court,[116] 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 judgment was the date of that judgment.[117] 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.[118]

(2) Enforcement of foreign judgments by statutory registration

(a) Part II of the Administration of Justice Act 1920

2.39 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,[119] 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.[120] Although the 1920 Act itself is silent on the

[116] At common law the original cause of action did not merge in a foreign judgment, so that a plaintiff had the option of suing either on the foreign judgment or on the original cause of action. However, this rule has been abrogated by the Civil Jurisdiction and Judgments Act 1982, s. 34, and an action can now be brought on the original cause of action only if the foreign judgment is unenforceable or is not entitled to recognition.

[117] *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.

[118] *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, and it was held that the appropriate time as at which to calculate the conversion was the date of the judgment of the Canadian court. The *Batavia* case has been applied in actions based upon foreign judgments; but the question of the conversion date applicable to a claim on an original cause of action has been the subject of conflicting decisions in the Canadian courts. The *Batavia* case was applied in *Williams and Glyn's Bank Ltd.* v. *Belkin Packaging Ltd.* (1979) 108 D.L.R. (3d) 585. (This decision was subsequently reversed by the British Columbia Court of Appeal (1981) 123 D.L.R. (3d) 612 on grounds immaterial to this issue; and on 17 May 1983 the Supreme Court of Canada upheld the decision of the latter court without considering the question of the appropriate conversion date.) By contrast, however, the breach-date rule was applied, though with reluctance, in *Am-Pac Forest Products Inc.* v. *Phoenix Doors Ltd.* (1979) 14 B.C.L.R. 63 (B.C.S.C.). A third approach was suggested in *Airtemp Corp.* v. *Chrysler Airtemp Canada Ltd.* (1980) 121 D.L.R. (3d) 236, at p. 239 (Ont. S.C.)—namely, that conversion should be effected at the date of the issue of the writ. (On appeal the Divisional Court of the Ontario High Court of Justice expressly refrained from expressing a view on this issue; *ibid.*, at p. 241.)

[119] A list is to be found in *The Supreme Court Practice (1982)*, in the notes to R.S.C., O. 71, r. 1 (71/1/4).

[120] See para. 2.40, below.

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 have been applied to those registered under the 1933 Act.[121]

(b) Foreign Judgments (Reciprocal Enforcement) Act 1933

2.40 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.[122] 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 Act 1977 (save as to judgments then registered).[123] 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 were an English judgment in foreign currency and the judgment debtor may, at his option, pay the sterling equivalent at the date of payment.[124] 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.

(c) Civil Jurisdiction and Judgments Act 1982

2.41 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

[121] See para. 2.40, 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.

[122] A list of the foreign and Commonwealth countries to which the Act has been applied appears in *The Supreme Court Practice (1982)*, Notes to R.S.C., O. 71, r. 1 at 71/1/6 and 71/1/7 respectively. 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 Sched., art. 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 Sched., art. 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 Sched., art. 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).

[123] Sect. 4(2)(b)(i) and Sched. 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.)

[124] See *The Supreme Court Practice (1982)*, Notes to R.S.C., O. 71, r. 3.

between the six original Member States of the E.E.C. The Convention, which will be implemented in this country by the Civil Jurisdiction and Judgments Act 1982[125] when the relevant provisions of that Act are brought into force, 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 detailed provision is made by the Convention for the various procedures to be followed, it makes no express provision to deal with the conversion of the currency in which judgment has been given into that of the Member State where recognition and enforcement is sought. In the working paper[126] we assumed that the legislation to give effect to the Convention in this country would also be silent on this matter, leaving the courts free to apply the *Miliangos* rule to judgments recognised and enforced under the Convention. In the event, the Civil Jurisdiction and Judgments Act 1982 is, indeed, silent on this matter.[127]

(*d*) *European Community Judgments*

2.42 The European Communities (Enforcement of Community Judgments) Order 1972[128] provides that a "Community judgment"[129] 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.[130] There is now no express provision as to the conversion date and it would appear to be the case that a Community judgment will be registered in the foreign currency in which it is expressed,[131] and as usual the judgment debtor may, at his option, pay the sterling equivalent at the date of payment. Accordingly, in the context of this report, no problem arises in relation to Community judgments.

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[125] Sect. 2(1). Consolidated English texts of the Convention and of a Protocol on its interpretation by the European Court (in each case, as amended by the Accession Convention) and the transitional and final provisions made by the Accession Convention are set out in the Act as Scheds. 1, 2 and 3.

[126] Para. 3.56.

[127] The Convention applies also to the recognition of maintenance orders, as to which s. 8 of the Civil Jurisdiction and Judgments Act 1982 does provide for conversion of currency; see para. 2.51, below.

[128] S.I. 1972, No. 1590.

[129] This term signifies, not a judgment of an ordinary national court of the E.E.C., recognition of which falls under the Civil Jurisdiction and Judgments Act 1982, but one given by certain specified bodies, such as the European Court of Justice. Among 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.

[130] Sect. 4(2)(*b*)(iii) and Sched. 5, Part I. (The wording of s. 4(2)(*b*) indicates, incorrectly, that conversion under art. 3(2) of the Order required conversion into sterling as at the date of registration; the error is, however, immaterial since it does not effect the operative words of the subsection.)

[131] Including, presumably, European Units of Account.

F ARBITRAL AWARDS

(1) English awards

2.43 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,[132] an application may be made to the High Court under section 26(1) of the Arbitration Act 1950[133] 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 we have been informed[134] that, when the court grants leave to enforce the award under that section, leave is granted in the terms of the foreign currency in which the award is expressed. The effect is that arbitral awards and judgments are now treated in a similar manner so far as conversion into sterling is concerned—that is to say, no such conversion takes place until such time (if any) as an enforcement procedure, such as writ of fi. fa., is initiated.[135] 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. English arbitral awards appear, therefore, to give rise today to no difficulty in the context of this report and are not further considered.

(2) Foreign awards

2.44 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.[136] 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 currency.[137]

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[132] Arbitration Act 1950, s. 32.

[133] 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 consideration of this matter is expressed only in terms of High Court procedure.

[134] By Master Elton, the Senior Master of the Queen's Bench Division of the High Court, to whom we are indebted for his assistance in obtaining this information.

[135] In *Jugoslavenska Oceanska Plovidba* v. *Castle Investment Co. Inc.* [1974] Q.B. 292, it was held by the Court of Appeal, before *Miliangos*, that an arbitral award in foreign currency in respect of which leave to enforce was sought should be converted into sterling as at the date of the award. However, in *Miliangos* Lord Wilberforce indicated ([1976] A.C. 443, at p. 469) that this rule constituted a possible minor discrepancy in view of the general rule laid down in the latter case and might require consideration; and in Working Paper No. 80, para. 3.26, we suggested that the approach which we understand has now been adopted by the courts was correct in principle.

[136] 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.

[137] 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*, in which 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.

2.45 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[138] or apply to the court for leave to enforce it under section 26 of the 1950 Act.[139] 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.[140]

2.46 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,[141] 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 (except as to awards then registered).[142] It is to be assumed that an 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.

2.47 As in the case of English awards, foreign arbitral awards now give rise to no difficulty in relation to the issues with which we are concerned in this report, and accordingly they are not considered further.

G Maintenance Orders in Foreign Currency

(1) Foreign maintenance orders

(a) Maintenance Orders (Facilities for Enforcement) Act 1920

2.48 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.[143] There are, however, various statutory provisions enabling foreign maintenance orders to be enforced here. First, the Maintenance Orders (Facilities for Enforcement) Act 1920

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[138] 1950 Act, ss. 36(1) and 40(*a*); 1975 Act, s. 6.

[139] 1950 Act, s. 36(1); 1975 Act, s. 3(1)(*a*). Sect. 26 of the 1950 Act is considered at para. 2.43, above.

[140] *Jugoslavenska Oceanska Plovidba* v. *Castle Investment Co. Inc.* [1974] Q.B. 292, 305. The observations made in para. 2.43, 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.

[141] Under the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933; see paras. 2.39–2.40, above.

[142] Sect. 4(2)(*b*)(ii), and Sched. 5, Part I.

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

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 Order in Council,[144] 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,[145] 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 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.[146] This is different from the *Miliangos* rule, whereby conversion is made as at the date when the enforcement process is set in motion.

(b) Part I of the Maintenance Orders (Reciprocal Enforcement) Act 1972

2.49 The second provision is Part I of the Maintenance Orders (Reciprocal Enforcement) Act 1972, which provides for the reciprocal enforcement of maintenance orders along lines similar to those of the 1920 Act.[147] The scheme of Part I 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.[148] 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, save that Part I of the 1972 Act also extends, with modifications, to the Republic of Ireland.[149]

2.50 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. In such a case section 16 of that Act provides

[144] The 1920 Act has been extended to many countries but it will ultimately be superseded and repealed by Part I of the Maintenance Orders (Reciprocal Enforcement) Act 1972, referred to in paras. 2.49–2.50, 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.

[145] R.S.C., O. 105 (formerly O. 104), r. 2.

[146] Following the analogy of s. 16 of the 1972 Act. See para. 2.50, below.

[147] 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.

[148] They are listed in the Order in Council which applies the Act to them: S.I. 1979, No. 1317, Sched. 1 (as amended by S.I. 1981, Nos. 837, 1545 and 1674, and S.I. 1983, No. 885), namely Czechoslovakia, Finland, France, Italy, Luxembourg, Netherlands (Kingdom in Europe and Netherlands Antilles), Norway, Portugal, Sweden and Switzerland.

[149] Part II of the Act, which provides for the transmission of a maintenance claim to the country of the defendant's residence (and thus is not concerned with registration and enforcement), applies to a wider range of Commonwealth and non-Commonwealth countries.

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.[150]

However, in the case of the countries which fall within the second category referred to in paragraph 2.49 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 "[151] by a United Kingdom court, if earlier than the date of registration, is substituted for the date of registration.[152] The consequence is that section 16 of the 1972 Act provides a conversion date which is different from that under the *Miliangos* rule. That 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.

(c) *Civil Jurisdiction and Judgments Act 1982*

2.51 The 1968 E.E.C. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters will be implemented in this country by the Civil Jurisdiction and Judgments Act 1982 when the relevant provisions of that Act are brought into force.[153] The Convention extends to the recognition of maintenance orders obtained in another Member State of the E.E.C. 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. In our working paper we discussed[154] the related questions whether section 16 of the 1972 Act should remain in its present form (with a rule different from that under the *Miliangos* principle[155]) and, if so, whether provision ought not to be made for a similar rule in the case of maintenance orders recognised under the 1968 Convention. We favoured consistency with whatever is to continue to be the rule under the 1972 Act and this approach has been adopted in the Civil Jurisdiction and Judgments Act 1982. Section 8 of that Act applies to maintenance orders recognised under the 1968 Convention the rule that sums payable in the United Kingdom under a maintenance order obtained in another Member State of the E.E.C. shall be paid in sterling and, if the foreign order is expressed in another currency, conversion is to be at the rate of exchange prevailing on the date of registration of the order.[156] This constitutes a further statutory exception to the *Miliangos* principle.

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[150] 1972 Act, s. 16(5), as modified in its application to the Hague Convention countries by S.I. 1979, No. 1317, Sched. 2, para. 16 (and set out, as amended, *ibid.*, Sched. 3).

[151] 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 the 1972 Act, s. 21(1).

[152] 1972 Act, s. 16(5).

[153] Some consideration has already been given to the Convention and the 1982 Act in para. 2.41, above.

[154] Paras. 3.59–3.62.

[155] See para. 2.50, above.

[156] Sect. 8(3) provides that a written certificate as to the relevant exchange rate by an officer of any bank in the United Kingdom shall be evidence of that rate.

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

2.52 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.

H The Conversion of Foreign Currency under certain International Conventions

2.53 The necessity arises for 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.[157] As the terms of these Conventions cannot be amended without the agreement of the other Contracting States, they fall for practical purposes outside the scope of this report, and we refer to them only for the sake of completeness.

[157] The main Acts in question are listed in Working Paper No. 80, para. 2.68.

PART III

A REAPPRAISAL OF THE PRESENT SUBSTANTIVE LAW

A Introduction

3.1 In Working Paper No. 80[158] we divided into two categories the issues which fell to be considered in our examination of the existing law. They were, first, the questions that appeared to involve major issues of policy and, secondly, matters of detail rather than of principle. We have found it convenient to adopt a similar classification in this report.

3.2 As we have explained in Part I of this report,[159] we do not recommend the enactment of legislation in this field, except in relation to interest on judgment debts in foreign currency, an issue which we consider below in Part IV. We have accordingly formulated our present views on the various questions of substantive law which we canvassed in the working paper in the form of conclusions rather than recommendations.

B Major Issues of Policy

(1) Are judgments in foreign currency desirable?

3.3 In the working paper we examined the principle underlying the form of judgment approved in *Miliangos*—namely, that the defendant " do pay, say, 1,000 U.S. dollars or their sterling equivalent at the time of payment ";[160] and we concluded, for the following reasons, that this principle was greatly to be preferred to the sterling-breach-date rule which it has replaced. By ensuring that the value of the debtor's foreign money liability is measured in terms of the foreign currency, the new approach obviates the injustice to the creditor caused by a fall in the relative value of sterling after the due date but before judgment is given; it prevents a corresponding injustice from arising to the debtor in the converse case (i.e., where the relative value of sterling *rises* after the due date); and the *Miliangos* form of judgment preserves the value of the debtor's obligation in terms of the foreign currency after judgment. None of these advantages applied when the sterling-breach-date rule governed the enforcement of foreign-currency claims.

3.4 With one exception, no-one who commented on our working paper disagreed with the view that we expressed in the working paper on this issue, and several commentators specifically supported this approach. However, in a detailed paper, Mr. Roger Bowles and Dr. Christopher Whelan[161] argued that a more satisfactory régime would result from a restoration of the sterling-breach-date rule, coupled with freedom for courts and arbitrators to award interest on an unrestricted basis.

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[158] See para. 3.1. We referred in the working paper, for completeness, to a third category comprising matters which in our view gave rise to no problem: see Working Paper No. 80, paras. 3.73–3.79.

[159] See para. 1.5, above.

[160] The term " payment " in this context signifies either the date of actual payment or the date on which the court authorises enforcement of the judgment, whichever event should be the earlier: see para. 2.4, above.

[161] For a published critique by them of our working paper see "Law Commission Working Paper No. 80, Private International Law, Foreign Money Liabilities ", (1982) 45 M.L.R. 434.

3.5 It is not possible here to do full justice to the detail of the arguments put forward by Mr. Bowles and Dr. Whelan. However, they made two main points, as follows:

(1) The sterling-breach-date rule produces certainty in contrast to the flexibility, but concomitant uncertainty, of the *Miliangos* approach. So far as the international trading community is concerned, certainty is a fundamental matter since it provides a background against which they can enter into transactions with confidence as to the outcome in the event of a breach of contract; and it prevents, as the present law does not, tactical manoeuvring by, for example, a debtor in delaying payment in the light of currency fluctuations.

(2) The problem of the loss sustained by a plaintiff by virtue of a fall in the value of sterling after the date on which the foreign-currency obligation accrued due[162] would be met, at least in part, by the appropriate award of interest by courts and arbitrators, based upon the sterling rate from time to time[163] since, when sterling is weak against foreign currencies, the level of interest rates in the United Kingdom tends to be high, and *vice versa*; and, as to this, courts and arbitrators ought to be empowered to award compound interest in order more realistically to compensate the creditor for any such loss.[164]

3.6 In our view, however, there are powerful arguments for rejecting this approach. Among these are that no other commentator suggested on consultation that the restoration of the sterling-breach-date rule is desirable; nor are we aware of any evidence that such a change would be welcomed by the commercial community. Indeed, the other comments we have received indicate the opposite. Secondly, the new régime has been in force for several years, during which period considerable judicial development of the implications of *Miliangos* has taken place in relation to various substantive and procedural problems, and we believe that a return to the former rule by the enactment of legislation reversing *Miliangos* would be unacceptable to the international commercial communities as well as to their advisers. Thirdly, so far as interest in general is concerned, courts[165] and arbitrators[166] now have power to award interest even when the principal sum has been paid after proceedings or a reference has been initiated but before judgment is given or an award made, which mitigates the effect of the general rule that interest cannot be awarded as of right for the late payment of a debt.[167]

[162] See para. 2.5, above.

[163] In commercial cases the court may award interest at a rate that takes into account the " general attributes " of the plaintiff—for example, the fact that the plaintiff, as a large public company, was able to borrow money at a lower rate than a less prestigious concern would be able to do: *Tate & Lyle Food and Distribution Ltd.* v. *Greater London Council* [1982] 1 W.L.R. 149, 154 (Forbes J.). Mr. Bowles and Dr. Whelan refer to this decision with approval. No consideration was given to the question of interest, either in the Court of Appeal ([1982] 1 W.L.R. 971) or in the House of Lords ([1983] 2 W.L.R. 649).

[164] The court or an arbitrator has no power to award compound interest under the relevant statutory power: see para. 2.33, above.

[165] See s. 35A of the Supreme Court Act 1981, introduced by the Administration of Justice Act 1982, s. 15(1) and Sched. 1, Part I.

[166] See s. 19A of the Arbitration Act 1950, introduced by the Administration of Justice Act 1982, s. 15(6) and Sched. 1, Part IV.

[167] See para. 2.29, above. Where the claim is for a debt or liquidated demand and interest under s. 35A of the Supreme Court Act 1981 is claimed at a rate not exceeding the rate on judgment debts current at the date of the issue of the writ, final judgment in default may be entered for interest as well as for the principal sum: see R.S.C., O.13, r. 1(2) and Practice Note (Claims for Interest) (No. 2) [1983] 1 W.L.R. 377, para.1.

As to the question, finally, of compound interest, Parliament has recently had the opportunity to consider this matter in the context of the Bill that became the Administration of Justice Act 1982 and has decided that no change should be introduced in the rule that only simple interest may be awarded by a court and that the new statutory power conferred upon arbitrators should be limited to an award of simple interest.[168] It would therefore be impracticable at present to recommend a reversal of that policy decision.

3.7 One commentator suggested that judgment should be given in sterling in claims for unliquidated damages (and in the case of restitutionary awards), converted at the date of judgment. He argued that the purpose of an award of damages, which is to compensate the plaintiff for his loss, can adequately be achieved by an award in sterling "creating thenceforth a debt in the court's own currency". Accordingly (he suggested) damages for breach of contract or in tort, having first been calculated in the appropriate foreign currency in accordance with the rules applicable under the present law,[169] should be converted into sterling at the date of judgment. As to this, however, we see no reason in principle why a judgment awarding damages should be converted into sterling; if, in accordance with *Miliangos*, the plaintiff's loss is properly to be expressed in a foreign currency, it appears to us that an award in the foreign currency is as appropriate in such a case as it would be in the case of a debt. And the first two reasons to which we have referred in the previous paragraph as militating against a return to the sterling-breach-date rule would seem to apply with equal force to this suggestion.

CONCLUSION

3.8 The principle underlying the decision in *Miliangos* and the consequences which flow from it are greatly to be preferred to the rules which that decision superseded.

(2) **Should a plaintiff be precluded by legislation from obtaining a judgment in sterling where his claim ought properly to be expressed in a foreign currency?**

3.9 In the working paper we explained that, on a literal construction of the rule that a claim *may* be made, and judgment given, in a foreign currency, it might appear that a plaintiff can at his option obtain judgment either in sterling (though the date as at which the conversion into sterling should be calculated is not clear) or in the relevant foreign currency.[170] Although there is little authority on the point[171] it is clear that to allow

[168] See the provisions referred to in nn. 165 and 166 above, which specifically provide that only simple interest may be awarded.

[169] See paras. 2.8 and 2.9, above.

[170] Para. 3.8.

[171] In *Ozalid Group (Export) Ltd.* v. *African Continental Bank Ltd.* [1979] 2 Lloyd's Rep. 231, 234, Donaldson J. stated, obiter, that the plaintiff must select the currency in which to make his claim and must prove that judgment in that currency would most truly express his loss. (It is true that Donaldson J. also indicated, at p. 233, that the plaintiff was entitled, not bound, to claim in foreign currency. But he was there making the point that, since on the facts of *Ozalid* the currency of the plaintiff's loss happened to be sterling, a judgment should be given in sterling. He was not, it would seem, 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.)

the plaintiff to seek judgment in sterling in the case of a foreign-currency claim would be contrary to the principle in *Miliangos*. It would be unjust to the defendant, since the plaintiff would be able to make his claim in whichever of the two currencies happened to be the more favourable from his point of view. In the working paper we expressed the view that the courts would have little difficulty in applying *Miliangos*, as part of their development of the principle underlying that decision, in such a way as to prevent a plaintiff from obtaining judgment in sterling in respect of what was in substance a foreign-currency claim and that legislative intervention was not required for the purpose of ensuring that result.

3.10 Few commentators referred to this issue, but those who did (including the Bar[172] and The Law Society) agreed with our conclusion, to which we adhere.

CONCLUSION

3.11 (*a*) A plaintiff should not be able to obtain judgment in sterling in the case of the enforcement of a claim which ought properly to be expressed in a foreign currency; but

(*b*) legislative intervention to secure that result is not necessary, since the matter can appropriately be left to judicial decision.

(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 of the judgment.[173] To that extent, therefore, it may be said that the present rules do not adequately implement the principle on which *Miliangos* is based. In Part V of this report, we consider this issue in relation to various matters of procedure in the light of practical considerations; we are concerned here only with the general principle underlying the rule. As to this, we pointed out in the working paper[174] that the "ideal" date for conversion into sterling would be the date of actual payment, even where such payment was made after an enforcement process had been set in motion by the judgment creditor; but, we explained,[175] it was most unlikely that the enforcement of a judgment without converting it into sterling would be practicable, at least for most methods of enforcement.

[172] We refer to "the Bar" for convenience. More precisely, the comments are those of a working party set up by the Senate of the Inns of Court and the Bar, the membership of which is included in the list of commentators set out in Appendix C to this report.

[173] See para. 2.4, above.

[174] Para. 3.13(i).

[175] Working Paper No. 80, para. 3.14.

3.13 In the working paper, we also canvassed the possibility of converting the foreign-currency claim into sterling as at the date of judgment.[176] We pointed out there that the advantages of such a rule would lie in its convenience, in the production of consistency between cases which involve foreign currency and those which do not, and in the fact that the difficulties arising from applying the *Miliangos* principle to cases of set-off would be resolved. The disadvantage, by contrast, of such a rule would be that it would limit the application of the philosophy on which *Miliangos* is based to the period before judgment and thereby destroy one of the beneficent consequences of the present rule—namely, that fluctuations in the value of sterling relative to the foreign currency in question are immaterial after, as well as before, judgment is given. In the light of these considerations, and of the absence, so far as we were aware, of any evidence that any injustice or dissatisfaction arises under the present rule, we expressed a provisional preference in the working paper for its retention.[177]

3.14 On consultation, most of the few commentators who expressed a view on this matter supported our approach.[178] In particular, both the Bar and The Law Society favoured the present rule, although the latter body indicated that, in their view, the date of actual payment was more desirable than any other. They explained that their comments upon our proposals concerning procedure reflected their support for that major principle, which, they believed, should be departed from only for necessary practical reasons.

CONCLUSION

3.15 No change is necessary or desirable in 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, because in general that rule provides the best practical implementation of the *Miliangos* philosophy.

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

3.16 We explained at paragraph 2.1 above that, 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 on the issue whether it is open to the parties by agreement to exclude the right to pay in sterling. 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. In the working paper

[176] *Ibid.*, paras. 3.13(ii) and 3.15.

[177] *Ibid.*, para. 3.16.

[178] One commentator favoured the judgment date, but only in respect of claims for unliquidated damages and restitutionary awards: see para. 3.7, above.

we provisionally proposed that in principle an affirmative answer should be given to that question, on the ground that 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."[179]

3.17 The majority of those who, on consultation, commented on this issue favoured our provisional view, which we accordingly now adopt as our conclusion.[180]

(*b*) Should the parties be free to agree the date and the rate of any conversion?

3.18 A question which, though distinct from that considered in the two previous paragraphs, also concerns freedom of contract is whether the parties should be at liberty to agree the date at which any currency conversion should be made and to agree the exchange rate to be applied to such conversion. It would seem that under the present law an agreement concerning these matters would be upheld.[181] In the working paper we briefly referred with approval to this principle[182] and no commentator disagreed with it on consultation.

CONCLUSION

3.19 Parties should continue to be free to agree:

(*a*) that payment in England and Wales should be made in a particular foreign currency alone (with no option for the debtor to pay in sterling); and

(*b*) in relation to any currency conversion, the date at which it is to be made or the exchange rate to be applied.

C MATTERS OF DETAIL REQUIRING CONSIDERATION

(1) Set-off and related issues

(*a*) *General*

3.20 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. Difficulties arise where the two currencies in question are foreign, and also where one of them is foreign and the other sterling.

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[179] Working Paper No. 80, para. 3.18.

[180] For this conclusion to be effective in practice the court must have power to give judgment in foreign currency without allowing the defendant the option of satisfying the judgment in sterling. We consider this issue in Part V, at paras. 5.14–5.17, below.

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

[182] Para. 3.18.

The difficulty arises whether or not the *lex causae* applicable to A's claim is a different one from that by which B's was determined, because the issue of set-off, being categorised as one of procedure, falls to be resolved by English law as the law of the forum.[183]

3.21 The general rule laid down in *Miliangos* for the conversion of foreign currency into sterling cannot be applied without qualification to cases of set-off; 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. It follows that unless some procedure is introduced for ensuring that one party's judgment is subject to the other's,[184] set-off can only be applied by the court by converting the currency of one claim into that of the other as at a date no later than the date of judgment. There appears to be no decision after *Miliangos* which lays down the principles that should govern set-off in the light of that case. However, in *The Despina R* Brandon J., at first instance, suggested that conversion should be effected at the date of judgment.[185]

3.22 In Working Paper No. 80 we canvassed three options as possible rules that ought to govern the issue of set-off. They were that:

(i) The currency conversion should be calculated at the judgment date.

(ii) The conversion should be effected as at some specified earlier date—for example, when the later of the two losses was incurred.

(iii) The operation of set-off should be excluded in foreign-currency cases, so that each party would be given judgment for his own claim. As to this, we referred to the possibility of introducing procedural rules under which one party could not enforce his judgment without taking the other's into account.[186]

3.23 On consultation, some support was expressed for each of the options referred to in the previous paragraph, although there was a majority in favour of option (i). There was, however, little support for option (ii). One commentator who favoured that approach suggested that conversion should be effected as at the earliest date at which the set-off could have been made; but we take the view that the drawbacks to this approach are such as

[183] *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 report.

[184] See paras. 3.24–3.25 and 3.27(*a*), below.

[185] [1978] Q.B. 396, 415. See para. 2.12, above.

[186] Working Paper No. 80, paras. 3.32–3.34.

to render this an unsatisfactory solution. These drawbacks, to which we referred in the working paper,[187] are that:

(i) the adoption of this principle would perpetuate the defects of a kind similar to those inherent in the now abandoned breach-date rule; and

(ii) it would be necessary for the court to determine the dates on which the losses were " incurred ", a process which could prove difficult in some cases.

Accordingly, we do not favour option (ii).

3.24 On reconsideration of this problem, we have formed the view that the most appropriate solution would be to adopt the third option, whereby each party would obtain judgment for the amount of his claim expressed in the appropriate foreign currency. However, this conclusion is subject to the qualification that neither judgment should be enforceable without the other judgment being taken into account.[188] On this basis, a payment made in or towards satisfaction of either judgment debt before any question of enforcement had arisen would be converted into the currency of the relevant judgment at the date of actual payment in accordance with the principle underlying *Miliangos*.

3.25 The question arises, however, whether a solution along these lines is practicable. As we explain in Part V of this report (which relates to procedural matters),[189] we have not conducted a detailed investigation of the practical issues arising in this essentially procedural context, though we hope that consideration will be given to our conclusions concerning procedural matters by those who are expert in that field. In relation to the issue of set-off, however, we would draw attention to section 100 of the County Courts Act 1959, which enables an application to be made by either party, where the parties have obtained cross-judgments against each other and at least one of the judgments was given by a county court, for leave to set off " any sums . . . payable under the several judgments ".[190] It is perhaps worth considering whether a general rule along these lines might be introduced in relation to the enforcement of the respective judgments in different currencies.

3.26 If the introduction of a procedural rule of the kind referred to in the previous paragraph is considered undesirable or impracticable, we would recommend, having regard to the remarks of the majority of those who on

[187] Para. 3.33. We referred there to a third disadvantage—namely, that it seemed anomalous for the *Miliangos* principle concerning currency conversion to be applied where separate actions were brought by each party against the other in respect of his claim and another rule where the respective claims were brought in one action. However, this criticism would apply equally if the conversion were effected at the judgment date.

[188] In arriving at this conclusion, we have taken into account the comments of the Bar and The Law Society. The Bar, who favoured option (iii), considered it essential that a party who seeks to enforce his judgment should be required to give credit for the judgment against him; and The Law Society, although favouring option (i) (the judgment date) in general, made a similar suggestion in relation to cases " where cash deposits are involved or where a precise conversion is required ".

[189] See para. 5.4, below.

[190] Sect. 100(1). As to applications in the High Court under this provision, see R.S.C., O. 107, r. 4.

consultation commented on this matter,[191] that conversion should be effected at the date of judgment in accordance with the suggestion of Brandon J. in *The Despina R.*[192]

CONCLUSION

3.27 The problem of set-off which arises where the parties' judgments against each other are expressed in different currencies should be resolved:

(*a*) if a procedure can be introduced whereby neither party's judgment can be enforced without taking account of the other's, by giving judgment for each party in the currency applicable to his claim and directing that the judgments should be subject to such procedure in the event that enforcement of either judgment is subsequently sought;[193] but

(*b*) in the absence of such a procedure, conversion should be effected at the date of judgment, and judgment given in the currency of the claim of the party whose claim on that basis is the larger.

(*b*) *Limitation of a shipowner's liability under section 503 of the Merchant Shipping Act 1894 (as amended)*[194]

3.28 We considered, in paragraphs 2.13—2.14 above, the right conferred on a shipowner by section 503 of the Merchant Shipping Act 1894 to limit 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 the judgment ought to be expressed in a foreign currency but in which the statutory limit on liability also applies? There has been no decision on the matter since *Miliangos*, although as mentioned in paragraph 2.14 above, Brandon J. has tentatively suggested that, in the common situation where 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).[195]

3.29 We suggested in paragraph 3.37 of the working paper that, 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 is properly expressed in a foreign currency should be given in that

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[191] See para. 3.23, above.

[192] [1978] Q.B. 396, 415. See para. 3.20, above.

[193] The necessary currency conversion would be calculated as at the date on which an enforcement procedure is initiated.

[194] This section will be replaced by s. 17 of the Merchant Shipping Act 1979 when that section is brought into force; see n. 53, above.

[195] *The Despina R* [1978] Q.B. 396, 415. When s. 17 of the Merchant Shipping Act 1979 is brought into force, 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, Part I, 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.

currency. We explained that, strictly and in the light of that rule, the position should be formulated rather differently.[196] We went on to invite comments[197] on whether our suggestion would give rise to any difficulty.

3.30 On consultation, most of those who commented on this issue favoured the adoption of the approach put forward in our working paper in preference to that suggested by Brandon J. in *The Despina R.*[198] Accordingly we adhere to that approach.

CONCLUSION

3.31 As to the question of the form in which judgment should be given in the case where such judgment ought to be expressed in a foreign currency but where the limit of liability in sterling under section 503 of the Merchant Shipping Act 1894 (as amended) applies:

(*a*) the matter should be left to judicial development; but

(*b*) we favour the adoption of the principle that

(i) 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;*

(ii) 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 in some form which, in effect, is for "£100,000 or such sum in [the foreign currency] as is at the date of payment[199] the equivalent of £100,000".

(*c*) *An order for an account to be taken*

3.32 In Working Paper No. 80 we referred to a difficulty which may arise, in the case of an order for an account to be taken, where the constituent items of the account are expressed in different currencies.[200] 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. We expressed the view, however, that on analysis this exercise raised a problem essentially similar to that of set-off, because it involved 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

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[196] See para. 3.31, below.

[197] Working Paper No. 80, para. 3.37.

[198] [1978] Q.B. 396, 415; see para. 3.28, above. However, the Bar, while supporting the approach suggested in the working paper, expressed doubt whether it was fair to the plaintiff for the defendant to have the option of paying in foreign currency in the situation referred to in para. 3.31(*b*)(ii), below. In our view, however, the defendant ought to have that right by virtue of the *Miliangos* principle.

[199] 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. 2.4, above.

[200] Para. 3.38.

proposed that this problem should be solved along the same lines as those to be applied to set-off;[201] and those who commented on the proposal on consultation favoured this approach.[202]

CONCLUSION

3.33 Where the constituent items of an account ordered by the court to be taken are expressed in different currencies, the question of the date at which currencies should be converted into the currency in which the final balance is to be expressed should be resolved along similar lines to those applicable to set-off.[203]

(2) Claims to share in a fund

(a) On the liquidation of a company and in bankruptcy

3.34 As we explained in Part II,[204] decisions since *Miliangos* have made it clear why, in the case of the liquidation of a company, whether it is or is not solvent, and in a bankruptcy, foreign-currency debts should be converted into sterling at the date of the resolution to wind up the company (if the liquidation is voluntary), at the date of the winding-up order (where the court orders the winding-up), or at the date of the receiving order (in the case of bankruptcy). In our working paper we expressed agreement with this approach;[205] and in their final report,[206] which was published some months after our working paper, the Insolvency Law and Practice Review Committee also supported the principles that have been laid down by the courts, strongly recommending that "... any future Insolvency Act should expressly provide that the conversion of debts in foreign currencies should be effected as at the date of the commencement of the relevant insolvency proceedings".[207]

3.35 In the working paper[208] we referred to, but rejected, a possible argument that a more satisfactory approach than the present one would be for the conversion of a foreign currency obligation into sterling to be effected at the latest practicable date—which would seem to be each occasion on which it is decided to declare and pay a dividend. We went on to suggest that the justification for adopting that principle in preference to the existing rule lay in the fact that it would correspond more closely with the philosophy underlying *Miliangos* and so produce a fairer result for a foreign-currency creditor, especially in the numerous cases where the process of liquidation or bankruptcy is prolonged, sometimes over many years.[209]

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[201] See paras. 3.20–3.27, above.

[202] The Law Society suggested that the conversion should be effected after a limited period of, say, 7 days.

[203] See para. 3.27, above.

[204] See paras. 2.22–2.23, above.

[205] Para. 3.47.

[206] (1982), Cmnd. 8558, paras. 1306–1309.

[207] *Ibid.*, para. 1309. The Committee specifically endorsed our view (see Working Paper No. 80, para. 3.45) that conversion as at that date should continue to apply, even if the debtor was subsequently found to be solvent.

[208] Para. 3.41.

[209] *Ibid.*

3.36 On consultation, opinion was divided. The Bar and The Law Society favoured the retention of the existing rule, and one[210] of the two commentators who preferred the different approach referred to in the preceding paragraph conceded the existence of a substantial body of opinion on the part of insolvency practitioners that the adoption of that approach would be impracticable. In both the *Dynamics*[211] and the *Lines Bros.*[212] cases the contrary arguments were fully considered by the court, but were rejected for reasons which appear to us to be convincing.[213] We remain of the view which we expressed in the working paper.

CONCLUSION

3.37 The present law relating to the conversion into sterling of foreign-currency claims in relation to solvent and insolvent companies and to bankruptcy is satisfactory.[214]

(b) Section 504 of the Merchant Shipping Act 1894 (as amended)[215]

3.38 We have explained in Part II[216] 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 bring an action for a decree limiting the total amount of his liability; that if he succeeds and the total amount of the claims exceeds the limit, the fund out of which a dividend on the claims will be paid will be in sterling; and that accordingly if any claim is in foreign currency the question arises as to the date on which conversion into sterling should take place.

3.39 In the working paper[217] we expressed the view that the issue should be left to judicial development, though we provisionally favoured the suggestion made by Brandon J.[218] that the appropriate date was that of the decree of limitation, on the ground that, as the situation constituted a " form of statutory insolvency ", the rule applicable to it should be similar to that governing the conversion of foreign-currency debts proved in the liquidation of a company.[219] On consultation the Bar and The Law Society, who alone commented on this matter, supported our approach.[220]

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[210] This commentator suggested that, in the case of a compulsory winding-up, conversion into sterling should be the date of the presentation of the petition, because that date marked the " commencement of the winding-up " (see the Companies Act 1948, s. 229(2)).

[211] *Re Dynamics Corporation of America* [1976] 1 W.L.R. 757.

[212] *Re Lines Bros. Ltd.* [1983] Ch. 1 (C.A.), upholding the decision of Slade J. at first instance: (1981) 125 S.J. 426.

[213] In F.A. Mann, *The Legal Aspect of Money*, 4th ed., (1982), p. 337, the decision in the *Dynamics* case is described as " courageous, but unquestionably correct ".

[214] In Working Paper No. 80, para. 3.49, we referred to certain issues to which the E.E.C. Draft Bankruptcy Convention appeared to give rise; and we indicated that further consideration of those issues would be needed as negotiations on the Draft Convention progressed. Such negotiations are still in progress and there has been no further development which calls for consideration in the context of this report.

[215] Sect. 504 of the 1894 Act will be replaced by s. 17 of the Merchant Shipping Act 1979 when the latter section is brought into force.

[216] See para. 2.24, above.

[217] Para. 3.50.

[218] *The Despina R* [1978] Q.B. 396, 415–416.

[219] See paras. 2.22–2.23 and 3.34–3.37, above.

[220] The Law Society added, however, that " ideally " conversion should take place as nearly as possible to the date of actual payment if the limitation fund proved to be sufficient to cover every claim.

CONCLUSION

3.40 The most appropriate date as at which, in the context of a decree of limitation of liability under section 504 of the Merchant Shipping Act 1894 (as amended), the conversion of a foreign-currency claim should be calculated is the date of the decree.

(c) Other claims to share in a fund[221]

3.41 As we explained in paragraph 2.26 above, there appears to be no decision since *Miliangos* indicating what principle governs claims to share in a fund other than those discussed in paragraphs 3.34–3.40 above. We referred in paragraph 2.26, however, to *Re Chesterman's Trusts*[222] in which it was held, in circumstances involving no question of " insolvency ", 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 by the Master to be due should be calculated as at the date of the issue of his certificate.

3.42 In the working paper,[223] while indicating that in our view the issue was appropriately to be resolved by judicial development, we suggested that:

(*a*) the amounts found to be due for payment out of the fund should be expressed in the currency applicable to the claim, and conversion effected as near to the date of actual payment as was practicable; and

(*b*) where any doubt existed as to whether the fund was sufficient to meet every claim upon it, a date should be fixed as at which claims were to be valued and any requisite conversion effected.

3.43 On consultation, no-one other than the Bar and The Law Society commented upon the provisional view that we had expressed in the working paper. While the Bar agreed with our views, The Law Society suggested that, bearing in mind the variety of situations that could arise in practice, no satisfactory general rule can be formulated.[224] On reconsideration in the light of the comments received on consultation, we agree that it is not practicable to suggest a general principle which would be applicable to every kind of fund.

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[221] We have explained in para. 2.25, above that in certain circumstances it is necessary for pecuniary legacies expressed in foreign currency to be converted into sterling, and we pointed out that it had been held before *Miliangos* that conversion into sterling should be calculated at the end of " the executor's year " (i.e. on the first anniversary of the testator's death). We suggested in the working paper, at para. 3.72, that *Miliangos* had no bearing on that principle, which in our view appeared to be satisfactory. On consultation, those who commented on this issue were divided. There was some support for our approach, but others considered that, in the light of *Miliangos*, the date of payment should now be adopted; and The Law Society proposed a third solution—namely, that conversion should be calculated as at the date of death. On reconsideration in the light of these comments, we are unable to recommend the adoption of a general rule that would be applicable to every case.

[222] [1923] 2 Ch. 466.

[223] Paras. 3.52–3.53.

[224] However, The Law Society agreed with our suggestion in the working paper, para. 3.52, that in accordance with *Miliangos*, the amount found due by the Master in cases such as *Re Chesterman's Trusts* (referred to in paras. 2.26 and 3.41, above) ought to be expressed in foreign currency and conversion into sterling effected as near to the date of actual payment-out to the claimant as practical considerations would permit.

CONCLUSION

3.44 No satisfactory general rule can be formulated for the purpose of determining the date as at which currency conversions should be calculated in relation to claims to share in a fund other than those referred to in paragraphs 3.37 and 3.40 above.

(3) Foreign judgments

3.45 In paragraphs 2.37–2.42 above, we outlined the present law concerning the enforcement in this country of foreign judgments by action at common law or by registration in accordance with statutory procedures. We suggested in Working Paper No. 80[225] that the present rules were satisfactory, as being in accordance with the philosophy underlying *Miliangos*. Those who commented on this matter agreed with us.

CONCLUSION

3.46 The present rules governing questions of currency conversion in relation to the enforcement of foreign judgments in this country are satisfactory.

(4) Maintenance orders in foreign currency

3.47 The rules governing the conversion into sterling of maintenance orders expressed in a foreign currency for the purpose of the enforcement of those orders have been outlined in Part II.[226] As we explained in the working paper,[227] no problem arises in relation to an order made by an English court and expressed in a foreign currency,[228] since such an order is essentially similar to a judgment given in the form approved in *Miliangos*. By contrast, however, orders of a foreign court which are registered under the statutory provisions to which we have referred in paragraphs 2.48–2.51 above are converted into sterling as at the date of their registration here. In the working paper[229] we accordingly invited views as to whether the existing rules should be amended for the purpose of bringing them into line with *Miliangos*, bearing in mind, however, the practical and administrative problems to which such an amendment might give rise.[230]

3.48 On consultation, the weight of opinion expressed by commentators on this issue was in favour of making no change to the existing rules, on grounds both of principle[231] and of practical and administrative convenience; and on reconsideration we have formed the view that no change should be made in the existing rules.

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[225] Para. 3.55.

[226] See paras. 2.48–2.52, above.

[227] Para. 3.58.

[228] See para. 2.52, above.

[229] Para. 3.61.

[230] When we published Working Paper No. 80 the 1968 E.E.C. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters had not yet been incorporated in legislation, as it now has been in the Civil Jurisdiction and Judgments Act 1982, s. 8 of which provides for conversion at the date of registration: see para. 2.51, above.

[231] One commentator suggested that different considerations applied in relation to maintenance from those relevant to other categories of court order and that the appropriate remedy of a party affected by fluctuations in currency exchange rates is to apply for a variation of the maintenance order in question.

CONCLUSION

3.49 No change should be made in the present rules governing the conversion into sterling of maintenance orders expressed in a foreign currency when such orders are enforced.

(5) Interest and compensation for late payment

(a) Interest

3.50 In paragraphs 2.27–2.33 above we have outlined the present law concerning the award of interest on foreign-currency claims in respect of the period up to the date of judgment.[232] In Working Paper No. 80 we made suggestions as to four aspects of this issue, which we now consider in turn.

3.51 First, we expressed the view[233] that the present choice of law rule, under which the *lex causae* governs the question whether or not there is a right to claim interest (*a*) on the basis of a contractual term[234] and (*b*), probably, as damages,[235] was satisfactory. Those who commented on this provisional conclusion agreed with it.

3.52 Secondly, we canvassed[236] the issue of the rate which the court should apply when awarding interest in the exercise of its statutory discretion[237] in relation to a foreign-currency claim. We expressed a preference for the rate applicable to the foreign currency in question.[238]

3.53 In *The Pacific Colocotronis*,[239] which was decided too late to be fully considered in our working paper, the Court of Appeal adopted an approach similar to the one which we had suggested was appropriate, with the qualification that the principle we favoured was of a prima facie, rather than an absolute, character. On consultation, general support was expressed for the retention of the existing law. We consider that the position as to this issue is now satisfactory.

3.54 Thirdly, we expressed the view[240] that where interest is claimed by virtue of a contractual term, both the validity of that term and the rate at which interest is to be paid should, as under the existing law, be governed by the proper law of the contract. Those who, on consultation, commented on this suggestion agreed with it, and we remain of the view expressed in the working paper.

3.55 Fourthly, we considered whether the law governing the rate of interest on damages should be the law of the forum, the *lex causae* or some

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[232] Interest on foreign-currency judgment debts is a separate issue, which we consider in Part IV below.

[233] See Working Paper No. 80, para. 4.11.

[234] See para. 2.29, above.

[235] See para. 2.30, above.

[236] Working Paper No. 80, paras. 4.13–4.21.

[237] Under the Law Reform (Miscellaneous Provisions) Act 1934, s. 3, which has since been replaced by s. 35A of the Supreme Court Act 1981: see para. 2.33, above.

[238] Working Paper No. 80, para. 4.21.

[239] *Shell Tankers (U.K.) Ltd.* v. *Astro Comino Armadora S.A.* [1981] 2 Lloyd's Rep. 40, 45–7.

[240] Working Paper No. 80, para. 4.22.

other law. The present law is not clear on this issue,[241] and in the working paper[242] we considered at length the respective arguments that might be advanced in favour of the adoption of either the *lex fori* (English law) or the *lex causae,* and the conflicting dicta[243] concerning this question. We tentatively concluded that the most suitable rule appeared to be that the *lex fori* should govern the rate of interest on damages.[244]

3.56 On consultation, opinion was divided, though the majority of those who commented on this point, including the Bar and The Law Society,[245] favoured the approach that we had suggested in the working paper. On reconsideration we remain of the view that English law as the *lex fori* should govern the rate at which interest should be awarded.

SUMMARY OF OUR CONCLUSIONS CONCERNING INTEREST ON FOREIGN-CURRENCY CLAIMS

3.57 (*a*) The present law that the existence of the right to claim interest is governed by the *lex causae* is satisfactory.

(*b*) The present law, whereby when the court exercises its discretion under section 35A of the Supreme Court Act 1981 to award interest, it does so, prima facie, at the rate applicable in the context of the currency of the judgment, is satisfactory.

(*c*) Where interest is claimed by virtue of a term of the contract, the validity of that term and the rate at which interest is to be paid should continue to be governed by the *lex causae* (i.e., the proper law of the contract).

(*d*) The rate of interest on damages should be determined by the application of English law as the law of the forum.

(*b*) *Compensation for late payment*

3.58 We referred in paragraph 2.34 above to the general principle that (apart from any question of interest) only nominal damages are recoverable for failure to pay money; that the rule has, however, been criticised and is subject to established exceptions; and that special damages are recoverable in respect of loss suffered by a party to a contract in consequence of the failure by the other party to pay a sum of money due under the contract, provided that the loss was foreseeable by that other party. We went on, in paragraph 2.35 above, to point out that in the context of foreign-money

[241] See para. 2.32, above.

[242] Paras. 4.23–4.27.

[243] See Working Paper No. 80, para. 4.9.

[244] *Ibid.*, para. 4.28.

[245] The Law Society conceded that the argument was finely balanced, particularly in relation to the award of interest on claims for breach of contract, as to which there was an argument for applying the law which the parties had chosen to govern their contract, especially where the contract contained an express term to this effect. However, The Law Society favoured the *lex fori* on the ground that there were practical advantages in applying English law as the law of the forum, because s. 3 of the Law Reform (Miscellaneous Provisions) Act 1934 (which has now been replaced by the Supreme Court Act 1981, s. 35A: see para. 2.33, above) conferred upon the court a wide discretion to make such award as was fair in the circumstances of the particular case (see paras. 2.33 and 3.53, above), and in an appropriate case the court had power to apply the rate specified by the *lex causae.*

liabilities compensation was awarded in the *Ozalid* case[246] 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.

3.59 In Working Paper No. 80[247] we discussed the implications of the *Ozalid* case in some detail and said that we saw no inconsistency between the *Miliangos* principle and the rule that special damages could be awarded for a specific and foreseeable loss consequent upon the late payment of a debt. It was generally agreed by those commentators who expressed a view upon this issue that compensation should be awarded to a foreign-currency creditor who suffered loss by reason of currency fluctuations which occurred after the date for payment had passed. However, the Bar and The Law Society appeared to suggest that the creditor should *automatically* be entitled to claim compensation for such loss,[248] irrespective of whether or not the loss was specific or foreseeable.

3.60 In our view, compensation (apart from any question of interest) should not be awarded automatically for a late payment of a foreign-currency debt but only on the basis of the principles generally applicable to the award of damages for breach of contract. One reason why, in the Report on the 1967 Council of Europe Convention on Foreign Money Liabilities,[249] we recommended that the United Kingdom should not become a party to the convention, was the existence of a provision in the convention which would substantially have conferred an *automatic* right to compensation for late payment. As we have explained in paragraph 2.5 above, the philosophy of *Miliangos* is that a foreign-currency claim has nothing to do with sterling. It follows that the question whether in a particular case a creditor should be awarded compensation for the late payment of his debt, irrespective of the currency in which his claim is properly to be expressed, is essentially one that involves the law of damages for breach of contract, an area of the law which is constantly evolving to meet changing commercial needs.[250]

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

[247] Paras. 3.65–3.68.

[248] The Bar indicated that, in their view, the requirement that the loss should be both specific and foreseeable was " too restrictive ". The Law Society suggested that, where the debt remained unpaid at the date of judgment, the plaintiff should have the option of obtaining judgment in the currency in which his loss was felt rather than in the money of account, or, in other words, that the plaintiff could elect, in relation to a judgment for a debt, that principles similar to those which governed the determination of the foreign currency in claims for unliquidated damages (see paras. 2.8–2.10, above) should be applied.

[249] This was a joint report of the Law Commission and the Scottish Law Commission (Law Com. No. 109; Scot. Law Com. No. 66). See para. 2.36, above.

[250] *Ozalid* itself (see paras. 3.58–3.59, above) is an example of such development in the specific context of foreign money liabilities. Other recent decisions concerning the issue of compensation for late payment of a debt include *Wadsworth* v. *Lydall* [1981] 1 W.L.R. 598, referred to in para. 2.34, above, and *Compania Financiera " Soleada " S.A.* v. *Hamoor Tanker Corporation Inc.* [1981] 1 W.L.R. 274. It has been held by the Court of Appeal of New Zealand, in an action for damages brought by a seller of goods which involved the buyer's failure to take delivery on time (thereby postponing the dates when payment under the contract fell due) and where a loss was suffered by the seller in consequence of a variation in currency exchange rates between the due date and that of actual payment, that after *Miliangos* no special rule applied to a loss of that kind; and that accordingly the loss was recoverable if the general criteria applicable to an award of damages for breach of contract were satisfied: see *Isaac Naylor & Sons Ltd.* v. *New Zealand Co-operative Wool Marketing Association Ltd.* [1981] 1 N.Z.L.R. 361.

We believe that the introduction of a specific right of compensation applicable to foreign-currency creditors but not to those whose claim is in sterling would create an anomaly.

3.61 There remains one matter—namely, the question of compensation for the late payment of a judgment debt. In our view, the rules which govern the award of compensation for late payment of a debt ought in principle to extend to judgment debts, including those expressed in foreign currency.

CONCLUSION

3.62 The introduction of a specific rule governing the award of compensation for late payment of a foreign-currency debt would be undesirable in the absence of a similar development in the general law relating to damages for late payment of a debt.

PART IV

INTEREST ON FOREIGN-CURRENCY JUDGMENT DEBTS AND ARBITRAL AWARDS

A INTRODUCTION

4.1 When Working Paper No. 80 was in the course of preparation we took the view that the statutory rates governing interest upon judgment debts did not call for consideration in the context of our work on foreign money liabilities. On consultation, however, it was suggested to us that after *Miliangos* the automatic application of those rules to foreign-currency judgments gave rise to an anomaly that ought to be remedied by legislation. We accordingly sought views on this issue from among those with relevant practical experience. In the light of the response which we received on this further limited consultation, we have arrived at the conclusion that legislation is desirable for the purpose of amending the law as to interest upon judgment debts and arbitral awards expressed in foreign currency. A draft clause to give effect to our recommendations is set out, together with explanatory notes, in Appendix A. We doubt whether a separate Bill is necessary as no other recommendations involving primary legislation are made in this report. We feel that the clause may more easily find a place in a suitable legislative vehicle.

4.2 In Section B of this Part of the report, we outline the present law; and in Section C we explain why we consider that the law requires amendment and set out our recommendations as to the changes which we believe to be desirable.

B THE PRESENT LAW

(1) High Court judgments

4.3 Section 17 of the Judgments Act 1838, as originally enacted, provided that:

> ". . . every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment[251] . . . until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment."

Under section 44 of the Administration of Justice Act 1970 the rate of 4% per annum specified in the 1838 Act may, by order, be replaced by the rate specified in the order. Each of the successive orders that have been made from time to time under this section refers to judgments "entered up" after a stipulated date so that every judgment carries interest at whatever fixed rate is in force at the date of the judgment.[252]

[251] The term "judgment" extends to a judgment in foreign currency; see para. 10 of the Practice Direction set out in Appendix D. Under the modern law, it appears that the statutory interest runs, not from the date on which judgment is actually entered, but from that on which the judgment is given, provided that it quantifies the amount: *Cook* v. *J. L. Kier & Co. Ltd.* [1970] 1 W.L.R. 774, 777; *Parsons* v. *Mather & Platt Ltd.* [1977] 1 W.L.R. 855; *Erven Warnink BV* v. *J. Townend & Sons (Hull) Ltd. (No. 2)* [1982] 3 All E.R. 312, 319 and 320.

[252] However, it is pointed out in *Halsbury's Laws of England*, 4th ed., (1980), vol. 32, para. 110 that "A contract to pay a debt with interest at a certain rate does not entitle a plaintiff to levy under his execution more than the statutory rate; the contract must state specifically that any judgment obtained for the recovery of the debt carries interest at a higher rate and that higher rate should form part of the judgment." The following authorities are cited in support of this proposition: *Re European Central Railway Co., ex parte Oriental Financial Corporation* (1876) 4 Ch.D. 33; *Re Sneyd, ex parte Fewings* (1883) 25 Ch.D. 338; *Arbuthnot* v. *Bunsilall* (1890) 62 L.T. 234; *Economic Life Assurance Society* v. *Usborne* [1902] A.C. 147.

(2) County court judgments

4.4 In 1887 it was decided that judgments obtained in the county court are not judgments to which the Judgments Act 1838 applies and accordingly that county court judgments do not carry interest under that Act.[253] However, in recent years some doubt has been cast on this decision[254] and comments have been made by members of the Court of Appeal to the effect that, if the decision was indeed correct, then the law should be changed.[255]

4.5 The question whether county court judgments should carry interest was considered by the Payne Committee on the Enforcement of Judgment Debts.[256] At the time their Report was published, the county court jurisdiction in contract and tort was limited to £500 and the Committee recommended that creditors should recover interest on county court judgments exceeding, say, £100.[257] The Payne Committee went on to point out that very difficult questions arose concerning the calculation and collection of interest on small judgments, especially when paid by instalments. Provision has now been made in relation to interest on county court judgments by section 101A of the County Courts Act 1959,[258] empowering the Lord Chancellor to provide by order for county court judgments or orders (including those for sums payable by instalments) to carry interest at such rate as may be prescribed. The power conferred by section 101A is flexible; for example, it permits orders made under the section to provide that interest should be payable only on sums exceeding a specified amount.[259] However, no order has yet been made under the section.

4.6 The power conferred upon the Lord Chancellor to which we have referred in the previous paragraph extends to certain sums of money which, although awarded by a tribunal rather than by a county court, may become recoverable as if they had been awarded by that court.[260] It is convenient to explain this by reference to the following example. Under the Employment Protection (Consolidation) Act 1978,[261] an industrial tribunal is empowered to award to an employee compensation against his employer for "unfair dismissal". That Act provides[262] that any sum "payable in pursuance of a decision of an industrial tribunal . . . which has been registered in accordance with the regulations [made under the Act][263] shall, if a county court so orders, be recoverable . . . as if it were payable under an order of that court."[264]

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[253] *R.* v. *County Court Judge of Essex* (1887) 18 Q.B.D. 704.

[254] *K.* v. *K.* [1977] Fam. 39, 49, *per* Lord Denning M.R.

[255] *Ibid.*, *per* Stephenson L.J., at p. 57 and Orr L.J., at p. 58; *Sewing Machine Rentals Ltd.* v. *Wilson* [1976] 1 W.L.R. 37, 43, *per* Megaw L.J.

[256] (1969), Cmnd. 3909.

[257] *Ibid.*, para. 1170.

[258] This section was introduced by the Supreme Court Act 1981, s. 149(1) and Sched. 3, para. 11.

[259] County Courts Act 1959, s. 101A(4)(*b*).

[260] County Courts Act 1959, s. 101A(2)(*b*). For a list of such awards, see *The County Court Practice (1983)*, Note to 0.25, r. 12.

[261] Sect. 68(2).

[262] Sect. 128(2) and Sched. 9, para. 7(1).

[263] Sect. 128(2) and Sched. 9, para. 1.

[264] The relevant procedure is laid down by C.C.R., O.25, r. 12. The Secretary of State may provide by order that sums payable in pursuance of decisions of industrial tribunals shall carry interest: Employment Protection (Consolidation) Act 1978, Sched. 9, para. 6A, introduced by the Employment Act 1982, s. 21(2) and Sched. 3, para. 7.

(3) Arbitral awards

4.7 The Arbitration Act 1950, section 20, provides that a sum directed to be paid by an arbitrator shall, " unless the award otherwise directs ", carry interest as from the date of the award and at the same rate as a judgment debt.[265] The arbitrator's power under this section is limited to the making of a direction that no interest should run on the award; he cannot direct that the award should carry interest at a rate other than that which is prescribed for judgment debts at the date of the award.[266] And, as in the case of judgment debts, interest on an award is permanently fixed at the rate in force at the date of the award.[267]

C The Reform which We Recommend

4.8 As we have explained in paragraph 4.1 above, the question of interest on foreign-currency judgments was not canvassed in Working Paper No. 80. On consultation, however, certain commentators referred to the difference between the rules governing the award of interest on a foreign-currency claim in respect of the period to the date of judgment[268] and the interest that automatically ran on judgment debts; and they suggested that this difference constituted an anomaly. This anomaly arises because the rate of interest applicable from time to time to judgment debts, whether expressed in sterling or in foreign currency, is fixed in the light of the interest rates currently prevailing in the United Kingdom. Thus, for example, the court might exercise its statutory discretion[269] to award interest on a particular foreign-currency debt at the rate appropriate to the currency in question[270] at, for example, 6% per annum in respect of the period from the date on which the debt fell due to the date of judgment, yet the rate of interest prescribed for judgment debts at the date of the judgment may be, say, 12%. To express the point in different terms: the judicial development of the rules concerning interest on foreign-currency claims to the date of judgment has not been matched by legislative change relating to the rate of interest that automatically runs on foreign-currency judgment debts.

4.9 In the light of these comments we sought the views of people and organisations with practical experience of this part of the law. We explained that we provisionally proposed the enactment of legislation whereby the court would be empowered, in the case of a foreign-currency judgment, to order at its discretion that a specified rate of interest other than the one prescribed under the Judgments Act 1838 should apply to the judgment.[271] With the exception referred to in paragraph 4.10 below, every commentator favoured our proposal. We are most grateful to all those whom we included in this limited consultation for their prompt and helpful response.

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[265] See para. 4.3, above.

[266] *Timber Shipping Co. S.A.* v. *London & Overseas Freighters Ltd.* [1972] A.C. 1.

[267] *Rocco Giuseppe & Figli* v. *Tradax Export S.A., The Times,* 25 May 1983.

[268] See paras. 2.29–2.33, above.

[269] Under the Supreme Court Act 1981, s. 35A.

[270] See para. 2.33, above.

[271] We consulted Mr. Justice Lloyd, the Chairman of the Commercial Court Committee; Master Elton, the Senior Master of the Queen's Bench Division; the Lord Chancellor's Department; Ian Hunter Q.C., the Chairman of the Working Party on Foreign Money Liabilities which was set up by the Senate of the Inns of Court and the Bar to consider Working Paper No. 80; The Law Society; and two firms of solicitors practising in London who had previously submitted comments on the working paper.

4.10 Master Elton, on behalf of himself and certain of his senior colleagues, expressed strong opposition to the proposal, on grounds both of principle and of practicality. He suggested that, since the obligation which arises under an English judgment supersedes the original "foreign" obligation, the judgment debtor's liability to pay interest on the judgment arises from failure to comply with the judgment rather than the original obligation. He went on to indicate, secondly, that the implementation of our proposal would introduce complex and difficult problems in relation to the execution of judgments, including the difficulty that would arise for the sheriff's officers in calculating the interest to be added to the judgment when they executed a writ of fi. fa. In our view, however, the *Miliangos* principle is applicable to foreign-currency claims after as well as before judgment, because, as Lord Wilberforce put it in that case, the plaintiff has "no concern with sterling"; and so far as the practical aspects of our proposal are concerned, we propose that the rate of interest applicable to a foreign-currency judgment debt should, as is now the case, be fixed for the purpose of execution of the judgment, though not necessarily at the statutory rate.[272]

4.11 In the light of the comments received on our limited consultation, we have arrived at the conclusion that a change in the present law along the lines outlined in paragraph 4.9 above is desirable. However, the question arises whether it is appropriate to confer upon the courts the proposed new power in relation only to judgments in foreign currency. As to this question, powerful arguments were addressed to us on consultation that the statutory rate of interest on judgment debts was lower in almost every case than that awarded on sterling claims in respect of the period to the date of judgment; and that accordingly the introduction of the proposed power would create another anomaly unless it extended to sterling judgments.[273] While we appreciate the force of this argument, we consider that the question of interest on sterling claims and judgments cannot appropriately form the subject of recommendations in the context of our work on foreign money liabilities. However, we think it right to draw attention to the views put to us on this matter.

4.12 One point remains for consideration—namely, the question of variable rates of interest. Both the High Court[274] and a county court[275] have power to award interest to the date of judgment calculated at different rates for different periods. By contrast, however, the statutory rate of interest on judgments is fixed at the date of the judgment, by reference to the order then in force. We consider that, in order to assimilate the rules governing the award of interest on foreign-currency claims to the date of the judgment to those applicable to interest on judgment debts in foreign currency, the court should have power to direct that the rate of interest should be variable.[276] For example, on a claim brought by a bank on a loan that had been made

[272] See para. 4.13, below.

[273] This argument is equally applicable to arbitral awards.

[274] Supreme Court Act 1981, s. 35A(6). This section was introduced by the Administration of Justice Act 1982, s. 15(1) and Sched. 1, Part I.

[275] County Courts Act 1959, s. 97A(5). This section was introduced by the Administration of Justice Act 1982, s. 15(2) and Sched. 1, Part II.

[276] We propose that arbitrators should have a similar power.

available to the defendant by means of overdraft facilities, the contractual rate of interest might be, say, 4% above the bank's base rate from time to time in force, and in those circumstances the court might be minded to direct that interest should run in those terms on the judgment until the judgment debt should be satisfied.[277]

4.13 There is, however, one qualification which we would make in relation to the case where, under the new power that we propose should be conferred upon the court and upon arbitrators, a direction is made that interest on the judgment or award should run at a variable rate. In our view the qualification is desirable in order to obviate the need for those concerned generally with the enforcement of judgments and awards, and in particular sheriff's officers charged with the execution of writs of fi. fa., to calculate interest otherwise than at a fixed rate. We propose that rules of court should provide that when an enforcement procedure is initiated, the rate of interest as at that date should apply for the purpose of that procedure or, in other words, that the interest rate should be " frozen " as at that date.[278]

4.14 We are conscious that the implementation of our recommendations as to variable rates of interest will mean that courts will be able to award interest in this form on foreign-currency judgment debts but not on sterling judgment debts. We would draw attention to this fact along with the wider issue raised in paragraph 4.11 above concerning the law as to interest on sterling judgment debts.

Our recommendations as to interest on judgment debts and arbitral awards in foreign currency

4.15 Our recommendations as to interest on judgment debts and arbitral awards in foreign currency are as follows:

(1) The High Court should be empowered to direct that a sum awarded by a judgment given by that court and expressed in foreign currency should carry interest at such fixed or variable rate as the court should think fit instead of at the rate which would otherwise apply.

(2) A county court should be empowered to direct that a sum awarded by a judgment or order which is expressed in foreign currency and which falls within the ambit of an order made by the Lord Chancellor under the County Courts Act 1959, section 101A should carry interest at such fixed or variable rate of interest as the court thinks fit instead of at the rate which would otherwise apply.

(3) An arbitrator should be empowered to order that a sum directed to be paid by an award and expressed in foreign currency should carry interest at such fixed or variable rate of interest as he should think fit instead of at the rate which would otherwise apply.

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[277] It has been held in Scotland that the court has power to grant decrees in these terms, on the ground that if " . . . the crave or conclusion is framed in terms of the contract the lender is asking the court to enforce the contract, not to terminate it ": *Bank of Scotland* v. *Davis* 1982 S.L.T. 20, 21.

[278] A similar rule apparently applies in Scotland: *The Royal Bank of Scotland PLC* v. *Geddes* 1983 S.L.T. (Sh. Ct.) 32.

(4) Provision should be made by rules of court that, when an enforcement procedure has been initiated in respect of a judgment (including an arbitral award which has become enforceable as a judgment under section 26 of the Arbitration Act 1950) as to which a variable rate of interest is applicable by virtue of an order made under the proposed new statutory power, interest on the judgment should thereafter run at the rate then applicable for so long as that enforcement procedure is in force.

PART V

PROCEDURE

A INTRODUCTION

5.1 The House of Lords' decision in *Miliangos* has had considerable significance from the point of view of practice and procedure. Since previously money judgments had been expressed exclusively in sterling, there has been no need for special procedures in cases involving a foreign money element. That decision, by empowering 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, gave rise to the need to adapt existing forms and procedures to claims and judgments in foreign currency. This need was met by the issue of a Practice Direction[279] (to which we shall refer as " the Practice Direction "), which still regulates the practice governing foreign-currency claims and judgments in the High Court.[280]

5.2 In Part V of our working paper[281] we examined the changes in practice and procedure that had been made in consequence of the decision in *Miliangos*, and considered whether there were practical advantages in other conversion dates. We expressed views, or indicated the possible options, as to a range of matters relating to the existing procedure, upon which we invited comments.

5.3 On consultation comments were received on this Part of our working paper primarily (though not exclusively) from those who had practical experience in the field, including Master Ritchie, the then Senior Master of the Queen's Bench Division, who suggested that, except for the issue of a revised and simpler Practice Direction in relation to certain matters,[282] no attempt should be made to deal with the various problems in advance by a comprehensive instruction. We also received detailed comments from both the Bar and The Law Society, which have called for reconsideration of the views we expressed in our working paper. On several important issues the two professional bodies expressed differing views. In addition to their comments on the issues canvassed in the working paper, both the Bar and The Law Society suggested the introduction of new procedures in this field,

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[279] *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. The Practice Direction, as amended, appears as Appendix D to this report.

[280] This discussion is (unless otherwise stated) confined to High Court practice and procedure, but *The County Court Practice* recommends that the Practice Direction should be followed with suitable amendments. Procedural issues may also arise in relation to awards made by various statutory tribunals, who appear to have power, in appropriate cases, to express their awards in a foreign currency. For example, as we have explained in para. 4.6 above, under the Employment Protection (Consolidation) Act 1978, an industrial tribunal may award compensation for unfair dismissal. Such an award is registrable in a county court and if the court so orders is recoverable as if it were payable under an order of that court. An award which is made on a claim for unfair dismissal in respect of a contract of employment that provided for wages to be paid in this country in a foreign currency might well be expressed in that currency.

[281] Paras. 5.1–5.61.

[282] As to these matters, we have of course taken into account Master Ritchie's comments when formulating our conclusions on the relevant specific issues.

which we consider in Section B below,[283] before proceeding, in Section C, to consider in turn the detailed matters of procedure and to indicate our conclusions.

5.4 We trust that, in the light of our conclusions, such bodies as the Supreme Court Rule Committee[284] and the Supreme Court Procedure Committee[285] will examine the procedural issues which in our view require further consideration.

B Comments Concerning Procedure in General

(1) The Bar

5.5 The Bar suggested that there was a need for the present rule covering foreign-currency judgments to be modified by the introduction of a requirement that, when the court gave judgment in foreign currency, it should state a time within which the judgment was to be satisfied, the judgment creditor to have "liberty to apply". If (the Bar went on to suggest) the debtor failed to satisfy the judgment within the specified period, the creditor would have liberty, if he chose, to apply for the amount of the judgment to be recalculated.

5.6 The Bar explain in their comments that what they described as this "rough working rule" is necessary to prevent "the fruits of a judgment" from being "shrivelled before they are picked". To illustrate their suggestion they refer to a hypothetical claim in which the money of account is U.S. dollars, and the money of payment Argentinian pesos, and in which judgment is given for one million pesos. They point out that, on the assumption that (*a*) the inflation rate applicable to the peso is 200% a year and (*b*) that the judgment is satisfied six months after the date of judgment, the plaintiff will have lost one-half of the value of his judgment in terms of the money of account (the U.S. dollar) as well as, in real terms, in the money of judgment.

5.7 We appreciate that a judgment creditor may suffer loss in consequence of a delay on the part of the judgment debtor in satisfying the judgment. In our view, however, the new procedure proposed by the Bar is not an appropriate method of dealing with the problem.

5.8 The Bar's comment relates to two distinct matters. The first concerns the problem of the depreciation of a country's currency in terms of its purchasing power in that country—the problem, in other words, of inflation. But, although inflation gives rise to difficulties in relation to the payment of debts and the award of damages, those difficulties are

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[283] See paras. 5.5–5.13.

[284] See the Supreme Court Act 1981, s. 85.

[285] The terms of reference of this law reform body, which was set up in 1982 under the chairmanship of Lord Justice Kerr, are: "To initiate, or consider and make recommendations upon suggestions for, changes in practice and procedure, which appear to be desirable in the interests of the more rapid disposal of business or the saving of costs and which are considered to be matters of urgency, which should not await the more general review of procedure recommended by the Royal Commission on Legal Services." For details of the functions and membership of the Committee and its relationship to the Supreme Court Rule Committee, see (1982) 126 S.J. 383; (1982) 132 N.L.J. 543.

distinct from the questions concerning fluctuations in the value of one currency against another which are the subject of Working Paper No. 80 and of this report.

5.9 The second element in the type of situation referred to by the Bar does, by contrast, concern the loss suffered by the judgment creditor in consequence of a fall in the currency of the judgment against the currency of account. In our view, however, their argument fails to take into account the principle that the court gives judgment in the currency in which the plaintiff's loss ought to be measured. Normally, in the case of a debt, this would be the currency of account—i.e. in the hypothetical example cited by the Bar, the U.S. dollar. Since, to adapt to that example Lord Wilberforce's statement in *Miliangos*,[286] the correct principle is that " a U.S. dollar for good or ill should remain a U.S. dollar ", the creditor is not, and ought not to be, entitled to compensation for any decline in the value of that currency between the date of the judgment and that of its satisfaction.

CONCLUSION

5.10 We do not favour the Bar's suggestion that the present procedure should be modified so as to enable a judgment creditor in a foreign currency to apply for the judgment to be recalculated after a specified period has elapsed. However, we believe that the anxieties which led to that suggestion will be met by other proposals made in this report.[287]

(2) The Law Society

5.11 The Law Society urged in their comments that a procedure should be introduced for the purpose of summarily resolving issues concerning the conversion of currency, such procedure to be available before and after judgment. They envisaged that applications under the proposed procedure would be made to a master (or, in the Commercial Court, to a judge), and would be determined either without evidence or, at most, on affidavit evidence, and that not only the parties but also others who were concerned (such as sheriffs, receivers, liquidators and banks) would be able to invoke the procedure.

5.12 We have borne in mind The Law Society's suggestion in our consideration of the various matters of detail that have fallen for reconsideration. However, with one exception concerning garnishee orders,[288] we were not convinced, in the course of our reconsideration of each of those matters, that the introduction of a special procedure to deal with questions of currency conversion was necessary or desirable. We would be reluctant to propose the introduction of a new procedure, the settling of the details of which would impose a substantial task upon those responsible for making rules of court, unless the need to do so had been clearly made out.

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[286] [1976] A.C. 443, 466. See para. 2.5, above.

[287] See para. 4.15, above.

[288] See para. 5.80, below.

CONCLUSION

5.13 We do not favour the suggestion that a general procedure should be introduced for the specific purpose of resolving issues concerning the conversion of one currency into another.

C THE PROCEDURAL ISSUES IN DETAIL

(1) Judgment for foreign currency in a form which does not allow the judgment debtor to pay in sterling

5.14 In the ordinary situation, where judgment is given in foreign currency in the form approved in *Miliangos*, the judgment debtor has the option, before any enforcement process is put in motion, of satisfying the judgment by payment in the sterling equivalent, at the date of payment, of the number of units of foreign currency specified in the judgment.[289] In our working paper we canvassed the question whether it should be possible for judgment to be obtained in the foreign currency alone without the option of payment in sterling.[290] As we explained there, we had been informed that in some cases since *Miliangos* the plaintiff had successfully requested a judgment in that form. We pointed out that such requests could well increase in view of the lifting of exchange controls. We referred also to the possibility that a judgment in foreign currency alone might be sought more readily when the E.E.C. Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, now embodied in the Civil Jurisdiction and Judgments Act 1982, comes into force in the United Kingdom.[291] We went on to explain, however, that our inquiries had failed to elicit either the incidence of such judgments or whether they were confined to any particular type of claim. We proposed provisionally that a successful plaintiff should be entitled to judgment in that form, but only with leave of the court.[292]

5.15 Those who commented on this proposal supported it, although The Law Society qualified their support by suggesting that leave should not be given except where the debtor had agreed to pay in foreign currency alone or for " another exceptionally strong reason ".[293]

5.16 In Part III[294] of this report we have concluded that, as a matter of substantive law, contracting parties should be at liberty to agree that a sum of money should be paid only in a specified foreign currency, with no option for the debtor to pay the sterling equivalent of that sum. This conclusion suggests that, in order to avoid the creation of a discrepancy between the substantive and the procedural rules, a similar answer must be given to the question whether the court should have power to give judgment in foreign currency alone. Having regard to this consideration and in the light of the comments received on consultation, we remain of

[289] Practice Direction, paras. 4, 5 and 9.

[290] Paras. 3.20–3.23.

[291] The relevant provisions of the Act have not yet been brought into force.

[292] Para. 3.23.

[293] The Law Society cite as an example of such reason the situation in which a judgment is to be enforced in a foreign country and is only enforceable there if expressed in that country's currency alone.

[294] See para. 3.19(*a*), above.

the view which we expressed in the working paper, although we recognise that in practice the possible difficulties[295] as to the enforcement of a judgment in foreign currency alone will in many cases deter the plaintiff from seeking judgment in that form as distinguished from the form approved in *Miliangos*.

CONCLUSION

5.17 Rules of court should provide that a successful plaintiff may, with the leave of the court, 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).

(2) Fixed costs on default judgments

5.18 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.[296] Fixed costs are applicable at three stages in an action where no trial takes place. In the first place, where the claim is for a debt or liquidated demand only, the writ must be endorsed with a statement of the amount claimed and costs; and it must further state that proceedings will be stayed if the defendant pays the total amount of debt and costs within the time allowed for acknowledging service of the writ.[297] Where, secondly, the plaintiff enters a judgment in default—for example, on the failure of the defendant to acknowledge service of the writ within 14 days—fixed costs on a prescribed scale may be added to the judgment. The third situation arises in the context of Order 14 of the Rules of the Supreme Court.[298]

5.19 In each of the three situations referred to in the previous paragraph the fixed costs are normally calculated by reference to a scale on which the amount of the costs varies according to an amount expressed in sterling. The Practice Direction provides that, in relation to foreign-currency claims, the fixed costs should be calculated by reference to the sterling equivalent of the relevant sum of foreign currency, converted as on the business day before the issue of the writ. In the case of summary judgment under Order 14, but not where judgment is signed in default, the court has power to order that fixed costs should not apply. In the working paper[299] we expressed the provisional view that as a matter of principle this power of the court, applicable at present only to Order 14 judgments, should be extended to the entry of judgment in default, so that in both

[295] We understand that no process of execution would be available in this country except possibly by way of a garnishee order attaching a debt, such as a bank account, which happens to be in the same currency as that of the judgment (see para. 5.74, below).

[296] R.S.C., O. 62, App. 3, Part I.

[297] R.S.C., O. 6, r. 2(1)(b).

[298] Order 14 provides a procedure for obtaining summary judgment whereby, the defendant having been served with the statement of claim and having given notice of his intention to defend the action, the plaintiff is given judgment on the ground that the defendant has no defence. "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": *Anglo-Italian Bank* v. *Wells (and Davies)* (1878) 38 L.T. 197, 200–201, *per* Jessel M.R. See further, *The Supreme Court Practice (1982)*, vol. 1, para. 14/3–4/2.

[299] Para. 5.9, where we pointed out, however, that in monetary terms the difference between the amount of costs recovered if the claim should fall into a higher band on the scale of costs rather than a lower one was slight.

situations the plaintiff might have the opportunity (for the sole purpose of fixed costs) of converting the amount of his foreign-currency claim into sterling at the rate of exchange current at the date of entering judgment.

5.20 On consultation, only the Bar and The Law Society commented on our provisional view. The Law Society agreed (*a*) with our view that the rules in the Practice Direction as to costs on entering judgment in default should in principle correspond with the rules applicable to costs under Order 14 and (*b*) with our suggestion[300] that the plaintiff ought to have an opportunity to certify the rate of exchange current at the date of entering judgment in default for the purpose of calculating the fixed costs on the judgment;[301] and the Bar agreed with the first of those propositions, though they made no comment on the second.

CONCLUSION

5.21 In relation to claims in a foreign currency, the rules concerning fixed costs in the case of judgments entered in default should be amended to correspond in principle with the rules applicable to costs under Order 14 of the Rules of the Supreme Court.

(3) Payment into court where the claim is for unliquidated damages

5.22 The rules of court provide that in "any action for a debt or damages" a defendant may at any time pay into court a sum of money in satisfaction of the claim.[302] In relation to payments into court in a foreign currency, we pointed out in our working paper that the Practice Direction provided for payment into court in a foreign currency where the claim was for a "debt or liquidated demand" but not where the plaintiff sought unliquidated damages;[303] and we suggested that, as it had become clear since the Practice Direction was issued that unliquidated damages could be claimed in a foreign currency,[304] the terms of the Practice Direction should be broadened to make it clear that payment into court could be made in foreign currency in respect of such claims.[305] On consultation, the Bar and The Law Society agreed with this suggestion.[306]

5.23 The suggestion made in the working paper to which we have referred in the previous paragraph has, however, been overtaken by the introduction of a new rule[307] as to payment into court in foreign currency. That rule provides that foreign currency may be paid into court only if—

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[300] Working Paper No. 80, para. 5.9.

[301] The Law Society went on to urge that, in the interests of simplicity, fixed costs should cease to relate to the amount claimed in the case of a claim in sterling as well as one in foreign currency. However, this suggestion falls outside the scope of this report, and we express no view as to its merits.

[302] R.S.C., O. 22, r. 1(1).

[303] Practice Direction, para. 7. The reference in that paragraph to the Exchange Control Act 1947 would seem now to be without practical significance.

[304] As in, e.g., *The Despina R* [1979] A.C. 685; see para. 2.9, above.

[305] Working Paper No. 80, para. 5.16.

[306] The Bar added a qualification which relates, however, to a more general point about the currency in which a payment into court may be made, an issue considered in paras. 5.31–5.35, below.

[307] The Supreme Court Funds Rules 1975, r. 21(1) (introduced by The Supreme Court Funds (Amendment) Rules 1981, r. 9).

(i) it is lodged in satisfaction of a claim for a debt or liquidated demand and is in the currency in which the claim is made; or

(ii) the court so directs or permits.

5.24 The leave of the court is not required by a defendant who wishes to make a payment into court in satisfaction of a sterling claim, whether the claim is, on the one hand, for a liquidated demand or, on the other, for unliquidated damages. In our view, a similar principle should apply where, in a claim for damages expressed in a foreign currency, the defendant wishes to pay into court in that currency.[308]

CONCLUSION

5.25 Provision should be made by rules of court enabling the defendant in an action for unliquidated damages in a foreign currency to pay a sum into court in that currency without leave of the court; and consequential amendments should be made to the Practice Direction.

(4) Payment into court in a purely domestic sterling claim

5.26 Paragraph 7 of the Practice Direction provides that the defendant may make a payment into court in foreign currency, whether the claim is expressed in sterling or in foreign currency; but since the Practice Direction as a whole relates to "the making of claims . . . expressed in a foreign currency",[309] it would seem that a payment into court in a foreign currency may not be made in respect of a claim in sterling unless the cause of action is a foreign-money obligation.[310] In the working paper we expressed our agreement with that result, but suggested that for the avoidance of doubt the Practice Direction should indicate expressly that foreign currency cannot be paid into court in respect of a purely domestic claim.[311]

5.27 On consultation, the Bar supported our view. The Law Society, however, did not. They suggested that the defendant ought to be free to pay into court any currency he wished, even in the case of a purely domestic claim, on the ground that if the defendant chose to pay into court in a foreign currency the risk of currency fluctuations would be borne by him. Accordingly, The Law Society argued, neither party would suffer injustice if the defendant were allowed to pay into court in a foreign currency.

5.28 On reconsideration of the approach we adopted in the working paper, we remain of the view we expressed there. We would emphasise that we are concerned here not with a claim which, though formulated in sterling, the defendant contends ought properly to be expressed in a foreign currency,[312] but with a case in which the question whether the claim relates to a foreign-currency obligation is not in issue. We believe that it would be wrong for a new principle to be introduced into the law whereby a plaintiff

[308] We consider in paras. 5.31–5.35, below, the question whether the defendant should be able to pay into court in a currency other than that in which the claim is expressed.

[309] Practice Direction, para. 1.

[310] See paras. 5.31–5.35, below.

[311] Working Paper No. 80, para. 5.17.

[312] We consider the problems that arise in relation to payments into court in that kind of situation in paras. 5.31–5.35, below.

in a domestic claim could encounter a payment into court in foreign currency, with the consequent inconvenience and problems as to conversion into sterling that would be involved.

5.29 However, in consequence of the introduction, after the publication of the working paper, of the rule concerning payments into court in foreign currency to which we have referred in paragraph 5.23 above, a defendant cannot now make payment into court of a sum in foreign currency without the leave of the court where the claim is expressed in sterling. Since the court would be unlikely to grant leave in a case where no issue is raised that the claim should be expressed in a foreign currency, we consider that the present rule is satisfactory.

CONCLUSION

5.30 No substantive change is necessary or desirable to the present rule governing the payment into court of foreign currency where the claim is expressed in sterling; but the Practice Direction does not now accurately reflect that rule and should be amended accordingly.

(5) The currency in which payment may be made into court in satisfaction of the claim

5.31 We pointed out in the working paper[313] that, although the Practice Direction does not stipulate which foreign currency may be paid into court, it is suggested in *The Supreme Court Practice* that the defendant may make a payment into court in the same foreign currency as that in which the plaintiff has made his claim.[314] We went on to explain[315] that this leaves unanswered, first, the question of the circumstances in which a defendant may pay foreign currency into court in satisfaction of a sterling claim which the defendant asserts should properly have been made in a particular foreign currency and, secondly, the problem arising when the defendant wishes to pay into court a different currency, other than sterling,[316] from the foreign currency claimed by the plaintiff.

5.32 In the working paper[317] we canvassed four possible approaches to this question, which, briefly, were as follows:

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

(ii) By contrast, the defendant could be restricted to making a payment into court, at his option, either in sterling or in the currency claimed by the plaintiff.

(iii) The defendant could have the option referred to in (ii), together with a right to make payment into court in a third currency, such right however being subject to some restriction—for example, a requirement that the leave of the court was to be obtained before he could pay into court in a third currency.

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[313] Para. 5.18.

[314] *The Supreme Court Practice (1982)*, vol. 1, para. 22/1/5.

[315] Para. 5.18.

[316] The defendant's right to pay into court in sterling in such circumstances is beyond question.

[317] Paras. 5.19–5.21.

(iv) The defendant could have the option referred to in (ii) and, in addition, the right to pay into court in such third currency as he alleges to be the currency in which the plaintiff's entitlement (if any) ought properly to be expressed; but if the court held at the trial that this allegation was not substantiated, such payment into court would not be regarded as a good one even if it satisfied the plaintiff's claim as to quantum, with the usual attendant consequences as to costs.[318]

We provisionally expressed a preference in the working paper for option (iv).[319]

5.33 On consultation, there was a division of opinion among the four commentators who expressed a view. Two, including the Bar, supported our provisional approach; the Lord Chancellor's Department favoured option (ii); and The Law Society preferred option (i) on the ground that the defendant should be free to pay into court in any currency he chose, provided that he took the "currency risk". On reconsideration, we remain of the view we expressed in the working paper. On the one hand, so far as option (i) is concerned, we think that in principle a plaintiff ought not to be faced with the prospect of having to accept a sum in what is, for him, an unwanted currency which has no relation to his claim. On the other hand, option (ii) would not permit the defendant to pay into court even the third currency in which he correctly contends that the plaintiff's loss is properly to be expressed and in which judgment is subsequently given,[320] a situation which in our view it would be wrong in principle to countenance.

5.34 In our view a defendant should be able to make payment into court not only in the currency claimed by the plaintiff or in sterling but also in such third currency as the defendant alleges to be the currency in which the claim should properly be expressed. The defendant would bear the risk that such allegation may not be substantiated and that consequently the payment into court would not be good. The rule as to payments into court in foreign currency, which has been introduced since the publication of Working Paper No. 80[321] and to which we have referred in paragraph 5.23 above is, however, in different terms. That rule provides that the defendant may pay into court in foreign currency as of right only if (*a*) the claim is for a debt or liquidated demand and (*b*) the payment-in is made in the same foreign currency as that in which the claim is expressed; in any other case the defendant cannot make payment into court in a foreign currency without the leave of the court.

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[318] See para. 5.40, below.

[319] Paras. 5.19–5.21.

[320] We stated (see para. 5.19 of the working paper) that in such circumstances the defendant could plead in his defence that the plaintiff's claim ought properly to be expressed in a different currency from that specified by the plaintiff; that the plaintiff might then, with leave, amend his claim by claiming in the currency indicated by the defendant; and that the defendant would then be free under option (ii) to make a payment into court in the latter currency. But, we pointed out, a significant change in the relative rates of exchange might have occurred in the interim, a development which might prove unfair to the defendant.

[321] The Supreme Court Funds Rules 1975, r. 21(1) (introduced by The Supreme Court Funds (Amendment) Rules 1981, r. 9).

CONCLUSION

5.35 The present rule should be amended so as to enable the defendant in an action for a debt (or other liquidated demand) or for damages expressed in a foreign currency to make payment into court as of right in any one of the following currencies:

(i) sterling;

(ii) the currency claimed by the plaintiff; or

(iii) such other foreign currency as the defendant alleges in his notice of payment into court should be the currency in which the plaintiff's loss ought properly to be expressed, in which case the defendant would bear the risk that his allegation may not be substantiated and that in consequence he has not made a good payment into court.

(6) Payment into court with a plea of tender before action

5.36 We provisionally proposed in our working paper[322] that, in the case of a payment into court accompanied with a plea of tender before action, the defendant should be permitted to pay into court either in sterling or in the currency in which he pleads that he has made his tender. Three of the four commentators who referred to this proposal agreed with it, but The Law Society, although they did not comment specifically on this proposal, did not exclude this situation from the ambit of their view that a defendant should be free to pay into court in any currency he chose. However, the objections to this approach to which we have referred in paragraph 5.33 above, in relation to payments into court in satisfaction of the claim, would seem to apply *a fortiori* to payments-in accompanied with a plea of tender before action.

5.37 In our view a defendant should be permitted to make payment into court with a plea of tender before action either in sterling or in the currency in which he pleads that he made his tender. The rule as to payments into court in foreign currency which has been introduced since the publication of our working paper[323] accords to some extent with this approach. Where the claim is made in a foreign currency, the rule enables the defendant to pay into court, as of right, in the same currency as that of the claim in the case of a debt or liquidated demand;[324] and no difficulty arises in relation to payment-in in sterling. However, the rule precludes a payment into court in foreign currency without leave of the court in the case where the plaintiff has expressed his claim in sterling or where the defendant pleads that he made a valid tender in a foreign currency other than the one claimed.

CONCLUSION

5.38 The present rule should be amended so as to permit a defendant to make payment into court in foreign currency with a plea of tender before action not only (as at present) where the claim is expressed in a foreign

[322] Para. 5.22.

[323] See para. 5.23, above.

[324] Tender before action cannot be pleaded as a defence to an unliquidated claim: *Davys* v. *Richardson* (1888) 21 Q.B.D. 202, 205.

currency and the defendant makes payment into court in that currency but also where the claim is made in sterling or where the defendant pleads that he made a tender before action in a different foreign currency from that claimed.

(7) The date of conversion of money paid into court

(a) An outline of the general principles governing payments into court

5.39 In an action for a debt or for 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 is making his claim 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.[325] On making payment into court the defendant must give notice of the payment-in to the plaintiff (and to any other defendant). The plaintiff has 21 days from his receipt of the notice of payment into court to accept that payment[326] but, after that period has expired, he may accept the money only in pursuance of an order of the court.[327] The defendant may also increase a previous payment into court, in which event he must give notice to the plaintiff of the increased payment.

5.40 If the plaintiff does not accept the money paid into court, the judge at the trial of the action will not be informed of the payment-in until all questions of liability and of quantum have been decided.[328] If the sum awarded to the plaintiff does not exceed the amount in court, the defendant is normally entitled to costs against the plaintiff from the date of the payment into court.[329]

5.41 If, on the other hand, the plaintiff gives notice of acceptance of the payment into court within 21 days after his receipt of the notice of that payment (or where more than one payment has been made, within 21 days after receiving the notice of the last payment-in), all further proceedings in the action are stayed; and the plaintiff is entitled to receive payment-out of the money in court.[330]

(b) The consideration in Working Paper No. 80 of the problem of conversion from one currency to another

5.42 We explained in the working paper[331] that, according to the Practice Direction, paragraph 7, 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; and we explained that in such

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[325] R.S.C., O. 22, r. 1(1).

[326] R.S.C., O. 22, r. 3.

[327] R.S.C., O. 22, r. 5.

[328] R.S.C., O. 22, r. 7. This rule does not apply to an action to which a defence of tender before action is pleaded.

[329] Although the court has an absolute discretion as to costs, it is a judicial discretion; the defendant cannot be deprived of his costs for no reason (*Findlay* v. *Railway Executive* [1950] 2 All E.R. 969) or upon insufficient grounds (for example, because the judge had considered giving a larger sum than he eventually ordered: *Wagman* v. *Vare Motors Ltd.* [1959] 1 W.L.R. 853).

[330] R.S.C., O. 22, r. 3(1) and (4).

[331] Para. 5.23.

circumstances it is necessary to compare the value of the sum paid in with the amount of the plaintiff's claim, a step which involves a currency conversion. The effect of the new rule concerning payments into court in foreign currency,[332] introduced since the publication of the working paper, is that the defendant may make payment into court as of right only (*a*) where such payment is in sterling or (*b*) where the claim is for a debt or liquidated demand expressed in foreign currency and the payment into court is made in that currency; in other cases, payment-in may be made only with the leave of the court. However, the introduction of that new rule does not bear upon the nature of the problems with which we are concerned here and which it may be helpful to consider against the background of the following example given in our working paper:[333]

> 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.

5.43 In the working paper we went on to consider the various problems that arose and to explain our provisional proposals relating to them in the following terms:

> " 5.24 The Rules allow the plaintiff 21 days in which to accept the payment into court.[334] 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 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.[335]
>
> " 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.

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[332] See para. 5.23, above.

[333] Para. 5.23.

[334] See para. 5.39, above.

[335] See para. 5.26 of the working paper, set out below in the passage cited.

" 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.[336] Although in the last analysis it is always a matter for the discretion of the court, the general rule (as we have seen[337]) 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 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. . . ." (footnotes amended.)

We concluded our discussion by indicating that this was a matter on which we should particularly welcome views.

(c) The comments received on consultation

5.44 On consultation, two commentators, one of whom was the Bar, agreed with our provisional conclusion, although the Bar made certain suggestions which we consider in paragraphs 5.46—5.47 below. By contrast, The Law Society expressed disagreement with our approach. They suggested that certainty rather than flexibility was desirable in this area, and that the risk of currency fluctuations should be upon the defendant where the plaintiff either accepted the payment into court within the relevant period of 21 days or did not accept it at any stage. In their view, where the plaintiff accepted the payment-in within that period, conversion should be effected on the date of his withdrawal of the money; but if he did not accept the payment, conversion should thereafter be made as at the last day of the

[336] See para. 5.40, above.
[337] *Ibid.*

period of 21 days that was allowed for acceptance without leave of the court.[338] However, The Law Society agreed that when a plaintiff seeks leave of the court to accept a payment into court after the expiry of that period, the court should exercise its discretion concerning the conversion date.

5.45 On analysis of The Law Society's comment, it would seem that their approach differs from the one favoured in the working paper only in relation to the case where the plaintiff does not accept the payment into court and the action goes to trial. In that situation the court would, according to The Law Society's suggestion, convert the currency as at the expiry of the period within which the plaintiff might have accepted the payment without the leave of the court. We see considerable merit in this approach, the adoption of which would afford guidance to the court at the trial of the action in determining the issue of costs in the light of the payment into court. However, the automatic application of a rule along these lines could produce a hard result where (for example) the relative value of the currency of the payment rose sharply by reason of an unforeseeable revaluation of that currency; we accordingly favour the adoption of the principle suggested by The Law Society, with the qualification that it should constitute only a prima facie rule from which the court would be free to depart where the application of the rule would appear to be unjust in the circumstances of a particular case.

5.46 We turn now to consider two suggestions made by the Bar in their comments. The first was that the payment into court should have to be accompanied by a statement showing (i) the conversion rate and date and (ii) specifying the reasons for payment-in of the amount in question. We are not attracted by the second limb of the proposed requirement, however, because a defendant does not normally have to give reasons why he has chosen to pay into court the amount in question, and in our view he ought not to have to do so where, and only where, he pays into court in a currency different from that claimed by the plaintiff. As to the first limb, we would point out that the conversion rate *at the date of the payment-in* will not concern the plaintiff. Rather, he would wish then to know the rate of exchange, so far as he can foresee it, at the date when he would receive payment.

5.47 The Bar also raised for consideration whether a plaintiff who is minded to accept a sum paid into court in a currency different from that claimed should be required to give, say, 2 days' notice to the defendant to enable the latter if he wishes to apply to the court to amend his notice of payment into court.[339] Their suggestion is intended to meet the case where the defendant pays into court, in a currency other than that of the claim, a sum which at the exchange rate then in force is smaller than the amount of the claim, but the currency paid into court appreciates against the currency of the claim, so that its value then exceeds the claim.[340] Without the introduction of the procedure to which they refer, this result would, they contend,

[338] The Law Society referred to a period of " 21 days from payment in ", but it appears from the context of their comment that, more precisely, the period of 21 days from the date of the receipt by the plaintiff of notice of the payment-in is in point.

[339] Under R.S.C., O. 22, r. 1(3).

[340] Under the present procedure the plaintiff may accept the payment-in as of right within the specified period of 21 days.

be unfair to the defendant and would be contrary to the principle underlying *Miliangos*. In our view, however, this suggestion is unacceptable in principle. If implemented, it would enable the defendant to choose whether or not to be bound by the currency risk inherent in his payment-in without conferring a corresponding right upon the plaintiff. Thus, in the converse case to that cited by the Bar, in which the relative value of the currency paid into court *fell* against the currency of the claim, the plaintiff would have to bear the loss.

CONCLUSION

5.48 (*a*) Except as mentioned in subparagraph (*b*) below, no change is necessary or desirable in the present practice as to the date of conversion of money paid into court.

(*b*) Provision should be made by rules of court in relation to the case where at the trial of an action judgment is given in a foreign currency and the defendant has made a sterling payment into court, or where judgment is given in sterling and the defendant has made a payment into court in the foreign currency claimed by the plaintiff.[341] In either situation, for the purpose of determining the question of costs, the court should convert the sum paid into court into the currency of the judgment as at the latest date at which the plaintiff could have accepted the money in court without leave, unless the court considers that it would not be just in all the circumstances to do so.

(8) Payment-out of money in court after the trial

(a) The general position

5.49 When money has been paid into court but not 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 in part satisfaction of the judgment debt. When an order for payment has been made, a Payment Schedule is 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[342] on the instructions of the Accountant General.

(b) The procedure where more than one currency is involved

5.50 Where the currency in which the judgment is expressed is different from the currency of the payment into court, the question of conversion arises. In *The "Halcyon Skies" (No. 2)*[343] where there was a sterling fund

[341] If our conclusions contained in para. 5.35, above concerning the currency in which payment into court may be made is implemented, a payment in any foreign currency other than the one claimed by the plaintiff would not constitute a good payment-in (unless judgment is given in the same currency as that paid into court, in which case the instant problem would not arise).

[342] The Bank acts as the Accountant General's banker for these purposes.

[343] [1977] 1 Lloyd's Rep. 22.

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[344] was " the date when application is made for payment out ". That decision being an Admiralty case,[345] 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.[346]

5.51 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 financial significance. In our working paper,[347] we canvassed the following dates as ones at which the conversion might most suitably be calculated:

(*a*) The date on which judgment is given.[348]

(*b*) The date of the issue of the cheque, which could be regarded as the " actual " date of payment (although there may of course be a further interval of time before the cheque is presented for payment).

(*c*) The date of the Accountant General's instructions to the Bank of England.

(*d*) The date which applies at present, than which, we pointed out, " it would be difficult to find a conversion date much closer to the actual date of payment " unless the Bank of England were to effect the conversion.

5.52 On consultation we were informed by the Bank of England that the Bank could, at the request of the Accountant General, notify him of the midday rate and that his office could then convert the foreign currency into sterling and write out a sterling cheque for the sum so ascertained. The Bar also favoured this approach, suggesting however that perhaps alternative means of effecting a payment-out such as telegraphic transfer might be available which would " bring together exactly the date used for conversion and the date of payment ". The Law Society, however, expressed the view that no satisfactory general rule could be devised, and that the question of the conversion date should be left to the discretion of the judge.[349]

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[344] *Ibid.*, at p. 28.

[345] See para. 5.49, above.

[346] *Ibid.*

[347] Paras. 5.33–5.34.

[348] Para. 5.34.

[349] The Law Society added that, although the approach adopted by Donaldson J. in *The " Halcyon Skies " (No. 2)* (see para. 5.50, above) might well be appropriate in cases where the sum in court clearly exceeded the amount awarded, where the money in court was less than that awarded, the Bank might be instructed to issue a cheque for the full amount in court. Rules of court (The Law Society went on to propose) should provide for conversion in such a case to be effected by the judgment creditor as at the date of the issue of the cheque and for him to give notice of the relevant details to the judgment debtor.

5.53 In our view the procedure relating to the payment-out of money in court ought in principle to be such that any currency conversion is effected as nearly as possible at the date on which the payee receives payment. It is not clear, however, that the present machinery gives effect to this principle in every case, and we consider that it should be reviewed with the aim of enabling that, so far as may be practicable, it should do so.

CONCLUSION

5.54 The procedure as to the payment-out of money in court in cases where a currency conversion is necessary should be reviewed with the object of ensuring that the date as at which the conversion is effected is as close as is practically possible to the date of the receipt by the payee of the money in court.

(9) Enforcement proceedings in general

5.55 It is convenient here to refer again to the form of judgment approved in *Miliangos* in relation to cases where the plaintiff has successfully sought an award in foreign currency. This form of judgment confers upon the judgment debtor, until an enforcement procedure is invoked, the option of satisfying the judgment debt either in the specified currency or in sterling converted at the date of actual payment. Broadly speaking, however, when an enforcement procedure has been initiated, conversion into sterling is effected as at the date of the initiation of that procedure.

5.56 In the working paper[350] we provisionally favoured the present rule on the ground that conversion at the actual date of payment, although theoretically the "ideal" date, would in many cases be impracticable after an enforcement procedure had been set in motion; and we expressed the view that the judgment date was not satisfactory because it is further from the "ideal" conversion date (namely the date of actual payment) than the date applicable under the present rule.[351]

5.57 On consultation the Bar and The Law Society agreed with the general approach adopted in the working paper, though the latter body commented that in principle the date of conversion ought to be as near as is practicably possible to the actual date of payment, and indicated that in their view not every enforcement procedure was satisfactory in that respect.[352]

CONCLUSION

5.58 We remain of the view, expressed in our working paper, favouring the present principle governing conversion into sterling on the ground that in general it provides the latest practicable date for such conversion.

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[350] Para. 5.60.

[351] Para 5.59.

[352] We refer to the various points made by The Law Society in relation to specific enforcement procedures below, under each relevant heading.

(10) **Enforcement proceedings : writs of fieri facias (fi. fa.)**

(a) Updating the conversion rate

5.59 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 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 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, subject to his statutory duty to retain for 14 days sums which he recovers under an execution for a sum in excess of £250,[353] he deducts his expenses and pays to the judgment creditor what is due.

5.60 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 ".[354] The Practice Direction, paragraph 11, 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. 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. For example, the sheriff may have difficulty in finding the debtor or the debtor may successfully apply for a temporary stay of execution;[355] and in any event the sheriff is under a statutory obligation to retain sums of money for 14 days before paying them to the judgment creditor.[356] Clearly, currency fluctuations may well occur during this period to the creditor's disadvantage.

5.61 In the working paper we canvassed the possibility that a judgment creditor should be permitted, after issuing a writ of fi. fa. but before he had received payment thereunder, to update the conversion rate from time to time. However, we expressed doubts whether that solution was practicable. We tentatively favoured, instead, a solution whereby the creditor should be allowed to withdraw his writ of fi. fa. and issue a new one at the current rate of conversion, although in that case he would take the risk of losing his original place in the order of priority as between creditors and, in addition, would be left to bear the costs of the discontinued execution.[357]

5.62 Of the six commentators who referred to this provisional proposal, four supported the approach which we favoured. In particular, the Under-Sheriffs Association expressed strong opposition to any procedure that might

[353] Under the Bankruptcy Act 1914, s. 41(2); Companies Act 1948, s. 326(2) (each as amended by the Insolvency Act 1976, s. 1(1) and Sched. 1, Part I).

[354] [1976] A.C. 443, 468 (*per* Lord Wilberforce). See para. 2.4, above.

[355] Under R.S.C., O. 47, r. 1. See para. 5.95, below.

[356] See para 5.59, above.

[357] Working Paper No. 80, para. 5.37.

involve the sheriff's officers in making currency calculations, and pointed out that the adoption of a rule whereby conversion was to be calculated at the actual date of payment would create practical difficulties for them.[358] By contrast, another commentator suggested that it would be practicable for the sheriff to calculate the requisite conversion into sterling either at the date when he had in his possession goods to satisfy the judgment or, if they were insufficient, at the date on which he made payment to the creditor; and the Bar, while expressing support for our approach, added that the creditor might be permitted to amend his writ of fi. fa. by reference to a more recent conversion date.

CONCLUSION

5.63 While it would be desirable in principle to permit a judgment creditor to update the conversion rate from time to time after the issue of a writ of fi. fa. but before payment was received thereunder, the question whether or not there are difficulties which would be such as to render impracticable the introduction of such a right requires further investigation by those with practical experience of these matters.

(*b*) *Should the judgment debtor be entitled to satisfy the judgment debt in the foreign currency of the judgment after the issue of a writ of fi. fa.?*

5.64 We considered in Working Paper No. 80[359] the question whether the judgment debtor should have the option to satisfy the judgment debt in the currency in which it is expressed after it had been converted into sterling for the purpose of enforcement.[360] We provisionally answered this question in the affirmative, on the ground that to deny the debtor this right would run counter to the view expressed in *Miliangos* that " 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 ".[361]

5.65 This question gave rise to a difference of opinion on consultation, and although both the Bar and The Law Society supported our view, the former body indicated that they did so only " on balance ", because they were concerned that (as we had pointed out in the working paper[362]) this approach gave the judgment debtor an incentive to delay payment where the relevant foreign currency was falling against sterling when the writ of fi. fa. was issued.

5.66 On further consideration of this question we have arrived at the conclusion that the provisional answer which we favoured in the working paper is wrong in principle. It is true that, before the issue of an enforcement procedure, a judgment in, say, Swiss francs has " nothing to do with sterling ", so that a debtor who wishes to pay in sterling and accordingly needs to ascertain what amount in sterling will satisfy that debt must convert his

[358] The Law Society supported our approach on practical grounds, despite their view that, in general, enforcement procedures ought to involve conversion on a date as near as is practicable to that of actual payment.

[359] Para. 5.38.

[360] There appears to be no authority as to the position under the present law.

[361] Para. 5.38; as to the passage cited, see [1976] A.C. 443, 466 (*per* Lord Wilberforce) and para. 2.5, above.

[362] Para. 5.38.

payment at the date on which it is made. However, when the creditor issues a writ of fi. fa., the obligation becomes converted, in effect, into one for a fixed sum in sterling; the debtor's obligation is no longer measured by reference to the foreign currency of the judgment. This does not preclude the subsequent revival of the original obligation to pay the number of units of the foreign currency specified in the judgment (or the sterling equivalent at the time of actual payment), in the event that the writ of fi. fa. is not successful, because, for example, the debtor has no available assets, or in the event that it is withdrawn by the creditor before the sheriff's officer has had an opportunity to seize the debtor's goods. The relevant principle is that so long as an enforcement procedure is in force, the debtor may satisfy the judgment debt only by paying the sum for which that enforcement procedure has been issued, and it will have been issued for a sterling sum.[363]

5.67 We appreciate that the application of the principle referred to in the previous paragraph may result in a loss to the creditor in terms of the foreign currency of his judgment, in consequence of a rise in the conversion rate of the foreign currency against sterling after the issue of the writ of fi. fa. Equally, however, a fall in that rate would operate to his advantage; and to allow the debtor to pay, at his option, either the sterling sum for which the writ of fi. fa. has been issued or the amount of foreign currency specified in the judgment would enable the debtor to have the best of both worlds, irrespective of whether the foreign currency had risen or fallen against sterling after the issue of the writ. In our view, if a judgment creditor is to have a remedy for loss sustained in consequence of the late payment of the debt, such remedy should lie in damages.[364]

5.68 The adoption of the principle that we now favour gives rise to the question: how is the conversion rate to be calculated in the case of partially unsuccessful enforcement proceedings? It is convenient to answer that question by means of the following illustration:

> C obtains judgment against D for 10,000 French francs or their sterling equivalent at the date of payment. D fails to satisfy the judgment, and C issues a writ of fi. fa. for £1,000 being at that time the sterling equivalent of the judgment debt at the rate of 10 francs to the pound. The execution, however, realises only £250—i.e. 25% of the amount then due from D. If D subsequently issues a further writ of fi. fa., he will give credit for 25% of the judgment debt (i.e. 2,500 francs) before converting the balance, namely 7,500 francs, into sterling at the date of the issue of that further writ.

Conclusion

5.69 It should be made clear that, when a writ of fi. fa. has been issued, the judgment debtor cannot, without the consent of the judgment creditor, satisfy the judgment by payment in the foreign currency of the judgment until that writ has ceased to be outstanding.

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[363] Of course, this principle does not affect the right of the judgment creditor to accept payment in terms of the foreign currency if he so desires, and no doubt in many cases he would wish to do so.

[364] We have considered the question of compensation for late payment of a debt in paras. 3.58–3.62, above.

(11) Enforcement proceedings: garnishee orders

(a) *The present position*

5.70 The judgment creditor (to whom we shall refer for convenience as " C ") can seek to enforce a judgment for " a sum of money amounting in value to at least £50 "[365] by making an application to attach a debt (or a sufficient part of it) owed to the judgment debtor (" D ") by a third party, known as the garnishee (" G "), who is commonly, though not necessarily, a bank. If, for example, C has obtained judgment against D for £500 and D is in credit with G, a bank, to the extent of £600, C can apply *ex parte* 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 G is indebted to D.[366] 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.[367] C must then serve G with the order nisi[368] who, when served, is bound to hold the money " frozen " pending the final outcome. If, at the second hearing, the bank (G) does not appear or does not dispute that it holds D's money, it may be ordered by the court to pay the appropriate sum over to C.[369]

5.71 In the working paper we identified four situations in which problems concerning foreign money arose in the context of garnishee proceedings.[370] The first situation arises where there is a foreign-currency judgment which C wishes to enforce by attaching a sterling debt. As to this, the Practice Direction, paragraph 12(*a*), provides for conversion into sterling at the date specified in the affidavit filed in support of the application for a garnishee order nisi.

5.72 The second situation arises where C has a sterling judgment but seeks to attach a foreign-currency debt owed to D in England. This case does not relate to a judgment in foreign currency, and the Practice Direction accordingly does not refer to the matter. However, it was suggested by the Court of Appeal in *Choice Investments Ltd.* v. *Jeromnimon*[371] that, where G is a bank, upon receipt of the order nisi it should convert the sterling sum into the currency of the bank account and attach the appropriate sum of foreign currency to meet the debt and costs. When the order is made

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[365] R.S.C., O. 49, r. 1(1). The phrase in quotation marks is an indirect reference to a judgment in foreign currency.

[366] R.S.C., O. 49, r. 2.

[367] R.S.C., O. 49, r. 1(2).

[368] R.S.C., O. 49, r. 3(1), which provides that, unless the court otherwise directs, the order must be served (i) on G at least 15 days before the time appointed thereby for the further consideration of the matter and (ii) on D at least 7 days after the order has been served on G and at least 7 days before the time appointed by the order for the further consideration of the matter.

[369] R.S.C., O. 49, r. 4.

[370] Paras. 5.40–5.43.

[371] [1981] Q.B. 149, 156–7 (*per* Lord Denning M.R.). The case concerned garnishee proceedings in a county court but the principles laid down by the Court of Appeal are equally applicable to such proceedings in the High Court. (See also *The Supreme Court Practice (1982)*, O. 49/1/17, para. 22.) Lord Denning pointed out that " adaptations may need to be made when the debtor has a sum owing to him by a shipping company or an insurance company—and not [by] a bank "; [1981] Q.B. 149, 157–8.

absolute, the bank must pay to C (or into court) the lesser of (*a*) the sterling equivalent of the attached amount of currency and (*b*) the judgment debt and costs.

5.73 The third situation relates to the case in which the judgment is expressed in one foreign currency and the debt which C wishes to attach is in another foreign currency. There are two uncertainties. The first is to determine in which of the three possible currencies (namely, sterling, the currency of the judgment, or the currency of the debt which it is sought to attach) the court will express a garnishee order. As to this, it was suggested, obiter, by Lord Denning M.R. in the *Jeromnimon* case that conversion into sterling was not necessary, since a garnishee order nisi could be made to attach so many units of the currency of the debt due from G to D as were needed to meet the judgment.[372] The second uncertainty is whether, on the one hand, the procedure should be similar to that referred to in paragraph 5.71 above, in which case the conversion would be made by C or whether, on the other hand, G should effect the conversion along the lines laid down in *Jeromnimon* in relation to sterling judgments.[373]

5.74 The fourth situation, which gives rise to no problem of currency conversion, concerns the case in which the foreign currency of the debt due from G to D is the same currency as that in which the judgment is expressed.[374]

(*b*) *The response on consultation*

5.75 With one important exception referred to in the next paragraph, those who commented on the issues canvassed in the working paper concerning garnishee proceedings did so briefly; they agreed, broadly speaking, with the provisional view we expressed there that no change was required to the present rules relating to the first, second or fourth of the situations referred to respectively in paragraphs 5.71, 5.72 and 5.74 above.[375] So far as the third situation is concerned (that in which there is a judgment in one foreign currency and the debt of which attachment is sought is in another), some support was expressed for the view that in principle the court should express the garnishee order in terms of the foreign currency of the judgment, a rule which would require G, not the court, to effect the conversion.[376]

5.76 The Law Society, however, expressed criticism of the procedure suggested by Lord Denning M.R. in the *Jeromnimon* case,[377] on the ground that the burden of ascertaining the conversion rates should fall upon C, not

[372] [1981] Q.B. 149, 157.

[373] It would appear from the context in which Lord Denning's suggestion was made that he had in mind the second alternative.

[374] The Practice Direction, para. 12(*b*), lays down the relevant procedure.

[375] Master Ritchie suggested that conversion should be made when the garnishee order was made absolute; but this approach would seem to give rise to the difficulty that when the judgment was in one currency and the garnished debt in another G would not know before that date what proportion of the debt to " freeze ".

[376] The Bar pointed out, however, that where there was no cross-rate of exchange between the two foreign currencies, conversion through sterling would be necessary.

[377] [1981] Q.B. 149; see para. 5.72, above.

G, particularly in the case where G was not a bank.[378] In the view of The Law Society, G should not have to concern himself with any currency other than the one applicable to the debt he owes to D, and that to require him to do otherwise would be contrary to the principle underlying *Miliangos*. The Law Society went on to outline a suggested alternative procedure, which would apply to every case where a currency conversion was necessary, irrespective of whether G was or was not a bank.

5.77 The procedure proposed by The Law Society would vary according as C knew, or did not know, the currency in which the garnished debt was expressed. Where that currency was known to C, the procedure should be similar to that laid down by the Practice Direction in relation to the case where the judgment is in foreign currency and the debt to be garnished is in sterling.[379] Where, however, C does not know in which currency the debt due from G to D is expressed, an order nisi should be made (The Law Society suggests) which specifies both the amount of the debt in the foreign currency of the judgment and its sterling equivalent. Thereafter, if upon service of the order it transpired that the garnished debt was expressed in a foreign currency other than the one specified in the order, G would notify C of the position. C would then apply *ex parte* to a master, supported by evidence of the prevailing exchange rates, for a certificate as to the equivalent in the currency of the garnished debt of the outstanding amount of the judgment at (say) the exchange rate prevailing at the date of service of the order nisi. Presumably it is envisaged that between the date of the service of the garnishee order upon G and the making of an order by the master under this proposed procedure G would be at risk if he were to pay over any part of the debt, so that if G was a bank the entire balance standing to D's account would in effect be "frozen".

(*c*) *Our reconsideration in the light of consultation*

5.78 The question whether the burden of calculating currency conversions should lie, on the one hand, upon C or, on the other hand, upon G arises for consideration in relation to the case where, as in *Jeromnimon*, the judgment debt is in sterling and the garnished debt is in a foreign currency and also to the case where the judgment debt is in one foreign currency and the garnished debt in another. We appreciate the force of the point put to us by The Law Society that in principle this burden should not lie upon G in any circumstances. However, it may well be that in many cases, primarily in those cases where G is a bank, G is willing and able to calculate the necessary conversion; and we are reluctant to propose the reversal by rules of court of a decision of the Court of Appeal which has laid down a procedure for which no provision has otherwise been made and as to the operation of which no evidence was received on consultation of any difficulties encountered in practice.

[378] We referred in the working paper (at para. 5.40) to the fact that in some cases G would be a private individual in relation to the situation referred to in para. 5.71 above (where it is sought to attach a sterling debt by way of enforcement of a foreign-currency judgment); and we suggested that it might be unreasonable to expect a garnishee other than a bank to calculate the requisite currency conversions. We indicated that the garnishee was less likely to be a bank in this situation than in the converse situation, to which *Jeromnimon* relates; see Working Paper No. 80, para. 5.40, n. 424.

[379] See para. 5.71, above.

We have arrived at the conclusion that the problem of currency conversion can most appropriately be resolved by the introduction of a procedure which would apply whenever the garnished debt is in one currency and the judgment debt is expressed in a different currency. This procedure would enable G (whether or not he is a bank), if he so desires, to apply to the court for directions as to the amount, in terms of the foreign currency in which his debt is expressed, which must be "frozen" by him in order to comply with his obligation under the garnishee order nisi; notice of such application would be given to C and D.[380]

(d) Payment in the currency of the judgment after the issue of garnishee proceedings

5.79 We expressed the provisional view in Working Paper No. 80[381] that D should be allowed to satisfy a foreign-currency judgment by payment in that foreign currency notwithstanding that the relevant sum had been converted into sterling for the purposes of the issue of a garnishee order nisi; and both the Bar and The Law Society agreed with this approach. On reconsideration, however, we have arrived at the conclusion that during the period in which garnishee proceedings are in force, D should not have such a right, for reasons similar to those which we have indicated in the context of writs of fi. fa.[382]

(e) Summary of our conclusions as to garnishee proceedings

5.80 It is convenient to summarise our conclusions in relation to garnishee proceedings as follows:

(*a*) A new procedure should be introduced by rules of court in relation to the case where the garnished debt is in one currency and the judgment is in a different currency, whereby the garnishee is enabled (but not bound) to apply to the court for an order specifying what amount, in terms of the currency of the garnished debt, must be "frozen" in compliance with the garnishee order nisi.

(*b*) During the period in which garnishee proceedings are outstanding, the judgment debtor should not be entitled to satisfy a foreign-currency judgment debt by payment in the currency of the judgment without the consent of the judgment creditor.

(12) Enforcement proceedings: charging orders

5.81 By virtue of the Charging Orders Act 1979,[383] the court may make an order imposing on certain categories of property of the debtor specified in the Act[384] a charge for securing the payment of money due or to become

[380] The introduction of this procedure would necessitate a consequential amendment to the Practice Direction, para. 12(a) (see para. 5.71 above), since C would not be bound (as the Practice Direction now requires), although he would be free, to calculate the conversion from the foreign currency of the judgment debt into sterling for the purpose of initiating garnishee proceedings.

[381] Para. 5.44.

[382] See paras. 5.66–5.67, above.

[383] Sect. 1. The Act is based on the recommendations contained in our Report on Charging Orders (1976), Law Com. No. 74.

[384] Sect. 2, which refers to beneficial interests (i) under a trust or (ii) in land, certain specified securities (including government stock) and funds in court.

due under a judgment or court order.[385] A charge imposed by an order under the Act takes effect as if it were an equitable charge created by the debtor under his hand,[386] the primary method of enforcing which is an order for sale.[387]

5.82 The procedure laid down by rules of court[388] for obtaining a charging order is similar to that which is applicable to garnishee orders in cases where the judgment debt is in foreign currency; the charging order is expressed in sterling.[389] In our working paper we pointed out that there might be a very long time-lag between the date of the charging order and the sale of the property charged or of the earlier satisfaction of the judgment debt; and we invited views as to whether it would be desirable to permit charging orders to be expressed in foreign currency, the date for conversion into sterling to be that of the sale by the judgment creditor after he had obtained an order for sale or (if the debtor voluntarily satisfied the judgment debt) the date of actual payment.[390]

5.83 On consultation, Master Ritchie and the Bar agreed with this approach. The Law Society, however, expressed the view that conversion ought to take place at the date of actual payment to the judgment creditor, pointing out that the fact that the proceeds of sale would be in sterling when the charging order was enforced is immaterial. We believe that this argument has considerable force, and we see no objection in principle to the adoption of The Law Society's suggestion; indeed it is better adapted to resolving the problem to which we referred in the working paper[391] than the one we advanced there.

CONCLUSION

5.84 The present practice should be changed so that no conversion into sterling is made in relation to the enforcement of a foreign-currency judgment by means of a charging order; the order would be expressed in the currency of the judgment. This would have the consequence that, where the judgment debtor voluntarily makes payment after a charging order has been made or where the property comprised in the charge is sold by way of enforcement of the charge, conversion into sterling would be made at the date of the actual payment to the judgment creditor.

(13) Enforcement proceedings: attachment of earnings

5.85 Attachment of earnings as a method of enforcing a judgment is available only in the county court; but a High Court judgment may be enforced by obtaining an attachment of earnings order from the county court.[392] The application for attachment of earnings is issued and served on

[385] The Act extends to any arbitral award (including a foreign award) or foreign judgment which is enforceable as a judgment or order of the court: s. 6(2).

[386] Sect. 3(4).

[387] *Tennant* v. *Trenchard* (1869) L.R. 4 Ch. App. 537. The court may also appoint a receiver.

[388] R.S.C., O. 50, rr. 1–4.

[389] Practice Direction, para. 13; see para. 5.71, above.

[390] Working Paper No. 80, para. 5.45.

[391] *Ibid.*

[392] Attachment of Earnings Act 1971, ss. 1(2)(*b*) and 2(*c*)(i); C.C.R., O. 27, rr. 1–22.

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 in turn pays the sums collected to the judgment creditor from time to time until the debt is satisfied.

5.86 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 both the normal deduction rate and 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 a period of time will elapse before the debt is satisfied.

5.87 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[393] 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, years may pass 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. In our working paper[394] we accordingly canvassed the possibility of a change in the procedure so as to enable the rate of exchange to be updated during the period for which the attachment of earnings order was in force. However, we rejected this approach on the ground that it was impracticable and would create uncertainty; and our provisional view that there should be no change in what appeared to be the present practice was supported on consultation.[395]

CONCLUSION

5.88 We remain of the view provisionally expressed in our working paper that there should be no change in the present procedure applicable to the conversion into sterling of a foreign-currency judgment for the purpose of attachment of earnings orders.

(14) Enforcement proceedings: equitable execution

5.89 All divisions of the High Court have jurisdiction to appoint a receiver by way of equitable execution.[396] A receiver can be appointed only

[393] The County Court Rules provide that a judgment creditor who desires to enforce in the county court a judgment of the High Court by (*inter alia*) attachment of earnings shall file, with his request for an attachment of earnings order, an office copy of the judgment and "an affidavit verifying the amount due under the judgment . . . ": see C.C.R., O. 25, r. 11.

[394] Para. 5.48.

[395] The Law Society pointed out that, in addition to the practical problems that a procedure for updating the conversion rate would involve, such a procedure would lead to unfairness as between creditors in the case where a consolidated attachment order was made in respect of two or more attachment of earnings orders (pursuant to C.C.R., O. 27, rr. 18–22).

[396] R.S.C., O. 51, and O. 30, rr. 1–6.

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, and we accordingly suggested in the working paper[397] that, so far as a date for conversion is concerned, similar considerations arise as in the case of attachment of earnings.[398]

5.90 On consultation, the Bar supported our approach. The Law Society, however, suggested that, although it was convenient that conversion into sterling should take place at the date of the order for the appointment of a receiver, such conversion was not desirable and that, in accordance with the principle of *Miliangos*, the judgment creditor ought to give credit in the foreign currency of the judgment for each sum in sterling which he receives at the date of the payment to him. We see much force in this suggestion, but the issue involves matters of considerable complexity[399] and we do not know whether the adoption of the approach favoured by The Law Society would be practicable. However, in our view the rules concerning this method of enforcement ought to be examined further in the light of *Miliangos*.

CONCLUSION

5.91 The rules concerning the enforcement of a foreign-currency judgment by appointing a receiver by way of equitable execution should be further reviewed for the purpose of ascertaining what changes are necessary or desirable in the light of *Miliangos*.

(15) Enforcement proceedings: the position following a wholly or partially unsuccessful attempt to enforce a judgment

5.92 The conversion problem posed by wholly or partially unsuccessful enforcement proceedings can best be explained by way of an example. A creditor whose judgment is expressed in a foreign currency 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. The creditor then applies for a writ of fi. fa. Can he update 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? Oliver J. had to consider a similar question in *Re Dynamics Corporation of America*[400] in relation to a creditor who, having sought unsuccessfully to levy execution, subsequently petitions to wind up the debtor company. He 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

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397 Para. 5.49.

398 See paras. 5.87–5.88, above, and the Practice Direction, para. 13.

399 The relevant rules provide for the submission to the court of the receiver's accounts at such intervals or on such dates as the court may direct, for the accounts to be passed by a master, and for the payment into court of money in the receiver's hands: R.S.C., O. 30, rr. 4 and 5 (which apply by virtue of O. 51, r. 3).

400 [1976] 1 W.L.R. 757.

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."[401]

5.93 We pointed out in our working paper[402] that common sense suggested that the *Miliangos* principle did not require a judgment creditor who, after one unsuccessful attempt to enforce his judgment, tried again to do so would be held to the conversion rate obtaining at the date of his first attempt; and we expressed the view that, whatever might be the existing law, a judgment creditor ought not to be so held.[403] On consultation, the Bar and The Law Society expressed their agreement with our approach.[404]

CONCLUSION

5.94 No change should be made to what appears to be the present law—namely, that a judgment creditor is not bound by the rate of conversion applicable at the date of his first, unsuccessful attempt to enforce the judgment.

(16) Enforcement proceedings: the position when a debtor applies for a stay of execution of a writ of fi. fa.

5.95 The court has power[405] on the application of the judgment debtor to stay the enforcement of the operation of a writ of fi. fa. where there are special circumstances or where the applicant is unable to pay.[406] The present position is that the conversion rate is normally the one in force on the date of the issue of the writ of fi. fa. We raised the question in our working paper[407] whether this principle was desirable or whether, for example, the court should be empowered to grant a stay of execution on terms that the conversion into the sterling sum involved could, at the creditor's option, be updated. However, we concluded provisionally that no alteration of the present position was needed, and we pointed out that it was open to the judgment creditor where there had been a fluctuation in exchange rates to withdraw his writ and issue a new one.

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[401] *Ibid.*, at p. 774.

[402] Para. 5.51. The problem arises, at least in theory, because of the form of judgment approved in *Miliangos*, which provides for payment to be made in a specified number of units in the relevant foreign currency or their sterling equivalent at the date of " payment ". That term signifies, in relation to the case where an enforcement procedure has been invoked, " the date when the court authorises enforcement of the judgment in terms of sterling ": [1976] A.C. 443, 468 (*per* Lord Wilberforce).

[403] Working Paper No. 80, para. 5.51.

[404] The Law Society went on to suggest that, in the case of partially unsuccessful enforcement proceedings, the judgment creditor should give credit for the sterling sums he receives converted into the currency of the judgment at the date of his receipt of such sums. However, it follows from what we have said in paras. 5.66–5.68 above (in relation to writs of fi. fa.) that we do not favour this principle.

[405] R.S.C., O. 47, r. 1.

[406] The usual form of order provides that there should be a " stay of execution " so long as the judgment debtor pays the judgment debt and costs by specified instalments: *The Supreme Court Practice (1982)*, O. 47/1/1.

[407] Para. 5.52.

5.96 On consultation, The Law Society expressed support for our approach.

CONCLUSION

5.97 We remain of the view expressed in the working paper that no special provision should be made for updating the conversion rate where, after the issue of a writ of fi. fa., the debtor obtains a stay of execution of that writ.

PART VI

SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

6.1 In this Part of the report we summarise our conclusions in Part III concerning the substantive law, our recommendations in Part IV as to interest on foreign-currency judgment debts and arbitral awards, and our conclusions in Part V concerning procedural matters. Where appropriate we identify which relevant subsections of the draft clause set out in Appendix A are aimed at putting particular recommendations into effect.

6.2 Our conclusions concerning the substantive law are as follows:

(1) The principle underlying the decision in *Miliangos* and the consequences which flow from it are greatly to be preferred to the rules which that decision superseded.

(paragraph 3.8)

(2) (*a*) A plaintiff should not be able to obtain judgment in sterling in the case of the enforcement of a claim which ought properly to be expressed in a foreign currency; but

(*b*) legislative intervention to secure that result is not necessary, since the matter can appropriately be left to judicial decision.

(paragraph 3.11)

(3) No change is necessary or desirable in 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, because in general that rule provides the best practical implementation of the *Miliangos* philosophy.

(paragraph 3.15)

(4) Parties should continue to be free to agree:

(*a*) that payment in England and Wales should be made in a particular foreign currency alone (with no option for the debtor to pay in sterling); and

(*b*) in relation to any currency conversion, the date at which it is to be made or the exchange rate to be applied.

(paragraph 3.19)

(5) The problem of set-off which arises where the parties' judgments against each other are expressed in different currencies should be resolved:

(*a*) if a procedure can be introduced whereby neither party's judgment can be enforced without taking account of the other's, by giving judgment for each party in the currency applicable to his claim and directing that the judgments should be subject to such procedure in the event that enforcement of either judgment is subsequently sought; but

(*b*) in the absence of such a procedure, conversion should be effected at the date of judgment, and judgment given in the currency of the claim of the party whose claim on that basis is the larger.

(paragraph 3.27)

(6) As to the question of the form in which judgment should be given in the case where such judgment ought to be expressed in a foreign currency but where the limit of liability in sterling under section 503 of the Merchant Shipping Act 1894 (as amended) applies:

(*a*) the matter should be left to judicial development; but

(*b*) we favour the adoption of the principle that

(i) 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*;

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

(paragraph 3.31)

(7) Where the constituent items of an account ordered by the court to be taken are expressed in different currencies, the question of the date at which currencies should be converted into the currency in which the final balance is to be expressed should be resolved along similar lines to those applicable to set-off. (See subparagraph (6) above.)

(paragraph 3.33)

(8) The present law relating to the conversion into sterling of foreign-currency claims in relation to solvent and insolvent companies and to bankruptcy is satisfactory.

(paragraph 3.37)

(9) The most appropriate date as at which, in the context of a decree of limitation of liability under section 504 of the Merchant Shipping Act 1894 (as amended), the conversion of a foreign-currency claim should be calculated is the date of the decree.

(paragraph 3.40)

(10) No satisfactory general rule can be formulated for the purpose of determining the date as at which currency conversions should be calculated in relation to claims to share in a fund other than those referred to in subparagraphs (8) and (9) above.

(paragraph 3.44)

(11) The present rules governing questions of currency conversion in relation to the enforcement of foreign judgments in this country are satisfactory.

(paragraph 3.46)

(12) No change should be made in the present rules governing the conversion into sterling of maintenance orders expressed in a foreign currency when such orders are enforced.

(paragraph 3.49)

(13) (*a*) The present law that the existence of the right to claim interest is governed by the *lex causae* is satisfactory.

(*b*) The present law, whereby when the court exercises its discretion under section 35A of the Supreme Court Act 1981 to award interest, it does so, prima facie, at the rate applicable in the context of the currency of the judgment, is satisfactory.

(*c*) Where interest is claimed by virtue of a term of the contract, the validity of that term and the rate at which interest is to be paid should continue to be governed by the *lex causae* (i.e., the proper law of the contract).

(*d*) The rate of interest on damages should be determined by the application of English law as the law of the forum.

(paragraph 3.57)

(14) The introduction of a specific rule governing the award of compensation for late payment of a foreign-currency debt would be undesirable in the absence of a similar development in the general law relating to damages for late payment of a debt.

(paragraph 3.62)

6.3 *We recommend,* in relation to interest on judgment debts and arbitral awards in foreign currency, that:

(1) The High Court should be empowered to direct that a sum awarded by a judgment given by that court and expressed in foreign currency should carry interest at such fixed or variable rate as the court should think fit instead of at the rate which would otherwise apply.

(paragraph 4.15(1) and draft clause, subsection (1))

(2) A county court should be empowered to direct that a sum awarded by a judgment or order which is expressed in foreign currency and which falls within the ambit of an order made by the Lord Chancellor under the County Courts Act 1959, section 101A should carry interest at such fixed or variable rate of interest as the court thinks fit instead of at the rate which would otherwise apply.

(paragraph 4.15(2) and draft clause, subsection (2))

(3) An arbitrator should be empowered to order that a sum directed to be paid by an award expressed in foreign currency should carry interest at such fixed or variable rate of interest as he should think fit instead of at the rate which would otherwise apply.

(paragraph 4.15(3) and draft clause, subsection (3))

(4) Provision should be made by rules of court that, when an enforcement procedure has been initiated in respect of a judgment (including an arbitral award which has become enforceable as a judgment under section 26 of the Arbitration Act 1950) as to which a variable rate

of interest is applicable by virtue of an order made under the proposed new statutory power, interest on the judgment should thereafter run at the rate then applicable for so long as that enforcement procedure is in force.

(paragraph 4.15(4))

6.4 Our conclusions as to procedure are as follows:

General

(1) We do not favour the suggestion that the present procedure should be modified so as to enable a judgment creditor in a foreign currency to apply for the judgment to be recalculated after a specified period has elapsed. However, we believe that the anxieties which led to that suggestion will be met by the recommendations referred to in paragraph 6.3 above.

(paragraph 5.10)

(2) We do not favour the suggestion that a general procedure should be introduced for the specific purpose of resolving issues concerning the conversion of one currency into another.

(paragraph 5.13)

Judgment in a foreign currency alone

(3) Rules of court should provide that a successful plaintiff may, with the leave of the court, 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).

(paragraph 5.17)

Fixed costs on default judgments

(4) In relation to claims in a foreign currency, the rules concerning fixed costs in the case of judgments entered in default should be amended to correspond in principle with the rules applicable to costs under Order 14 of the Rules of the Supreme Court.

(paragraph 5.21)

The currency of payments into court

(5) Provision should be made by rules of court enabling the defendant in an action for unliquidated damages in a foreign currency to pay a sum into court in that currency without leave of the court; and consequential amendments should be made to the Practice Direction.

(paragraph 5.25)

(6) No substantive change is necessary or desirable to the present rule governing the payment into court of foreign currency where the claim is expressed in sterling; but the Practice Direction does not now accurately reflect that rule and should be amended accordingly.

(paragraph 5.30)

(7) The present rule should be amended so as to enable the defendant in an action for a debt (or other liquidated demand) or for damages

expressed in a foreign currency to make payment into court as of right in any one of the following currencies:

(i) sterling;

(ii) the currency claimed by the plaintiff; or

(iii) such other foreign currency as the defendant alleges in his notice of payment into court should be the currency in which the plaintiff's loss ought properly to be expressed, in which case the defendant would bear the risk that his allegation may not be substantiated and that in consequence he has not made a good payment into court.

(paragraph 5.35)

(8) The present rule should be amended so as to permit a defendant to make payment into court in foreign currency with a plea of tender before action not only (as at present) where the claim is expressed in a foreign currency and the defendant makes payment into court in that currency but also where the claim is made in sterling or where the defendant pleads that he made a tender before action in a different foreign currency from that claimed.

(paragraph 5.38)

The date of conversion of money paid into court

(9) (*a*) Except as mentioned in subparagraph (*b*) below, no change is necessary or desirable in the present practice as to the date of conversion of money paid into court.

(*b*) Provision should be made by rules of court in relation to the case where at the trial of an action judgment is given in a foreign currency and the defendant has made a sterling payment into court, or where judgment is given in sterling and the defendant has made a payment into court in the foreign currency claimed by the plaintiff. In either situation, for the purpose of determining the question of costs, the court should convert the sum paid into court into the currency of the judgment as at the latest date at which the plaintiff could have accepted the money in court without leave, unless the court considers that it would not be just in all the circumstances to do so.

(paragraph 5.48)

Payment-out of money in court after trial

(10) The procedure as to the payment-out of money in court in cases where a currency conversion is necessary should be reviewed with the object of ensuring that the date as at which the conversion is effected is as close as is practically possible to the date of the receipt by the payee of the money in court.

(paragraph 5.54)

Enforcement proceedings

General

(11) We remain of the view, expressed in Working Paper No. 80, favouring the present principle governing conversion into sterling on the ground that in general it provides the latest practicable date for such conversion.

(paragraph 5.58)

Writs of fieri facias (fi. fa.)

(12) While it would be desirable in principle to permit a judgment creditor to update the conversion rate from time to time after the issue of a writ of fi. fa. but before payment was received thereunder, the question whether or not there are difficulties which would be such as to render impracticable the introduction of such a right requires further investigation by those with practical experience of these matters.

(paragraph 5.63)

(13) It should be made clear that, when a writ of fi. fa. has been issued, the judgment debtor cannot, without the consent of the judgment creditor, satisfy the judgment by payment in the foreign currency of the judgment until that writ has ceased to be outstanding.

(paragraph 5.69)

Garnishee proceedings

(14) (*a*) A new procedure should be introduced by rules of court in relation to the case where the garnished debt is in one currency and the judgment is in a different currency, whereby the garnishee is enabled (but not bound) to apply to the court for an order specifying what amount, in terms of the currency of the garnished debt, must be "frozen" in compliance with the garnishee order nisi.

(*b*) During the period in which garnishee proceedings are outstanding, the judgment debtor should not be entitled to satisfy a foreign-currency judgment debt by payment in the currency of the judgment without the consent of the judgment creditor.

(paragraph 5.80)

Charging orders

(15) The present practice should be changed so that no conversion into sterling is made in relation to the enforcement of a foreign-currency judgment by means of a charging order; the order would be expressed in the currency of the judgment. This would have the consequence that, where the judgment debtor voluntarily makes payment after a charging order has been made or where the property comprised in the charge is sold by way of enforcement of the charge, conversion into sterling would be made at the date of the actual payment to the judgment creditor.

(paragraph 5.84)

Attachment of earnings

(16) We remain of the view provisionally expressed in Working Paper No. 80 that there should be no change in the present procedure applicable to the conversion into sterling of a foreign-currency judgment for the purpose of attachment of earnings orders.

(paragraph 5.88)

Equitable execution

(17) The rules concerning the enforcement of a foreign-currency judgment by appointing a receiver by way of equitable execution should be further reviewed for the purpose of ascertaining what changes are necessary or desirable in the light of *Miliangos*.

(paragraph 5.91)

Wholly or partially unsuccessful enforcement proceedings

(18) No change should be made to what appears to be the present law—namely, that a judgment creditor is not bound by the rate of conversion applicable at the date of his first, unsuccessful attempt to enforce the judgment.

(paragraph 5.94)

(19) We remain of the view expressed in Working Paper No. 80 that no special provision should be made for updating the conversion rate where, after the issue of a writ of fi. fa., the debtor obtains a stay of execution of that writ.

(paragraph 5.97)

(*Signed*) RALPH GIBSON, *Chairman*
STEPHEN M. CRETNEY
BRIAN DAVENPORT
STEPHEN EDELL
PETER NORTH.

J. G. H. GASSON, *Secretary*.
29 July 1983

APPENDIX A

Draft clause relating to interest on foreign-currency judgments and arbitral awards

Interest on judgment debts etc. in foreign currency 1838 c.110.

(1) Where a judgment is given for a sum expressed in a foreign currency and section 17 of the Judgments Act 1838 (under which judgment debts carry interest at the rate for the time being prescribed) applies to the judgment debt, the court may, if it thinks fit, direct that there shall be substituted for the rate of interest which would otherwise apply by virtue of that section such rate (whether fixed or variable) as the court thinks fit.

(2) Where—

(*a*) a judgment is given in a county court for a sum expressed in a foreign currency which is a sum to which subsection (1) of section 101A of the County Courts Act 1959 (interest on judgment debts etc.) applies, or 1959 c.22.

(*b*) an order is made in that court in respect of such a sum (including an order as a result of which the sum falls within subsection (2)(*b*) of that section),

the court may, if it thinks fit, direct that there shall be substituted for the rate of interest which would otherwise apply by virtue of an order under subsection (1) of that section such rate (whether fixed or variable) as the court thinks fit.

(3) Where a sum expressed in a foreign currency is directed to be paid by an award made on an arbitration agreement, the award may direct that there shall be substituted for the rate of interest which would otherwise apply by virtue of section 20 of the Arbitration Act 1950 such rate (whether fixed or variable) as the arbitrator or umpire thinks fit. 1950 c.27.

EXPLANATORY NOTES

1. This clause implements the recommendations in paragraph 4.15(1)—(3) of the report. The three subsections relate respectively to judgments given by the High Court, judgments or orders of a county court and arbitral awards.

2. The reason for the reference to a " variable " rate of interest in each subsection appears in paragraph 4.12 of the report; but this should be read subject to the recommendation in paragraph 4.15(4) that rules of court should be made to " freeze " the rate of interest when an enforcement procedure is invoked for so long as that procedure is in force. The point is further explained in paragraph 4.13 of the report.

3. *Subsection (1)* implements the recommendation in paragraph 4.15(1). The reference to section 17 of the Judgments Act 1838 is to that section as amended from time to time by an order made under the Administration of Justice Act 1970, section 44: see paragraph 4.3 of the report.

4. (*a*) *Subsection (2),* which gives effect to the recommendation in paragraph 4.15(2) of the report, applies to the judgments and orders of a county court which carry interest because they fall within the ambit of an order made by the Lord Chancellor (with the concurrence of the Treasury) under the power conferred on him by section 101A(1) of the County Courts Act 1959: see paragraph 4.5 of the report.

(*b*) The words in parenthesis in paragraph (*b*) of this subsection relate to an award which, though originally made by a tribunal, has, in accordance with the relevant statutory provision, become recoverable as if it were payable under an order made by the county court. The matter is explained in paragraph 4.6 of the report.

5. (*a*) *Subsection (3)* implements the recommendation in paragraph 4.15(3). Under the Arbitration Act 1950, section 20, the rate of interest that would " otherwise apply " would be the rate applicable to judgment debts in the High Court, unless the arbitrator has directed that no interest should run on the award: see paragraph 4.7 of the report.

(*b*) Paragraph 2, above, of these notes extends to an arbitral award leave to enforce which has been given by the court under the Arbitration Act 1950, section 26, considered in paragraph 2.43 of the report.

APPENDIX B

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 C

List of persons and organisations who commented on Working Paper No. 80

The Right Honourable Sir John Arnold
Bank of England, Foreign Exchange Division
The Association of British Chambers of Commerce
Mr. Roger Bowles
Professor R. H. Graveson, Q.C.
Mr. David A. Haig, Solicitor, London
Imperial Chemical Industries Limited
Mr. A. J. E. Jaffey
Mr. C. Larlham, Solicitor, London
The Law Society
Lord Chancellor's Department
Messrs. Linklaters and Paines, Solicitors, London
Master John Ritchie
Senate of the Inns of Court and the Bar*
Under Sheriffs Association
Professor P. R. H. Webb
Dr. Christopher Whelan

* The comments of the Senate of the Inns of Court and the Bar were prepared by a Working Party whose membership was:

Mr. Ian Hunter, Q.C. (*Chairman*)
Mr. Richard Yorke, Q.C.
Mr. Derek Wheatley, Q.C.
Mr. John Thomas
Mr. Stuart Isaacs

APPENDIX D

Practice Direction (Judgment: Foreign Currency)

[QUEEN'S BENCH DIVISION]

. . . . .

1. Subject to any order or directions which the court may make or give in any particular case, the following practice shall be followed in relation to the making of claims and the enforcement of judgments expressed in a foreign currency.

2. *Claims for debts or liquidated demands in foreign currency*

For the purpose of ascertaining the proper amount of the costs to be indorsed on the writ pursuant to R.S.C., Ord. 6, r.2(1)(b), before a writ of summons is issued in which the plaintiff makes a claim for a debt or liquidated demand expressed in a foreign currency, the writ must be indorsed with the following certificate, which must be signed by or on behalf of the solicitor of the plaintiff or by the plaintiff if he is acting in person:

" *Sterling equivalent of amount claimed*

I/we certify that the rate current in London for the purchase of (*state the unit of the foreign currency claimed*) at the close of business on the ..... day of ..... 19..... (*being the date next or most nearly preceding the date of the issue of the Writ*) was ..... to the £ Sterling and at this rate the debt or liquidated demand claimed herein, namely (*state the sum of the foreign currency claimed*) amounts to £..... or exceeds £650 (*as the case may be*).

Dated the ..... day of ..... 19.....

Signed .....

(Solicitor for the Plaintiff)."

3. *Pleading claims in foreign currency*

Where the plaintiff seeks to obtain a judgment expressed in a foreign currency, he should expressly state in his writ of summons, whether indorsed into a statement of claim or not, that he makes his claim for payment in a specified foreign currency and unless the facts themselves clearly show this, he should plead the facts relied on to support such a claim in his statement of claim.

4. *Default judgment for debts or liquidated demand in foreign currency*

A judgment in default of appearance or in default of defence may be entered in foreign currency by adapting R.S.C., Appendix A, Form 39, as follows:

" It is this day adjudged that the Defendant do pay the Plaintiff (*state the sum in which foreign currency is claimed*) or the Sterling equivalent at the time of payment."

5. *Judgment under Ord. 14*

Wherever appropriate, a judgment under R.S.C., Ord. 14, r.3 may be entered for a debt or liquidated demand in foreign currency by adapting R.S.C., Appendix A, Form 44 as follows:

> "It is this day adjudged that the Defendant do pay the Plaintiff (*state the sum in foreign currency for which the Court has ordered Judgment to be entered*) or the Sterling equivalent at the time of payment and £..... costs (or costs to be taxed)."

The amount of the fixed costs will 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.

6. *Transfer to the county court*

On the hearing of an application for an order under the County Courts Act 1959, section 45, for the transfer to a county court of an action for a debt or liquidated demand expressed in foreign currency, on the ground that the amount claimed or remaining in dispute does not exceed £1,000, the court will have regard to the sterling equivalent of the foreign currency claimed as indorsed and certified on the writ, unless at the time of the application it is shown to the court that the said sterling equivalent does exceed the sum of £1,000.

7. *Payment of foreign currency into court in satisfaction*

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, under R.S.C., Ord. 22, r.1, a sum of money in foreign currency by adapting Form No. 2 of the Supreme Court Fund Rules 1975. If it is desired that the money should be placed on deposit after the expiry of 21 days the necessary directions must be given on a Part II Order.

8. *Orders for conditional payment of foreign currency into court*

Where the court makes a conditional order for payment of money into court, e.g., when granting conditional leave to defend on an application for summary judgment under Order 14, or when setting aside a default judgment or granting an adjournment of the hearing of a summons or the trial or hearing of an action or making any other order conditional upon payment of money into court, the court may order that such money be paid into court in a foreign currency, and the court may further order that such money should be placed in a foreign currency account and if practicable should be placed in such an account which is an interest bearing account.

9. *Entry of judgment in foreign currency*

A judgment may be entered in foreign currency by adapting the relevant Forms in R.S.C., Appendix A as follows:

> "It is this day adjudged that the Defendant do pay the Plaintiff (*state the sum in foreign currency in which Judgment has been ordered to be entered*) or the sterling equivalent at the time of payment."

10. *Interest on judgment debt in foreign currency*

A judgment entered in foreign currency will carry the statutory rate of interest on the amount of the judgment in foreign currency and such interest will be added to the amount of the judgment itself for the purposes of enforcement of the judgment.

11. *Enforcement of judgment debt in foreign currency by writ of fi. fa.*

(a) Where the plaintiff desires to proceed to enforce a judgment expressed in foreign currency by the issue of a writ of fieri facias, the praecipe for the issue of the writ must first be indorsed and signed by or on behalf of the solicitor of the plaintiff or by the plaintiff if he is acting in person with the following certificate:

"*Sterling equivalent of Judgment*

I/we certify that the rate current in London for the purpose of (*state the unit of the foreign currency in which the Judgment is expressed*) at the close of business on the ..... day of ..... 19... (*being the date nearest or most nearly preceding the date of the issue of the Writ of Fi. Fa.*) was ..... to the £ sterling and at this rate the sum of (*state the amount of the Judgment debt in foreign currency*) amounts to £.....

Dated the ..... day of ..... 19...

Signed.....

(Solicitor for the Plaintiff)."

(b) The amount so certified will then be entered in the writ of fi. fa. by adapting R.S.C., Appendix A, Form 53 to meet the circumstances of the case but substituting the following recital:

"Whereas in the above named action it was on the ..... day of ..... 19... adjudged [or ordered] that the Defendant C.D. do pay the Plaintiff A.B. (*state the sum of the foreign currency for which Judgment was entered*) or the sterling equivalent at the time of payment, and whereas the sterling equivalent at the date of issue of this Writ is £..... as appears by the Certificate indorsed and signed by or on behalf of the Plaintiff on the Praecipe for the issue of this Writ."

12. *Enforcement of judgment debt in foreign currency by garnishee proceedings*

(a) Where the plaintiff desires to proceed to enforce a judgment expressed in foreign currency by garnishee proceedings the affidavit made in support of an application for an order under R.S.C., Ord. 49, r.1 must contain words to the following effect:

"The rate current in London for the purchase of (*state the amount of the Judgment in foreign currency*) at the close of business on the ..... day of ..... 19... was ..... to the £ sterling, and at this rate the said sum of ..... amounts to £..... sterling. I have ascertained the above information (*state the source of the information*) and verily believe the same to be true.".

The master will then make an order nisi for the sterling equivalent of the judgment debt as so verified.

(b) Where the plaintiff desires to attach a debt due or accruing due to the defendant within the jurisdiction in the same unit of foreign currency as the judgment debt is itself expressed, the affidavit made in support of an application for an order under R.S.C., Ord. 49, r.1 must state all the relevant facts relied on and in such event the master may make the order to attach such debt due or accruing due in *that* foreign currency.

13. *Enforcement of judgment debt in foreign currency by other modes of enforcement*

Where the plaintiff desires to proceed to enforce a judgment expressed in a foreign currency by other means of enforcement, e.g. by obtaining an order imposing a charge on land or interest in land under R.S.C., Ord. 50, r.1 or by obtaining an order imposing a charge on securities under R.S.C., Ord. 50, r.2, or some other similar order or by obtaining an order for the appointment of a receiver by way of equitable execution, under R.S.C., Order 51, the affidavit made in respect of any such application shall contain words similar to those set out in paragraph 11(a) above. The master will then make an order for the sterling equivalent of the judgment expressed in foreign currency as so verified by such affidavit.

14. These directions are issued with the concurrences of the Chief Chancery Master acting on the authority of the Vice-Chancellor so far as they apply to the practice in the Chancery Division, and of the Senior Registrar of the Family Division so far as they apply to the practice in that division.

I. H. JACOB,
Senior Master of the Supreme Court.

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