The Legal Nature of Obligations Payable in Foreign Currencies

Robert C. Effros

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The Legal Nature of Obligations Payable in Foreign Currencies

Robert C. Effros*

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The type of problem here, because of the time element, has been said to involve a consideration of a "fourth dimension—namely that of time." Since it also apparently involves an attempt to coordinate the currencies of two different national systems, a mathematical-minded legal philosopher might suggest the application of the general theory of relativity, which seeks to formulate "laws" for all coordinate physical systems and thus to attain uniformity. Happily, this court is spared any such Einsteinian effort, for the Supreme Court has worked out a solution which we must accept.

Circuit Judge Frank

Why have we in England insisted on a judgment in sterling and nothing else? It is, I think, because of our faith in sterling. It was a stable currency which had no equal. Things are different now. Sterling floats in the wind. It changes like a weathercock with every gust that blows. So do other currencies. This change compels us to think again about our rules.

Lord Denning, M.R.

I am also of the opinion that fluctuations in the value of money must be avoided, by substituting for the gold standard a standard based on certain classes of goods selected according to the conditions of consumption.

Albert Einstein

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1 Shaw, Savill, Albion & Co. v. The Fredericksburg, 189 F.2d 952, 954 (2d Cir. 1951).
3 Einstein, Answer to a Communication, in MEIN WELTBILD (1934), republished in A. EINSTEIN, IDEAS AND OPINIONS 92 (1954).
I. Introduction

Preserving stability of value is the essence of the jurisprudence of obligations payable in foreign currencies. The problem of maintaining stability of value of an obligation is a product of a world of fluctuating currencies whose exchange rates are continually varying both relative to one another and relative to the value of goods and services which they may command. The evolution and current state of thinking on this matter is revealed by a comparison of the rather traditional law of the United States with some relatively revolutionary developments in the English law. This paper considers the trends in the legal nature of obligations payable in foreign currencies as they relate to the larger question of preserving stability of value.

The development of thought in one area often foreshadows or runs parallel to thought in another unrelated sphere. Trends in music and art often conform with and reflect the ages of their composition. The confident orderly themes of the eighteenth century characterize an age of rational enlightenment in culture and in politics. The drama of nineteenth century romanticism is echoed in painting, symphony, and patriotic struggle. The discontinuity and violent upheaval of the twentieth century sound in abstraction and atonality.

Thus, trends in jurisprudence in the area of obligations payable in foreign currencies parallel the unrelated discipline of physics, particularly at the close of the last century. In the classical physics that had evolved, the world was thought to be comprehensible in terms of Isaac Newton's accurate laws of mechanics. Gradually, imperfections that appeared in those explanations made the concept of a mechani-

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4 This subject is part of a more general matter which was made the subject of a resolution by the International Law Association at the instance of its Monetary Law Committee. The resolution provides:

RECOMMENDS that the exchange risk inherent in resorting to one currency be attenuated by combination-of-currencies clauses managed by established international organizations, as the SDR and the ECU, and that in so doing due consideration be given to future modifications and cessation of the unit of account;

RECOMMENDS that devices for preserving purchasing power in transnational transactions be utilized by parties and upheld by States and that, in particular, parties should resort to index and other non-monetary clauses when value can be linked to elements essential to the economy of the transaction;

RECOMMENDS that, for international conventions concerning private law matters, due attention be given to indexing devices to be utilized in combination with SDR clauses, such as those now under study within UNCI-TRAL;

RECOMMENDS that the Committee, in keeping value clauses under consideration, consider not only devices for avoiding exchange risks, but also those aimed at preserving purchasing power, including review and indexing mechanisms for taking into account the depreciation of the component currencies of the combination-of-currencies units. . . .

cal universe obsolete, to be replaced by a quite different understanding. In the same way, the traditional but static legal conceptions of obligations payable in foreign currencies, which reach back to the age of Newton, were perceived in the twentieth century to give rise to inequity. The inequity is not invariable and arises only in certain situations, but it is significant enough to have revolutionized English jurisprudence. The traditional mechanical concepts are still expressed in the law of the United States.

II. The United States: A System of Classical Mechanics

In the United States, as was the case until recently in England, courts can only award judgments expressed in the currency of the forum: dollars. They cannot award judgments in foreign currencies. When a contractual obligation that is expressed in terms of a foreign currency is sued on, the court must convert the amount of that obligation into an equivalent amount of dollars. For example, assume that Mr. Smith in New York owes Mr. Rodriguez in Quito ten thousand sucres and is sued in a U.S. court on the obligation. The U.S. court cannot award judgment in sucres but must state its judgment in terms of dollars. A problem arises in the calculation of the conversion. If when the debt became due two years ago, ten thousand sucres would have bought 400 dollars but when the court awards judgment, ten thousand sucres only buys 115 dollars, should the court award judgment for 400 dollars or for 115 dollars? When the exchange rate has moved, should the court choose the rate of conversion of the day of the breach of obligation or the day that judgment is awarded?

As a consequence of the parallel systems of state courts and federal courts in the United States, the rules may differ. Although on most substantive matters the latter are instructed to follow the former, in spheres recognized as separate the two may diverge. The rule adopted by the New York courts for example differs from the more complicated rule applied by the federal courts in non-diversity cases.

New York courts determine the rate of exchange as of the day of the breach. Mr. Rodriguez in our example would receive judgment for 400 dollars. This holds whether the contract sued on was made

\footnote{The rule is believed to derive from § 20 of the Coinage Act of April 1792 (codified at 31 U.S.C. § 371 (1954) and recodified at 31 U.S.C. § 5101 (1982)). The most recent recodification, which deleted certain language, may give rise to questions. There are a number of state statutes to the same effect.}

\footnote{Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938) "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state. . . ." Id. Accordingly, federal courts sitting in diversity cases must apply the rule employed by the courts of the states in which they sit. See Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 865 (2d Cir. 1981).}
in New York and performable abroad or vice-versa. Thus, in *Librairie Hachette, S.A. v. Paris Book Center, Inc.* plaintiff was a book publisher in France and defendant was an importer and distributor of French publications in New York. The contract between them called for payment of francs in Paris. Subsequent to defendant's default in making payment, the franc was devalued. Defendant argued for dollar judgment at the rate of exchange in effect on the day of judgment (for less dollars would then be required to purchase the amount of francs called for by the obligation). Plaintiff argued for the rate in effect on the day of default (the breach day). The Supreme Court of New York, New York County, noting that the difference in the award would be substantial, awarded the greater amount of dollars required by the breach day rule. The court explained that New York courts had adopted the breach day rule and that if it were not applied in the case before it, "the defendant would be rewarded for defaulting in his obligation to pay for the merchandise."8

In contrast to the New York courts, the federal courts do not limit themselves to the breach day rule. They apply both the breach day rule and the judgment day rule in appropriate non-diversity cases.9 An example of the latter occurred in *Shaw, Savill, Albion & Co. v. The Fredericksburg.*10 A U.S. ship and a British ship collided in British territorial waters. The British owners paid for repairs to their ship in sterling and sued the U.S. owners in a U.S. federal court for the amount of the repairs plus interest which the U.S. owners had agreed to pay. Before full settlement was made, sterling was devalued. The British owners sought an award of dollars at the rate either on the date when the repairs were paid or on the date of the collision. The latter date in tort corresponds to the breach day rule for a contractual obligation. The U.S. Court of Appeals for the Second Circuit agreed with the U.S. owners that only the amount of dollars necessary to purchase the expended amount of sterling plus interest determined on the basis of the rate of exchange prevailing on the judgment day should be awarded.11 In the course of its opinion, the court commented on the "Einsteinian" dimensions of the problem proceeding from the time element, but followed a Supreme Court decision on the matter.12

The Supreme Court case applied the judgment day rule where the obligation is performable in a foreign country in the money of that country. This was based on the theory that an obligation in

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8 Id. at 877, 309 N.Y.S.2d at 705.
9 See Deutsche Bank v. Humphrey, 272 U.S. 517 (1926) and Hicks v. Guinness, 269 U.S. 71 (1925) discussed later in this article.
10 The Fredericksburg, 189 F.2d at 955, 956.
11 Id. at 955.
12 Id. at 954. See supra text accompanying note 1.
terms of that currency must take the risk of currency fluctuation.\textsuperscript{13} In other circumstances a federal court would, under decisions of the Supreme Court, not apply the judgment day rule and be obligated to apply the breach day rule.

The alternative rules derive from two cases decided by the Supreme Court after the First World War. In \textit{Hicks v. Guinness}\textsuperscript{14} a German company owed a debt to a U.S. company payable in the United States in German marks. The latter depreciated in value between the date when the contract to pay the debt was breached and the time of the suit. The Supreme Court held that judgment should be in dollars calculated at the exchange rate prevailing at the time of breach.\textsuperscript{15}

In the second case, \textit{Deutsche Bank v. Humphrey}\textsuperscript{16} a different result was reached. The account was in marks and was payable on demand. The money was not paid when the depositor demanded it in 1915. Subsequently the mark depreciated in value. Suit was brought on the debt in 1921 and the issue was the rate at which the amount of the judgment in dollars should be calculated. The plaintiff argued for the rate at the date of breach when the demand for payment was made. The Supreme Court decided in favor of the rate of exchange in effect on the day of judgment.\textsuperscript{17}

Two rationales have been offered for the different results reached by the Supreme Court. Its choice between the breach day and the judgment day rates depends on either the place of performance of the contract, or on the conflict of laws. Under the place of performance rationale, the Supreme Court and subordinate federal courts apply the judgment day rate in converting into dollars an obligation expressed in foreign currency when the obligation to be performed is to take place in a foreign country. This was the case in \textit{Deutsche Bank v. Humphrey}. On the other hand, when the obligation to be performed is to take place in the United States, as in \textit{Hicks v. Guin-}

\textsuperscript{13} Refusing to give the British owners a windfall which would have resulted from the application of the breach day rule, the court noted:

\textit{Id.} at 956-57.

\textsuperscript{14} 269 U.S. 71 (1925).

\textsuperscript{15} \textit{Id.} at 80.

\textsuperscript{16} 272 U.S. 517 (1926).

\textsuperscript{17} \textit{Id.} at 519-20.
ness, the breach day rate is applied. The cases are subject to an alternative explanation. Under the conflict of laws approach, the judgment day rate applies when the cause of action arises under foreign law, as in *Deutsche Bank*, while the breach day rate applies when it arises under the law of the forum, as in *Hicks*.  

A special rule is prescribed in U.S. law for negotiable instruments. Uniform Commercial Code section 3-107(2) provides:

> A promise or order to pay a sum stated in a foreign currency is for a sum certain in money and, unless a different medium of payment is specified in the instrument, may be satisfied by payment of that number of dollars which the stated foreign currency will purchase at the buying sight rate for that currency on the day on which the instrument is payable, or, if payable on demand, on the day of demand. If such an instrument specifies a foreign currency as the medium of payment the instrument is payable in that currency.  

While section 3-107(2) is probably not intended to make a distinction between the date when an instrument is due and the date when judgment is entered after it is dishonored, one commentator has written that “it is believed quite likely that the prime importance given the ‘due date’ rate of exchange will carry over when the question becomes a choice between the due date and the judgment day rate.”

New York State omitted the last sentence of section 3-107(2) and from the first sentence omitted: “unless a different medium of payment is specified in the instrument.” New York is apparently

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18 This approach was adopted by the *Restatement of Conflict of Laws*, but was omitted by the drafters in the *Second Restatement*. “Damages for breach of a contract to deliver money not currency of the state where the delivery is to be made are measured in currency of the state of performance at the rate of exchange current at the time of breach.” *Restatement of Conflict of Laws* § 423 (1934) (emphasis added). “When judgment is rendered on a cause of action for damages created in another state, the rate of exchange adopted is that which exists at the time when judgment is rendered.” Id. § 424 (emphasis added).

19 U.C.C. § 3-107(2) (1978). Comment 4 to U.C.C. § 3-107 makes it clear that whatever the medium of account, the medium of payment may be and, in fact, unless the instrument otherwise specifies, is presumed to be dollars:

> the intention of the parties in making an instrument payable in a foreign currency may be that the medium of payment shall be either dollars measured by the foreign currency or the foreign currency in which the instrument is drawn. Under subsection (2) the presumption is, unless the instrument otherwise specifies, that the obligation may be satisfied by payment in dollars in an amount determined by the buying sight rate for the foreign currency on the day the instrument becomes payable.

*Id.*


21 See N.Y. U.C.C. § 3-107(2) (McKinney 1964). The New York Commission stated in its Supplementary Report to the New York Legislature:

> The omission of the bracketed language makes clear that a promisor or drawee under an instrument payable in a foreign currency is under no duty to have on hand foreign currency and satisfies his obligation under the instrument by a payment in dollars. Neither the federal courts nor the courts of New York will grant judgments payable in foreign currency.
the only jurisdiction which made these changes. One of the arguments made in favor of the deletions was that it may be very difficult for a bank remote from the centers of international trade to keep foreign currencies on hand so as to provide for payment therein. A commentator has noted, however, that in the absence of a special arrangement, it is unlikely that a bank would be held liable for wrongful dishonor of a negotiable instrument payable at the bank in a given foreign currency because of its inability to pay in that currency. In addition, the commentator points out that "the New York amendment may affect the rights of a payee and subsequent holders to demand payment of the specified foreign currency from the primary party after having been tendered American dollars by the payor bank."

Support for the judgment day rule arises from two considerations. First, the result is the same as if suit had been brought in the country whose currency is designated in the obligation. The court of that country would give judgment for the amount of the denominated currency (ignoring whether its value had changed relative to that of foreign currencies since the cause of action accrued) and the plaintiff, who desires local currency, would convert it into his own currency at the rate prevailing at the time of judgment. The second consideration in favor of the judgment day rule (arising as a consequence of the first) is that the result is a uniform one whether suit is brought in the local forum or a foreign one.

The chief disadvantage of the judgment day rule is that it may work to the detriment of local and foreign creditors in the event that their debtors default at a time when the foreign currency is depreciating in terms of that of the creditors. Again, the ultimate recovery might depend on the vagaries of the court calendar and the duration of the litigation.

Support for the breach day rule arises from the fact that it places the creditor in the position which he would have occupied had the obligation not been broken insofar as its measure of recovery is related to the date of breach. The disadvantage of the rule lies in the incentive it provides for forum shopping. Thus, if the foreign currency in which the obligation is denominated depreciates in terms of the local currency of the creditor after the default of the debtor, the creditor will wish to sue in his local forum in order to recover the local currency equivalent to the currency of account at the (higher) rate obtaining at the time of the breach rather than the (lower) rate prevailing thereafter as a consequence of the depreciation of the for-


22 See 5 R. Anderson, supra note 20, § 3-107:2, at 253.

eign currency. On the other hand, if the local currency depreciates (or the foreign currency of account appreciates), the creditor will wish to sue the defaulting debtor in the foreign forum in whose currency the obligation is denominated (or another forum which awards judgments in the currency of account) in order to receive a judgment in the currency of account rather than the local value of the amount of the obligation at the time of the breach which, by hypothesis, is presently worth less in terms of the currency of the account than at the time of the breach.\[*24*]

Despite the elegant simplicity of the New York breach day rule or the imposing baroque facade and subtle intricacies of the federal system, which in appropriate cases, chooses between breach and judgment day, are there situations in which justice will not result? In the *Librairie Hachette* case, the court felicitated itself on the equitable result achieved by applying the simple New York rule,\[*25*] but the equities of the rule shift on different facts. If instead of French francs, which had depreciated against the dollar between the time of the defendant's default and the time of the court's judgment, the obligation between the foreign book publisher and the New York distributor had been denominated in Swiss francs and the U.S. dollar had during the interim depreciated rather than appreciated against this currency, it would not be just to apply the breach day rule because the amount of dollars awarded would no longer purchase the agreed sum of Swiss francs. The principle of compensating the plaintiff for his loss would not be fulfilled and instead the defendant, who had breached the obligation, would benefit by his default through having to pay fewer dollars on the day of judgment than he would have had to pay when his payment was due.

The judgment day rule, even as applied by federal courts, can give rise to equivalent injustice. In *Paris v. Central Chiclera, S. de R.L.*\[*26*] defendant, an importer in the United States, breached a contract for the purchase of gum from plaintiff, a Mexican exporter. The contract had been entered into in Mexico, was to be performed there, and the purchase price was stated in Mexican pesos. The U.S. Court of Appeals for the Fifth Circuit held that the *Deutsche Bank* case governed and that damages should be calculated at the rate of exchange existing on the judgment day.\[*27*] The Mexican peso had fallen in value against the U.S. dollar in the interim between the

\[*24*] For a suggestion that an ad hoc approach be adopted, see Note, *Conversion Date of Foreign Money Obligations*, 65 COLUM. L. REV. 490 (1965).

\[*25*] "In this case, the equities favor application of the 'breach day rule.' If it were not applied, the defendant would be rewarded for defaulting in his obligation to pay for the merchandise. The breach day rule should be applied in this case." 62 Misc. 2d 873, 877, 309 N.Y.S.2d 701, 705 (1970).


\[*27*] Id. at 963.
breach day and the judgment day. On the breach day the exchange had been 4.70 pesos for each dollar, contrasted with 8.62 to 1 on the judgment day.\(^{28}\)

The U.S. jurisprudence of obligations payable in foreign currencies, characterized by the mechanical application of the breach day or judgment day rules, is analogous to the principles of physics prevalent at the close of the last century. In classical physics the world could be explained by invariable Newtonian laws of mechanics. But "before the turn of the past century certain deviations from these laws became apparent; and though these deviations were slight, they were of such a fundamental nature that the whole edifice of Newton’s machine-like universe began to topple."\(^{29}\) Thus, recent developments in English law make apparent fundamental deviations in sound jurisprudence.

III. The English Law: A Revolution in Jurisprudence

Not long ago it was settled that where a claim is founded on an obligation expressed in a foreign currency, an English court would award a judgment only in sterling calculated at the rate of exchange prevailing on the breach day. The House of Lords confirmed this in *In re United Railways of Havana and Regla Warehouses, Ltd.*\(^{30}\) The local currency rule has been traced as far back as 1626, sixteen years before the birth of Isaac Newton when, in the case of *Ward v. Kidswin*,\(^{31}\) the judges agreed: "that in the case of foreign coin, such as Flemish, one must declare the value in English."\(^{32}\) This three hundred year rule was first breached in *Jugoslavenska Oceanska Plovidba v. Castle Investment Co., Inc.*\(^{33}\) in which, in an arbitration proceeding, the court upheld an award in U.S. dollars. The old rule was again challenged in *Schorsch Meier v. Hennin*.\(^{34}\) In *Schorsch* a German auto supply company sued an automobile dealer in England for payment for spare parts. The contract was denominated and payable in Deutsche marks. When the English dealer defaulted, the exchange rate was 1 £ = DM 8.30. Subsequently sterling was devalued so that the rate became 1 £ = DM 5.85. The German plaintiff asked for judgment in Deutsche mark. Under the traditional rule, the English court would only have granted judgment in sterling and it would have made its award as of the breach date. Plaintiff’s claim for DM 3.756.03 would

\(^{28}\) *Id.* A strong dissent noted the inequity: "By invoking the law’s delay, defending and ultimately losing this suit, the defendant has gained more than eight thousand dollars, and the plaintiff has lost a like amount, nearly half of its claim." *Id.* (Rives, J., dissenting).

\(^{29}\) L. Barrett, *The Universe and Dr. Einstein* 8 (rev. ed. 1950).

\(^{30}\) 1961 A.C. 1007.


\(^{32}\) *Id.* (quoted with approval in *United Railways*, 1961 A.C. at 1044).


\(^{34}\) [1975] 1 All E.R. 152.
have been converted into only £ 452, though it would have yielded £ 641 at the time of suit. The Court of Appeals departed from the traditional rule, basing its decision both on procedural changes that had been made in the English law and on the Treaty of Rome to which the United Kingdom had adhered upon becoming a member of the European Economic Community. Lord Denning, the Master of the Rolls, opined that English courts would be acting contrary to the spirit of the Treaty of Rome if they required a German creditor to accept payment in depreciated sterling. Moreover, he took the occasion not only to challenge the part of the traditional rule that required judgments to be converted into local currency, but to change the time of conversion if payment were to be made in that currency.

Schorsch Meier had directly challenged the old law, but its scope appeared to be limited to cases involving foreign money obligations which are denominated and payable in the currency of members of the European Economic Community. The landmark case of Miliangos v. George Frank (Textiles) Ltd. forced ancient rules to full retreat. In Miliangos a Swiss manufacturer of synthetic yarn contracted with the English defendant for sale of yarn in Swiss francs. When the purchaser defaulted, plaintiff brought suit in an English court seeking to recover sterling at the breach day rate in accordance with the traditional rules of English law. Before the case came to trial, Schorsch Meier was handed down, and the plaintiff amended his claim to seek the amount due to him in Swiss francs. The House of Lords found that the law of the contract as well as the money of account and the money of payment were Swiss. Thus, in this action for the payment of a debt, the court awarded Swiss francs. In explaining this departure from the rule that had been unanimously confirmed by the same House in In re United Railways of Havana, Lord Wilberforce noted the great changes resulting when the world's currency system moved from the relatively stable regime of fixed par values to the floating regime:

The situation as regards currency stability has substantially changed even since 1961. Instead of the main world currencies being fixed and fairly stable in value, subject to the risk of periodic re- or devaluations, many of them are now "floating," i.e., they have no fixed exchange value even from day to day. This is true of sterling. This

\[\text{Id. at 155. In the course of his opinion, Lord Denning M.R. reflected upon the ancient rule from which he was departing. See supra note 2 and accompanying text.}\]

\[\text{Mar. 25, 1957, 298 L.N.T.S. 11.}\]

\[\text{It is perfectly legitimate to order the defendant to pay the German debt in deutschmarks. He can satisfy the judgment by paying the deutschmarks: or, if he prefers, he can satisfy it by paying the equivalent sum in sterling, that is, the equivalent at the time of payment.}\]

\[\text{[1975] I All E.R. at 156.}\]

\[\text{[1975] 3 All E.R. 801.}\]

\[\text{Id. at 811.}\]
means that, instead of a situation in which changes of relative value occurred between the “breach-date” and the date of judgment or payment being the exception, so that a rule which did not provide for this case could be generally fair, this situation is now the rule. So the search for a formula to deal with it becomes urgent in the interest of justice.

A number of Continental European countries for many years awarded judgments in foreign currency. For an English Court to do so was a revolution in English jurisprudence. Nevertheless, Miliangos left certain points unsettled. Miliangos was decided on a fact situation involving a debt certain. This left open the question of whether damages for breach of contract and damages in tort could be awarded in foreign currency, as well. Miliangos also expressly noted that the governing law of the contract was foreign. If the governing law were English, the outcome might not be the same. These ambiguities were resolved in two cases that came before the House of Lords.

In Owners of M. V. Eleftherotria v. Owners of M. V. Despina R41 two ships collided and an agreement was reached between their owners that the Despina would pay a portion of the loss and consequential damage suffered by the owners of the Eleftherotria. Repairs to the Eleftherotria were made in various currencies in the several ports that it had subsequently called. While expenditures had been made in Chinese, Japanese, United States and British currency, the bank account used for all of these payments was a U.S. dollar account in New York. Thus all expenses incurred in the foreign currencies were met by either transferring from this account or paying directly U.S. dollars.42 The issue in the first instance was whether judgment had to be made in sterling and converted at a date analogous to the breach date in accordance with the traditional rule or whether the new rule of the Miliangos case, which sanctioned awards in terms of foreign currencies, should be extended to cover torts as well as contract debts. The House of Lords decided in favor of the latter,43 leaving the issue of which foreign currency or currencies make the judgment. As one question was answered, a new one arose.

The House found itself confronted with deciding between an award in the several currencies expended (the expenditure currency) or the currency in which the plaintiff normally conducted business (the plaintiff’s currency). Cautioning against the adoption of an invariable rule, Lord Wilberforce stated that the plaintiff’s currency, U.S. dollars, should be awarded.44

40 Id. at 809.
41 [1979] 1 All E.R. 421.
42 Id. at 425.
43 Id. at 426.
44 My Lords, in my opinion, this question can be solved by applying the normal principles, which govern the assessment of damages in cases of tort . . . .
In a companion case to Despina, the House of Lords settled two more questions left open by Miliangos. In Services Europe Atlantique Sud (SEAS) v. Stockholms Rederiaktiebolag SVEA (The Folias) respondents, a French company, shipped a cargo of onions from Spain to Brazil aboard a vessel owned by appellants, a Swedish company. As a consequence of a failure of the ship's refrigeration, the cargo was damaged and the respondents had to settle a claim against them by the Brazilian purchasers in cruzeiros. The respondents then claimed damages against the ship's owners for breach of contract either in francs which they had expended in order to purchase the cruzeiros or in U.S. dollars, the currency of the charter party. The court decided that damages for breach of contract could be awarded in a foreign currency, extending further the Miliangos rule. Importantly, the proper law of the contract was not foreign (as was the case in Miliangos) but was accepted to be English. The rationale was stated by Lord Wilberforce to result from the fact that:

[N]either of the parties to the contract, nor the contract itself, nor the claim which arose against the charterers, nor that by his charterers against the owners, had any connection with sterling, so that prima facie this would be a case for giving judgment in a foreign currency.

The final question was in what foreign currency or currencies the judgment should be stated. In the case at bar, it was held to be the plaintiff's currency since "it was reasonable to contemplate that the charterers, being a French corporation and having their place of business in Paris, would have to use French francs to purchase other currencies to settle cargo claims arising under the bills of lading."

Schorsch Meier and Miliangos were responsible for the great change in direction that was made in English jurisprudence in the area of foreign money obligations. Those cases dealt only with the problem of a single foreign currency. Despina and Folias illustrated the complexities that arise in situations involving multiple currencies. The problem of what interest rate to use was unsettled until

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

Id. at 427.  
45 [1979] 1 All E.R. 421.  
46 Id. at 428-29.  
47 Id. at 430.  
48 Lord Wilberforce noted that: "In some cases the 'immediate loss' currency may be appropriate, in others the currency in which it was borne by the plaintiff. There will be still others in which the appropriate currency is the currency of the contract." Id. at 431.  
49 Id.
Helmsing Schifffahrts G.M.B.H. v. Malta Drydocks Corp. In Helmsing plaintiffs were shipowners in Germany who contracted with the defendants to build two ships in Malta. The plaintiffs were entitled to a refund on the purchase price and when this was not paid in 1972 at the time the ships were delivered, they brought suit in an English court. While the shipbuilding contracts were expressly governed by English law and contained an English arbitration clause, the currency of account was Maltese pounds and it was this currency in which plaintiffs had made payment of the purchase price. The dispute centered on which interest rate to apply to the judgment. The defendants contended that Maltese rates of interest should be used since the Maltese pound was the currency of account and plaintiff’s claim was for judgment in that currency. The shipowners argued that the court should award interest on the basis of English rates, or in the alternative German rates, both of which were higher than the Maltese rates. The Queen’s Bench Division (Commercial Court) awarded judgment in Maltese currency with interest payable in that currency but based on the prevailing commercial borrowing rates in Germany from 1972 through 1976, when the obligations were settled. The rationale for this decision was that defendants’ failure to make a timely refund caused a loss to plaintiffs because they then had to borrow the defaulted sum at commercial rates in Germany. The court rejected the defendants’ argument since, in its view, once the ships had been delivered plaintiffs no longer had any business in Malta. Furthermore, there was no reason why they would borrow in Malta to replace the unpaid sum.

In England, by comparison to the effect of negotiable instruments under U.S. law, section 72(4) of the Bills of Exchange Act of 1882 expressly permitted (in the absence of an express stipulation to the contrary) payment in local currency. The interpretation of this provision in light of the decisions in Midangos and its progeny faced the court in Barclays Bank Int’l Ltd. v. Levin Brothers (Bradford) Ltd. In Barclays sellers in the United States sold a quantity of cloth to an English company and drew four bills of exchange each in the amount of 23,137 dollars on the latter. The bills were duly accepted but were dishonored when presented for payment by plaintiffs to whom they had been endorsed by the sellers. Though plaintiffs sought

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50 [1977] 2 Lloyd’s L.R. 444.
51 Id. at 448.
52 Id.
53 Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.
Bills of Exchange Act, 1882, 45 & 46 Vict., ch. 61, § 72(4).
judgment in dollars, the Master, applying section 72(4) of the Bills of Exchange Act, gave judgment in sterling as of the due dates together with interest to the day of judgment plus costs. The pound had sharply depreciated between the due dates of the bills and the day of judgment. The court held that judgment should be awarded in dollars in accordance with the decision in Miliangos. The significance of section 72(4), held the court, was that it allowed the obligor of a bill of exchange the option of discharging the sum payable in sterling at the rate of exchange prevailing on the due date, but that it did not operate to prevent recovery by the plaintiff in foreign currency in the event of default by the obligor. Subsequently, the law was amended so that section 72(4) ceased to have effect.

IV. Legislative Approaches to Maintenance of Value

Even before the Second World War ended, government representatives were planning the international financial system that would prevail for the next quarter of a century. Under that system, embodied in the Articles of Agreement of the International Monetary Fund which entered into force on December 27, 1945, each member country was required to establish a par value for its currency in terms of gold, either directly or by way of the U.S. dollar of the weight and fineness in effect on July 1, 1944. Each member further undertook to ensure that spot exchange transactions between its own currency and that of other members took place in its territory within narrow margins. Many members undertook to satisfy the latter obligation through the purchase and sale of an intervention currency against their own currency. Under a decision adopted by the Fund in 1959, the maximum margin permissible for transactions involving the intervention currency was set at one percent and the maximum cumulative margin resulting therefrom in terms of a member currency other than the intervention currency was set at two per-

55 Id. at 283.
56 Id. at 275. In the language of the court:
[A]s regards section 72(4) of the Bills of Exchange Act 1882, on which the master based his decision, the very restrictive wording of the subsection merely provided a formula to ascertain the amount of sterling which an acceptor should pay on the date of maturity in order to discharge his obligation under a bill of exchange, if he chose to pay that bill of exchange in sterling and not in the currency in which it was drawn. Accordingly the function of the subsection ended with day of payment and it had no statutory effect upon the sum recoverable when no payment had been made on the date of maturity and the indorsee subsequently sued the acceptor.

Id.

The case has been considered in Guest, Instruments Denominated in a Foreign Currency, 27 Am. J. Comp. L. 533, 537 (1979).
59 Id.
The par value system establishes a pattern of fixed relationships between currencies of member countries of the Fund. While changes in these relationships could be and were made, the pattern was relatively stable and the exchange rates of members from the inception of the system until its demise in 1971 reflected relative stability.

On August 15, 1971, the United States announced that it would no longer convert official holdings of dollars into gold or other reserve assets. Moreover, it would not undertake other measures to ensure that exchange transactions taking place within its territories occurred only within the prescribed margins. With the center of the par value system thus excised, the system collapsed. Despite an effort to revive it in the Smithsonian Agreement of December 18, 1971, the system was succeeded after a period of uncertainty by the current system of floating currencies. Under the amended Articles of Agreement, members may adopt any exchange arrangement except that they may not maintain the external value of their currencies in terms of gold.

The Second Amendment to the Fund’s Articles of Agreement formally abolished the old par value system. As a consequence gold can no longer serve as the common denominator of exchange rate relationships. Moreover, the Amendment abolished the official price for gold and the obligations of members concerning the price at which they could buy and sell it. These changes gave rise to problems in interpretation of gold clauses inserted in contracts and conventions to preserve stability of value.

In the past, parties to international contracts and agreements who sought to protect the value of their obligations expressed that value in terms of gold or in terms of a gold currency unit such as the Poincare franc or the Germinal franc. As a unit of account, gold offered protection against changes in exchange rates. Moreover, the gold standard, which prevailed before the First World War, offered protection against changes in the price level because the price level of countries on that standard tended to adjust to the stated relationship between gold and their currencies. While the protection against changes in the price level offered by expressing a value in terms of gold has eroded since the abandonment of the gold standard following the First World War, its protection against exchange rate

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60 See J. Gold, Floating Currencies, Gold and SDRs 5 (1976).
61 The Challenge of Peace, 7 WEEKLY COMP. PRES. DOC. 1170 (1971).
65 Id.
changes remained significant through the period of the par value system.

A recent example of the problems that have resulted from the use of a gold currency unit in an international agreement appears in Franklin Mint Corp. v. Trans World Airlines Inc. In Franklin Mint plaintiffs contracted for the carriage of a numismatic cargo from the United States to England aboard one of the defendant’s airplanes. The cargo was lost or destroyed, rendering the airline liable under the 1929 Convention for the Unification of Certain Rules Relating to International Transportation by Air, more familiarly known as the “Warsaw Convention.” Under article 22 of that Convention, the carrier’s liability was limited to a specified number of French gold Poincare francs. At issue in the case was the manner in which to make that conversion into U.S. dollars.

The Court of Appeals for the Second Circuit considered four alternative methods of making the conversion. The results yielded by the different approaches ranged from less than 6,500 dollars to over 400,000 dollars. The four methods of valuing the gold unit to convert it into dollars were: the last official price of gold, its market price, the current French franc, and the SDR. The official price of gold was abolished on an international level by the Second Amendment to the Fund’s Agreement, and explicitly repealed by Congress in 1978 by repeal of the Par Value Modification Act of 1973. The court found the free market price of gold unsatisfactory insofar as it now was devoid of monetary linkage and accordingly reflected only the “highly volatile price of a commodity determined in part by forces of supply and demand unrelated to currency values.” The current French franc was dismissed as simply one domestic currency subject to change by the unilateral act of a single government. As for the SDR, there was neither authority to use it in the Warsaw Convention, nor had the U.S. Senate ratified the Protocols which substituted the SDR as the Convention’s unit of account. The court held that the last official price of gold controlled the valuation, but that prospectively the Warsaw Convention’s limitations on liability for the loss of cargo would be unenforceable in U.S. courts. The Supreme

68 Warsaw Convention, supra note 67, art. 22. The latter is a unit of account of 651/2 milligrams of gold at a standard fineness of 900 thousandths. It was inserted into the Convention in order to provide a common mode of expression of the limits of liability that could be readily converted into the currencies of countries that subscribed to the Warsaw Convention.
69 Franklin Mint, 690 F.2d at 305.
71 Franklin Mint, 690 F.2d at 310.
72 Id. at 311.
Court affirmed the judgment of the Court of Appeals, but rejected its declaration that the Warsaw Convention was prospectively unenforceable. The Supreme Court considered that Congress' repeal of the Par Value Modification Act did not imply that the conversion factor of the last official price of gold could no longer be used to implement the United States' obligation to abide by the Convention's liability limit.

Though the Court of Appeals in the Franklin Mint case felt unable to convert the Warsaw Convention's gold monetary unit of account into U.S. dollars through the use of the SDR, there has been a growing trend to replace such units of account in international conventions with the SDR. Although the SDR was originally defined in terms of gold, the demise of the par value system made it impossible to translate that value into currencies. Accordingly, the Fund arrived at a solution involving the market values of a basket of sixteen currencies. The original basket of currencies was reduced to five currencies effective January 1, 1981, those of the United States, the Federal Republic of Germany, Japan, France and the United Kingdom. These were the five member countries of the Fund that in the five-year base period of 1975-1979 had the largest exports of goods and services.

Because it is defined "as a basket of currencies, the SDR maintains its purchasing power over the collection of component currencies as well as over other currencies maintaining a stable relationship to the SDR." Its purchasing power over goods and services, however, is not assured and varies over time with the purchasing power of component currencies. Thus in an era when all of the countries whose currencies are represented in the basket experience inflation, their currencies will depreciate against the goods and services they purchase.

In 1934, Albert Einstein offered his solution: "I am also of the

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74 Id. at 1784.
75 See J. GOLD, SDRS, CURRENCIES AND GOLD, SIXTH SURVEY 3 (1983).
76 The shares of these currencies in the value of the SDR corresponded to the following weights and amounts for each currency:

<table>
<thead>
<tr>
<th>Currency</th>
<th>Weight (in percent)</th>
<th>Amount (in units of each currency)</th>
</tr>
</thead>
<tbody>
<tr>
<td>U.S. Dollar</td>
<td>42</td>
<td>0.54</td>
</tr>
<tr>
<td>Deutsche mark</td>
<td>19</td>
<td>0.46</td>
</tr>
<tr>
<td>French franc</td>
<td>13</td>
<td>34.00</td>
</tr>
<tr>
<td>Japanese yen</td>
<td>13</td>
<td>0.74</td>
</tr>
<tr>
<td>Pound sterling</td>
<td>13</td>
<td>0.071</td>
</tr>
</tbody>
</table>

opinion that fluctuations in the value of money must be avoided, by
substituting for the gold standard a standard based on certain classes
of goods selected according to the conditions of consumption . . . ."78 A solution of this nature was adopted by the United Nations
General Assembly upon the recommendation of the 1982 plenary
session of the United Nations Commission on International Trade
Law (UNCITRAL).79 UNCITRAL considered the problem "of es-
tablishing a system for determining a universal unit of constant value
which would serve as a point of reference in international conven-
tions for expressing amounts in monetary terms."80 In the view of
the representative requesting consideration of the issue, the use of
the SDR was only a temporary solution because it did not guarantee
the maintenance of real value in terms of purchasing power. The
proposal was based on the consideration that all currencies in the
SDR basket continually depreciate in value in terms of purchasing
power.81

UNCITRAL conducted a series of studies to determine whether
it would be feasible to construct a suitable price index that could be
combined with the SDR basket. These studies concluded that for
most purposes a composite consumer price index would be techni-
cally feasible, although it would be possible to select any of a number
of other price indices for a particular convention. The composite
price index would be of those countries whose currencies comprise
the SDR, combined to reflect the weights corresponding to the cur-
rency composition of the SDR. In accordance with this method,
whenever it was necessary to calculate in terms of a given currency a
maximum limitation of liability that was expressed in terms of the
SDR, the latter would first be multiplied by the current value of the
composite price index. This value would then be expressed in the
given currency according to the current exchange rate between it
and the SDR.

In the course of the studies, alternative indices were examined
and rejected. Indices based on the price of gold were too irrational
and unstable. Movements in the market price of gold do not neces-
sarily parallel movements of the general price level any more than do
movements of the market prices of other commodities. Over the last
decade the market price of gold was more volatile than prices of
most commodities. A similar problem of instability was observed re-

78 Einstein, supra note 3.
81 This had, of course, been commented upon in the past and various groups, includ-
ing the Committee on International Monetary Law of the International Law Association,
have been engaged in exploring the possibility of a solution.

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garding a basket of primary commodities' prices.\textsuperscript{82}

The UNCITRAL Working Group recommended two solutions: a suitable index coupled with the unit of account of the international convention, or adjustments for inflation made by revision committees using expedited procedures to consider amendments to the limits of liability under the convention. The recommendations were adopted by the plenary session of UNCITRAL and, in modified form, approved by the U.N. General Assembly.\textsuperscript{83} The inflationary potential inhering in the first solution and the difficulties that it may create under domestic law have caused some countries to express reservations about the utilization of an index in connection with the unit of account. No convention has yet employed this alternative.

V. Conclusion

In conclusion, the traditional rules of English and U.S. courts concerning payment of an obligation in foreign currency required that judgments be awarded in local currency. The date for determining the rate of exchange for converting the foreign sum into sterling or dollars, as the case required, was either: (i) the breach day (or an analogous date in the case of torts) in an English or New York court; or (ii) a choice between the breach day or the judgment day in a U.S. federal court, according to desiderata based alternatively on a finding of the place of performance or a conflict of laws approach. As sterling lost its pre-eminent position among currencies, the inequities of mandatory awards of sterling required the development of a new rule. A revolution in English jurisprudence occurred when the House of Lords sanctioned awards in foreign currencies in an era of floating currencies. Scholars in the United States are beginning to question rules that require the award of judgments in dollars. Although comment has begun for a change,\textsuperscript{84} no case has yet embodied it. As this article goes to press, such comment has progressed to the point where the Revised Restatement of the Foreign Relations Law of the United States proposes that the following rules be recognized as appropriate:

\begin{enumerate}
\item Courts in the United States ordinarily give judgment on causes of action arising in another state, or denominated in a foreign currency, in United States dollars, but they are not precluded from giving judgment in the currency in which the obligation is denominated or the loss was incurred.
\item If the court gives judgment in dollars in accordance with Subsection (1), the conversion is to be made at such rate as to make the creditor whole and to avoid rewarding a debtor who has delayed in carrying out the obligation.\textsuperscript{85}
\end{enumerate}

\textsuperscript{82} See Effros, \textit{Unit of Account for International Conventions is Considered by UNCITRAL}, IMF Survey, Feb. 8, 1982, at 40.

\textsuperscript{83} See Report, \textit{supra} note 79.


\textsuperscript{85} \textit{Restatement of the Foreign Relations Law} § 825 (Tent. Draft No. 6, 1985).
In the field of international conventions where the limitation of liability on obligations payable in different currencies poses analogous problems, new, but as yet untried proposals await use. As with physics, our perception of sound principles has become more sophisticated with passage of time, but unlike physics, the underlying system within which those principles operate is subject to change. The system within which the principles of obligations payable in foreign currencies operate is capable of being changed in accordance with changes in the international monetary system.