COMMENTS
COMMENTAIRES

The Currency of Suit in Actions for Foreign Debts

I. Introduction

As recently as 1961,[1] the House of Lords decided that a plaintiff could not sue in a court of England for an amount expressed in a currency other than the pound sterling thus confirming what had been considered good law since the question was first decided some 350 years earlier.[2] It was somewhat surprising, then, when they overturned this well-established rule in the landmark decision of *Miliangos* v. *George Frank (Textiles) Ltd.*[3] As a result of that judgment and its later application and expansion by the Court of Appeal in *Federal Commerce & Navigation Co.* v. *Tradax Export*,[4] a party who sues in an English court in contract, whatever the proper law of the contract, can sue for an amount expressed in the currency of that contract, regardless of whether that is pounds sterling.

To trace the juridical development of this new rule reveals a most enlightening example of two key tenets of the reform and modernization process of the common law: first, that the law should reflect the fundamental (commercial) realities of the day, and second, that the judge has a major role to play in keeping the law in step with those realities. This paper will examine the practical relevance of this issue in today's economy as well as the evolution of the new rule in the courts, following it from its origin[5] in the *Teh Hu case*[6] through its subsequent growth in other judgments to

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[1] *In re United Railways of Havana and Regla Warehouses* [1961] A.C. 1007. An ancillary issue, the date of exchange to be applied in an action brought to enforce a foreign judgment, will not be dealt with in this paper as such. Suffice it to say, however, that the reasoning applied to the issues in question here should be equally relevant to that issue, *mutatis mutandis*.

[2] *Rastell* v. *Draper* (1605) Yelv. 80, 80 E.R. 55. See also *Ward* v. *Kidswin* (1626) Latch 77, 82 E.R. 283 (reported in Norman French). An earlier case which actually did give judgment in a foreign currency, *Bagshaw* v. *Playn* (1590-91) 1 Cro.Eliz. 536, 78 E.R. 783, was never followed.

[3] [1976] A.C. 443 (H.L.).

[4] [1977] 2 W.L.R. 122 (C.A.).

[5] At least as far as the English courts are concerned. The rule had been widely accepted in certain continental jurisdictions for some time. See Mann, *The Legal Aspect of Money* 3d ed. (1971), 351, 363 *et seq.*

[6] *The Teh Hu* [1969] 3 W.L.R. 1135, 3 All E.R. 1200 (C.A.).

its acceptance in *Miliangos*[7] and, eventually, to its current status as expressed by Lord Denning in the *Federal Commerce & Navigation* case.[8] Finally, the paper will explore the interesting question of how this affects Canada, a topic of great potential significance notwithstanding the fact that the situation here has been regulated by federal legislation.[9]

II. Economic backdrop

The *United Railways of Havana*[10] case was significant not only because of its reconfirmation of the rule about suing in sterling but also because of its holding on a related issue: the date at which the foreign currency was to be converted into pounds. This second question is one which has greatly increased in importance since that 1961 decision as a result of the much-weakened status of the pound on world money markets and the general move by industrialized countries away from fixed exchange rates toward a system of "floating" exchange rates dictated by supply and demand.

In *United Railways of Havana,* the House of Lords accepted the principle that the correct exchange rate to be used to convert the foreign sum into pounds was the one prevailing on the day when the debt came due,[11] otherwise known as the "breach date conversion" rule. The merit of this rule follows both from an analysis of the case law and from common sense. In *S.S. Celia* v. *S.S. Volturno,*[12] a case not dealing with contract, the House of Lords decided that damages must be understood at the time they accrue. Lord Sumner added that the breach date rule would reduce the "speculative elements"[13] and uncertainty that can arise in such cases. His judgment was followed by the Privy Council in *Syndic in Bankruptcy of Salim Nasrallah Khoury* v. *Khayat,*[14] which was extensively cited by Viscount Simonds in *United Railways of Havana.*[15]

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[7] *Supra,* note 3.

[8] *Supra,* note 4.

[9] *Currency and Exchange Act,* R.S.C. 1970, c.C-39, ss.11, 12 as am. by S.C. 1976-77, c.38, s.1.

[10] *Supra,* note 1.

[11] *Ibid.,* 1046, 1053, 1059, 1071, 1086. Under the old order of economic affairs when the pound was "a stable currency 'of whose true fixed and constant quality there is no fellow in the firmament' ", *The Teh Hu, supra,* note 6, 1147 *per* Lord Denning, such rule may be seen to have benefitted the plaintiff always.

[12] [1921] 2 A.C. 544, 555.

[13] *Ibid.,* 558.

[14] [1943] A.C. 507, 2 All E.R. 406 (P.C.).

[15] *Supra,* note 1, 1044-45.

As reasonable as the breach date rule might appear, the *Miliangos* decision overturns it for certain cases, that is, contracts expressed in a foreign currency and sued on for an amount in that currency. The result of this is that the losing defendant owes an amount in foreign currency and the exchange rate applicable will be the one in effect when he chooses to pay that debt. This approaches either a judgment date or a payment date conversion rule in most instances.

The best way to appreciate the different results which can occur, depending on the choice of rules, is to take a simple numerical example. Assume that in the year the debt came due, for instance, 1972, the English pound was worth seven German marks (DM), but that by 1977, when judgment is finally rendered, the exchange rate has dropped to 5:1.

1972 (7:1) DM7,000 = £1,000
1977 (5:1) DM7,000 = £1,400
DM5,000 = £1,000

By the breach date rule, the plaintiff would receive £1,000 — or DM5,000 — instead of the DM7,000 he was due under the contract. By the judgment date rule, however, he would receive his DM7,000 (plus interest), while the defendant would be forced to bear the loss in exchange values (£400). And since, as was demonstrated above, suing for an amount expressed in foreign currency is tantamount to applying the judgment date rule, the practical effect of the *Miliangos* decision becomes evident.

Of course, one could protect oneself from such an eventual loss by buying DM7,000 in 1972. In addition, if sufficient German marks were retained in consequence of normal business dealings, any extra loss resulting from the lower exchange rate could be avoided. It is interesting to note that only the defendant and not the plaintiff is able to mitigate his loss in this fashion. Even a "gold value claim" would no longer be an answer, given the recent market fluctuations in the price of gold, not to mention the fact that they are illegal in Canada as being contrary to public policy.[16]

Discussing the choice of conversion dates is meaningless without illustrating the economic forces that have influenced the courts of England in their decision on this issue. There are two major factors to consider: the effect of international monetary instability and England's membership in the European Economic Community.[17] In

[16] *Gold Clauses Act*, R.S.C. 1970, c.G-4, s.7.
[17] Hereinafter referred to as E.E.C.

dealing with the former, it is important not to over-emphasize the role of the weakened pound. True, the old rule about suing only for pounds was based, to a large extent, on the once relative strength of that currency but other factors come into play as well. For example, until only a few years ago, most exchange rates were fixed and based either on the gold standard or, more recently, on the U.S. dollar. Devaluations and revaluations were fairly infrequent. Even international trade was not so prevalent a part of everyday business. However, the world has greatly changed in the last decade.

Today, most Western economies are inextricably linked to each other by sizeable and growing amounts of foreign trading and investing, not to mention tourism. As a result, the inter-exchange of currencies is a common occurrence and has become much easier and more certain with respect to relative valuation than was the case a century ago. As well, exchange rates now fluctuate or "float" according to the relative demand on world money markets for a currency and, occasionally, major revaluations and devaluations have been necessary to put things in order. Such significant changes in the way the world's business is carried on, coupled with the greatly decreased strength of the pound sterling, bespoke a real need to reassess some of the legal rules governing the English court system on matters relating to international contracts and the like, for example, torts committed abroad and sued on in England.

One of the prime factors of the above-noted proliferation of international trade has been the move to lower the barriers historically blocking such commerce, specifically, quotas and tariffs. In the early years after the Second World War this pattern was established among Western countries with the General Agreement on Tariffs and Trade (G.A.T.T.),[18] and in the 1970's its major by-product has been the continued existence and growth of the E.E.C.

When Great Britain entered the E.E.C. in 1972, the Treaty of Rome became part of English law.[19] Of particular interest to this study is section 106:

> Each member state undertakes to authorise, *in the currency of the member state in which the creditor or the beneficiary resides,* any payments connected with the movement of goods, services or capital, and any transfers of capital and earnings, to the extent that the movement of goods, services, capital and persons between member states has been liberalised pursuant to this Treaty.[20]

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[18] 55 U.N.T.S. 188.

[19] See the *European Communities Act 1972,* 1972, c.68 (U.K.).

[20] 294 U.N.T.S. 2, s.106 [emphasis added].

Although the words seem clear, it was two years before any English court, other than the Court of Appeal, was willing to apply them. And even then, the House of Lords found it necessary to impose limiting conditions on their application, a tribute, no doubt, to the memory of the "sue for sterling" rule which had served so faithfully, for so long, during Britain's reign atop the international economic order.

III. Evolution of the case law

In examining the recent case law dealing with this issue, one must focus on Lord Denning. The first time the Master of the Rolls had an opportunity to venture into the uncharted waters of awarding judgments for foreign sums was, appropriately enough, in a maritime arbitration dispute. The case, *Teh Hu* v. *Nippon Salvage Co.*,[21] involved the salvage of a Panamanian ship registered in Liberia carrying a Japanese cargo to the United States. When trouble occurred, the owners of the *Teh Hu* contracted with the respondents to salve the vessel under the terms of Lloyd's Standard Form of Salvage Agreement, which called for the determination of remuneration to be fixed in pounds by arbitration in London. In determining remuneration, the arbitrators would have to consider the salvors' out-of-pocket expenses, presumably made in yen, plus the salved value of the ship and cargo, expressed in yen or U.S. dollars and evaluated at the time the salved ship reached port. What really complicated the issue was that between the date of the rescue and the date of the award, the pound sterling was devalued by fourteen per cent.

Naturally enough, the salvors felt that their remuneration, expressed in pounds, should be increased to account for the change in currency valuation. Both the original arbitrator and the appeal arbitrator agreed. However, when the case reached the courts, the judge felt himself bound by the "sue for sterling" and "breach date conversion" rules; he therefore refused the request to adjust the award.[22] The majority of the Court of Appeal followed suit.

In his dissent, Lord Denning was very careful to delimit the conditions and reasons behind his view that the salvage award should be calculated and made in either dollars or yen. At that time Britain was not yet a member of the E.E.C., so Lord Denning had to rely on a common sense argument rather than one supported by legislation.

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[21] *Supra*, note 6.

[22] *The Teh Hu* [1969] 3 All E.R. 8 (P.).

In essence, he based his opinion on five major considerations:[23] first, the pound had absolutely no relevance to the parties — it came into play only because of the form of the salvage contract, and even after the contract had been signed, security was put up in U.S. dollars; second, there was an implied condition between the parties that devaluation should not affect the salvage award; third, arbitrators are not bound by the rules of procedure in English courts, especially since, fourth, "the maritime law as to salvage is a particularly equitable jurisdiction";[24] and finally, it was the only just resolution of the problem.

At the time of this decision, Lord Denning was not yet ready to say unequivocally that English courts should be allowed to give awards in foreign currency. His judgment expressly dealt only with arbitration cases but the signs of a broader view were apparent:

> After all, there are many countries whose courts can give judgment for a sum of money in a foreign currency, including some important maritime countries such as Norway, Germany or Italy: see Dr. F.A. Mann on *The Legal Aspect of Money*, 2nd ed. (1953), p.307. And I see no reason why English courts in a salvage suit should not do the same. But even if the courts cannot do it, I think that Lloyd's arbitrators can.[25]

Thus, even had the majority of the Court agreed with Lord Denning, the *Teh Hu* decision would have had limited application, with its major impact on arbitrators and only a very secondary effect on the courts. The judgment is, nonetheless, very significant. It signals the first, albeit slight, chink in the armour of the "sue for sterling" rule. To penetrate that armour, two further events were necessary: that the majority of the Court accept that arbitrators give awards in foreign currencies, and that the courts themselves follow suit.

The first of these steps was taken four years later in *Jugoslavenska Oceanska Plovidba* v. *Castle Investment Co.*,[26] another maritime arbitration case. Here, as in *Teh Hu*, the only counection between the parties to the dispute and England was that the arbitration clause in the contract provided that any disputes should be referred to commercial arbitrators in London. A major difference between the two cases, however, is that in *Jugoslavenska* the parties did not adopt Lloyd's Standard Form of Salvage Agreement, which expressly calls for an award in sterling. As a result, the Court of

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[23] *Supra*, note 6, 1146-50.
[24] *Ibid.*, 1148.
[25] *Ibid.*
[26] [1974] Q.B. 292 (C.A.).

Appeal applied the *Arbitration Act, 1950*[27] to decide the case. It found unanimously that such an arbitration award could and *should* be expressed in the foreign money, and only then converted to sterling for purposes of execution in England. This seems to have already been the practice for many years.[28] Cairns and Roskill L.J.'s, although agreeing with Denning M.R. on the specific issue before them, were not willing to put the "sue for sterling" rule into question, the former even going so far as to state that, "[a] *judgment* must be in sterling . . .".[29] Lord Denning, however, went several steps beyond what was necessary to decide the case and foresaw the direction in which the law would ultimately go:

> [Sterling] is the one currency which is known to the court and to the sheriffs and their officers. I venture to suggest that this view of the courts should be open for reconsideration. If the money payable under a contract is payable in a foreign currency, it ought to be possible for an English court to order specific performance of it in that foreign currency: and then let the exchange be made into sterling when it comes to be enforced. I know that this is not yet the law. There is high authority against it: see *In re United Railways of Havana and Regla Warehouses Ltd* [1961] A.C. 1007, 1043, 1052, 1069. But the House of Lords have since then held that specific performance can be ordered of a contract to make a money payment: see *Beswick* v. *Beswick* [1968] A.C. 58. This may point the way to a relaxation of the old rule and enable the courts, in proper circumstances, to order payment into a foreign currency, such as is suggested by Dr. Mann in his book at p.363.[30]

As a result of this case, the controversy over the fixing of arbitration awards in foreign currency seems to have been settled, subject to any statement on the matter by the House of Lords. Nevertheless, the "sue for sterling" rule remained intact, although not for long. About a year after its decision in *Jugoslavenska*, the Court of Appeal had the opportunity to rule directly on the currency of suit issue with respect to contract. There, a unanimous bench unequivocally supported the "modern view" that a plaintiff should be able to sue under contract for an amount expressed in the currency of the contract. This was the *Schorsch Meier G.m.b.H.* v. *Hennin* case,[31] decided some two months before *Miliangos* came before the Court of Appeal in early 1975.

In *Schorsch Meier*, Lawton L.J. based his decision solely on the impact of section 106 of the Treaty of Rome on British law, holding

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[27] 1950, c.27 (U.K.).

[28] *Supra*, note 26, 300, 303.

[29] *Ibid.*, 301 [emphasis of Cairns L.J.].

[30] *Ibid.*, 299. Note that Lord Denning is citing the 3d ed. of Mann, *The Legal Aspect of Money* (1971).

[31] [1975] Q.B. 416 (C.A.). The plaintiff here was German.

that it superseded the old rule.[32] Admitting that, "[t]ime has swept away nearly all the reasons why our courts were reluctant to give judgment in foreign currency",[33] he refused to overturn, for that reason alone, the old rule as approved in *United Railways of Havana*.[34] The other two judges were not so "timorous".[35] Lord Denning, with Foster J. concurring, founded his decision on two grounds: that the Treaty of Rome superseded the old rule, and that the reasons for that rule had ceased to exist — *cessante ratione legis cessat ipsa lex.*

It is highly significant that a majority of the Court of Appeal adopted both grounds, given that the first, the effect of the Treaty of Rome, could apply only to plaintiffs resident in an E.E.C.-member country, whereas the second would cover all countries and currencies. This point eventually had particular relevance for a certain Mr Miliangos, a Swiss resident who had contracted with a British firm to sell yarn for payment in Swiss francs.[36]

Before moving on to the *Miliangos* decision, it might be useful to review the result of the *Schorsch Meier* judgment. There, for the first time since the *Jugoslavenska* decision and Britain's entry into the E.E.C., the Court of Appeal had the opportunity to rule on the currency of suit question in a straight civil case. The issue of arbitration, which for so long had muddied the waters with respect to court procedure (as compared to arbitration procedure), was not in any way a factor. Consequently, Lord Denning finally had his chance to rule on the matter in the *ratio decidendi* of a case rather than in *obiter* as had been the situation in *Teh Hu* and *Jugoslavenska*.[37] It is ironic, therefore, that all the arguments about changing conditions, international commercial practice, and justice were not necessary to decide this particular case in the way the Master of the Rolls thought it should be decided. Since the plaintiff was a

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[32] *Ibid.*, 431.

[33] *Ibid.*, 428.

[34] *Supra*, note 1.

[35] Lawton L.J.'s own word. *Supra*, note 31, 430.

[36] See Lapres' comment in (1977) 55 Can.Bar Rev. 132, esp. 143 *et seq.* This point was also the source of a rather interesting discussion of *stare decisis* which took place in the courts of first instance and appeal.

[37] He no doubt was also quite anxious to get a second kick at this particular cat. He had been on the bench when *United Railways of Havana* went before the House of Lords and had agreed with the majority, stating at one point: "But I am afraid that, if he chooses to sue in our courts instead of his own, he must put up with the consequences. Our courts here must still treat sterling as if it were of the same value as before: for it is the basis on which all our monetary transactions are founded." *Supra*, note 1, 1069-70.

resident of an E.E.C. country, the Treaty of Rome seemed to cover the question sufficiently. Nevertheless, by relating his opinion to both grounds, he opened the door to a potential expansion of the new rule to suits involving non-E.E.C. residents.

Just such a situation presented itself in *Miliangos* v. *George Frank (Textiles) Ltd*,[38] which came before the Court of Appeal two months after the ruling in *Schorsch Meier*. Apart from the fact that Mr Miliangos was not an E.E.C. resident, the facts of the two cases appear to coincide. Nevertheless, Bristow J. in the court of first instance[39] refused to follow the Court of Appeal's decision in *Schorsch Meier*, decided the week before. In fact, even at the appeal level, *Miliangos* provided very little new reasoning on the matter from what was said two months earlier.[40]

IV. Miliangos in the House of Lords

Finally the time was ripe for an appeal to the House of Lords. Why *Miliangos* was selected over *Schorsch Meier* for this appeal is not made explicit, however, assuming that there was a conscious reason for choosing the later case over the earlier, it must have been based on the nationality of the plaintiffs. A ruling involving a non-E.E.C. plaintiff would avoid the confusion of the double *ratio* which misled the lower court in *Miliangos* in its application of *Schorsch Meier*. On this point, it is noteworthy that Lord Wilberforce, in giving the principal opinion, reserved judgment on the effect section 106 of the Treaty of Rome had on British law:

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[38] *Supra*, note 3. To demonstrate the proportions at stake here, the rate of exchange of pounds for Swiss francs at the date of the breach was 1:9.9. At the time the appeal was heard some three years later, the rate had fallen to about 1:6.

[39] *Miliangos* v. *George Frank (Textiles) Ltd* [1975] Q.B. 487 (C.A.).

[40] One interesting sidelight, however, was Lord Denning's statement on the very practical problem of how to enforce a judgment in foreign currency: "I would, however, mention particularly the way in which a judgment in foreign currency is able to be enforced. It is done in the same way as an award by arbitrators is enforced when given in a foreign currency: see the *Jugoslavenska* case [1974] Q.B. 292, 297. If the defendant does not pay, the plaintiff should file an application for leave to enforce it, supported by an affidavit showing the rate of exchange at the time, and the figures converted into sterling. Leave can then be given to execute for the sterling equivalent." *Ibid.*, 504. Note that this mode of enforcement does not adhere to the "judgment date" rule, but rather to the "payment date" rule. The time lag between judgment and enforcement might be a question of only a few weeks, but in a field as volatile as foreigu exchange, where significant changes can occur in a matter of hours, the difference can be very important.

> [T]he issue of the applicability and interpretation of article 106, if it were to be considered by this House, would necessitate a reference to the European Court under article 177 of the treaty. But nevertheless I feel bound to say that I entertain the strongest reservations concerning the use made by the Court of Appeal of article 106 in the present context.... Any other court in which such issues may arise would be well advised to refer them to the European Court for clarification. In this appeal, in my opinion, no argument based directly or indirectly upon article 106 of the treaty should be considered as available to the respondent.[41]

Thus, there seemed to remain but one ground on which Lord Wilberforce could base a judgment favourable to the Swiss plaintiff: the ground that only two of the three judges of the Court of Appeal espoused in *Schorsch Meier;* that of *cessante ratione legis*:

> What we can do, and what is our responsibility, is to consider whether this decision [*United Railways of Havana*], clear and comparatively recent, should be regarded as a binding precedent in today's circumstances. For that purpose it is permissable to examine the speeches in order to understand the considerations upon which the opinions there reached were based, for the ultimate purpose of seeing whether there have emerged fresh considerations which might have appealed to those who gave these opinions and so may appeal to their successors.[42]

Lapres, who sees this maxim as being irrelevant to the decision, describes their judgment as "changing legal rules to accomodate new social conditions".[43] Their Lordships, it is true, nowhere expressly said that they were applying this principle. Nevertheless, Lord Simon's criticism of the Court of Appeal's use of the maxim seemed to be directed more at that court's breach of the principle of *stare decisis* than at the relevance of the maxim to the global question before him.[44] Moreover, the language used by the majority, as witnessed above, is a clear indication that they were acting in accordance with this maxim, even if they were not willing to say so expressly.[45] After all, what is "changing legal rules to accomodate new social conditions" if not an aspect of *cessante ratione legis cessat ipsa lex?*

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[41] *Supra,* note 3, 465.

[42] *Ibid.,* 460. At 465 of the report, Lord Wilberforce expressed his agreement with what Lord Simon said in dissent about this maxim. Though he disagreed with the Court of Appeal's use of the maxim in *Schorsch Meier,* Lord Simon did concede at 476 that a correct interpretation of it was one of the considerations which their Lordships had to weight. However, he did not feel that it justified the judicial abrogation of a rule of law; it merely allowed for exceptions to be made.

[43] *Supra,* note 36, 139.

[44] *Ibid.,* 138.

[45] *Supra,* note 3, 497 *per* Lord Cross, 501 *per* Lord Edmund-Davies.

Lord Wilberforce found a second basis for his decision. He implied that the "breach date conversion" rule was an outgrowth of the rule used in damage cases — that the amount of damage is assessed at the time of the breach or the tort. He felt that this would not always be appropriate to claims for specific things, such as a sum of foreign currency. Thus, he saw good reason for not imposing the same rule in all situations, complaining of such "straight-jacket solutions based on concepts, or on forms of action."[46] He continued,[47]

> ... the mere fact that as a general rule in English law damages for tort or for breach of contract are assessed as at the date of the breach need not preclude, in particular cases, the conversion into sterling of an element in the damages, which arises and is expressed in foreign currency, as at some later date. It is for the courts, or for arbitrators, to work out a solution in each case best adapted to giving the injured plaintiff that amount in damages which will most fairly compensate him for the wrong which he has suffered.[48]

The final, remaining tie to the old "sue for sterling" dogma was the one marked "procedural difficulties", and Lord Wilberforce cut it rather perfunctorily. He simply said that he did not see why there should be any difficulty, voicing faith in the practitioners and the Supreme Court to work out suitable solutions.[49] As a result of this reasoning, Lord Wilberforce was willing to accept that parties be allowed to sue in English courts for an amount expressed in a foreign currency, adopting the "payment date" rule. However, he limited this, "at the present time",[50] to cases of foreign money obligations, that is, those "... arising under a contract whose proper law is that of a foreign country...".[51] The easy answer to the question of why he imposed such a restriction is that this was all that was necessary to decide the instant case.

Be that as it may, the headnote for this case is misleading on this potentially significant point. The other three majority judges do *not* expressly support such a condition and, on a fair reading of their opinions, they could be seen to be leaning the other way.[52]

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[46] *Ibid.*, 468.

[47] *Ibid.*

[48] This last statement has interesting implications with respect to suits for foreign damages resulting from breach of contract or from tort, and will be examined further at a later point in this paper. *Infra.* p. 434.

[49] *Supra,* note 3, 469.

[50] *Ibid.*

[51] *Ibid.*

[52] See *Barclays Bank International* v. *Levin Brothers* [1976] 3 All E.R. 900, 908 (Q.B.), where Mocatta J. ruled, following *Miliangos,* that English courts

Lord Fraser of Tullybelton imposed no such restriction:

> I think that a party suing for recovery of a debt due in a foreign currency should be entitled to claim payment of, and to get judgment for, the amount of the debt expressed in the foreign currency.[53]

Lord Edmund-Davies spoke only of cases "where a foreign currency is the currency of the contract giving rise to the claim."[54] And Lord Cross of Chelsea, although using the same terminology as Lord Wilberforce, that is, "foreign money obligation",[55] did not specifically say that it was limited to contracts whose proper law is that of a foreign country. Moreover, the implication in his judgment is to the contrary. In the same paragraph that he used the term "foreign money obligation", he spoke of being "... particularly impressed by the fact that awards in commercial arbitrations are now often made in a foreign currency...". Nowhere was it argued that such arbitration judgments were confined to cases of foreign-law contracts. Even Lord Wilberforce seemed somewhat equivocal on that point:

> [I]t would be an intolerable situation if a different rule were to prevail as regards arbitrations upon debts expressed in foreign currency on the one hand and actions upon similar debts on the other.[56]

But he did not restrict his statements only to those arbitration awards based on foreign-law contracts.

In the recent case of *Federal Commerce & Navigation Co.* v. *Tradax Export*,[57] the Court of Appeal had occasion to consider this question. Lord Denning delivered the main judgment on this point and the other two judges adopted his reasoning. He noted the "limited way in which Lord Wilberforce expressed his opinion in the *Miliangos* case", and went on to say:

> Once it is recognized that judgment *can* be given in a foreign currency, justice requires that it *should* be given in every case where the currency of the contract is a foreign currency: otherwise one side or the other will suffer unfairly by the fluctuations of the exchange .... So I would hold that in contracts where the currency of the contract is a foreign currency, but the proper law of the contract is English law, the court can and should give judgment in the foreign currency: and this both when it is for a debt due under the contract (as demurrage) or damages for breach of contracts (as of the implied term).[58]

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would give judgments for a sum expressed in a foreign currency as long as the currency of the contract was foreign, whether the proper law of the contract was English or not.

[53] *Supra*, note 3, 501.

[54] *Ibid.*, 498.

[55] *Ibid.*, 497.

[56] *Ibid.*, 464.

[57] *Supra*, note 4.

[58] *Ibid.*, 133-34 [emphasis of Lord Denning].

Here again, Lord Denning saw fit to go a little further than was necessary when he extended the rule to actions in damages for breach of contract. As well, there is reason to question what he meant by, "it *should* be given in every case...". Does he mean that it should be given in every case where the plaintiff so forms his petition, thus, in effect, leaving the option to the plaintiff to sue for the foreign amount or for the sterling equivalent at the time the debt came due? Or does he mean that no options are available and that once it is established that the currency of the contract is a foreign currency, then the plaintiff must sue for that foreign amount? Let us treat these issues in order.

Can and should the *Miliangos* rule be extended beyond its original context to include not only non-sterling debts due under a foreign contract but also damages for breach of that contract and, taking the matter to its limits, even damages for a foreign tort? Although less explicit on the point of damages than Lord Denning, Lord Wilberforce seemed willing to leave the door open for just such an eventuality:

> In my opinion it should be open for future discussion whether the rule applying to money obligations, which can be a simple rule, should apply as regards claims for damages for breach of contract or for tort.[59]

Lord Denning did not hesitate to take advantage of this opportunity. He noted that the House of Lords was greatly influenced in *Miliangos* by the practice of arbitrators, and furthermore, that arbitrators give awards in foreign currency both for debts due and for damages for breach of contract.[60] Thus, he was willing to apply the *Miliangos* rule to damages for breach of contract.

With regard to damages for foreign torts, this next step might prove more difficult. For one thing, there is much less, if any, arbitration practice to follow on the matter, and, for another, the critical consideration that the parties had agreed on a choice of currency before the occurrence of the damaging event is absent. However, the argnments of justice and fairness could still be convincing. If a Dutchman is injured by an Englishman's negligence in Holland, and sues for damages in an English court, should the court not consider that his out-of-pocket expenses (damages) had been paid, and will be paid in the future, in Holland and not in England? The logic seems consistent with *Miliangos.* The issue is well stated in *Dicey and Morris on the Conflict of Laws.*

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[59] *Supra,* note 3, 468.

[60] *Supra,* note 4, 134. Note that money not paid under a contract constitutes a breach of contract: Negus, *Rate of Exchange in Reference to Foreign Debts...* (1924) 40 L.Q.R. 149, 156.

> *Damages.* Nothing was said in *Miliangos* expressly to overrule the decisions cited in the main work which hold that damages for tort must be converted into sterling at the rate of exchange prevailing on the day when the loss was incurred, that damages for breach of contract must be converted at the date when the contract was broken, and salvage expenses and remuneration at the date when the salvage services terminated. It is extremely doubtful, however, in view of the tenor of their Lordships' speeches whether Rule 174(2)(b)-(d) and the decisions there cited can now safely be relied upon. It will be for the courts in future to decide each case on its particular merits as it arises.[61]

Should the plaintiff be given the option of suing for sterling or for the currency of the contract? Depending on which currency is involved, it could be in his best interest to do one or the other in a given situation. It is submitted that the state of the law today would, in fact, allow him this choice and that he would manifest his decision by the form of his petition to the courts, by asking for judgment in pounds or in the other currency. This conclusion follows from two main considerations.

First, *Miliangos* did not abrogate the "sue for sterling" rule; it merely provided an exception to it. This is clear from the judgment of Lord Wilberforce in that case.[62] Second, what is to be made of Lord Denning's statement in the *Federal Commerce* case?[63] Those words seem to indicate that he would not be willing to give the plaintiff a choice in the matter. Libling, in his recent article,[64] supports this position and cites *Re Dynamics Corp. of America*[65] as authority. His reasoning is that since the creditor bargained for a specific amount of marks, dollars or francs, that is exactly what he should get. And it is true that if he was paid in his country, he would only receive that amount (plus interest, presumably) and this payment would extinguish his cause of action in England no matter what had happened to the exchange rates in the meantime: "[I]t is an old and well-established principle of law that what is a good discharge of the debt in the country where it was contracted is a discharge of it everywhere."[66] Nonetheless, it is submitted that Lord Denning would reconsider the implications of such a statement and confine its ambit to only those actions where the plaintiff so requests judgment, if the interests of justice and fairness required it.

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[61] Morris, *Third Cumulative Supplement to the Ninth Edition* (1976) 909-10.

[62] *Supra,* note 3, 466-68. See the passage quoted at *supra,* note 47.

[63] *Supra,* note 58.

[64] *Questions & Answers (?); Miliangos* v. *Frank (Textiles) Ltd* (1977) 93 L.Q.R. 212, 214.

[65] [1976] 2 All E.R. 669 (Ch.Div.).

[66] Negus, *supra,* note 60, 157-58. See *Potter* v. *Brown* (1804) 5 East. 124, 130, 102 E.R. 1016, 1019.

The situation that comes immediately to mind is one in which the debtor withholds payment and forces the creditor to sue because he speculates that during the long process of obtaining a court judgment the relative values of the currencies will change in his favour. Knowing that the creditor is always required to sue for the foreign amount because the currency of the contract is foreign, the British debtor might be hard-pressed to control his gambling instinct. Given Lord Denning's oft-expressed concern that the innocent plaintiff should not bear the risk of the fluctuating exchange rate, it would be surprising in a case like this to see him stick dogmatically to a restrictive interpretation of his *obiter dictum* in *Federal Commerce.* This is especially so since such adherence would have the effect of reintroducing one of the unjust elements he tried to avoid in the first place — that the debtor should feel encouraged to speculate on the future trend of the exchange rate by withholding payment of the monies due.[67] In any event, an enterprising plaintiff who found himself obliged to sue for the devalued foreign currency could make a strong argument to include, as part of his damage, the value he lost because of a fluctuation in the exchange rate between the time the debt was payable and the time the judgment was paid.[68]

It might be helpful to summarize the state of the English law today as a result of the decisions in *Miliangos* and, to a lesser degree, *Schorsch Meier* and *Federal Commerce.* The "sue for sterling" rule is no longer universally applicable. A party who sues in an English court for a contract debt, regardless of whether the proper law of the contract is English or not, can ask for judgment in the currency of the contract. That much seems certain. Less certain are the possible extensions of that principle. Unless *Federal Commerce* is overturned on this point in the House of Lords,[69] this new rule would appear to cover damages for breach of contract as well, assuming that element of damages, to quote Lord Wilberforce, "arises and is expressed in foreign currency."[70] Following the logic of this statement, it is conceivable that a single claim for damages could be divided into several subheads of damages, each expressed in a different currency. The least settled aspect of this problem relates to non-contractual situations, the foreign tort. Much has been

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[67] In Part V of this paper, I propose a rule for the courts to follow in deciding in which currency judgment should be given. *Infra,* p.440.

[68] *Supra,* note 64, 215.

[69] Leave to appeal from the Court of Appeal's decision was granted; however, the currency question was a very secondary issue in this case.

[70] *Supra,* note 3, 468.

said in the cases to favour awarding judgment in a foreign currency for tortious damages which "arise and [are] expressed in foreign currency".[70a] However, there have been no recent cases on the topic, so the rule remains very much in question, awaiting future judicial pronouncement.

It is important to remember, however, that the real issue with respect to these types of claims is not whether the plaintiff will end up with Deutschmarks or dollars or pounds in his pocket, (for he will inevitably be paid in pounds), but rather what exchange rate should apply to convert those marks or dollars into pounds in order for the English courts to execute the judgment. Is it the exchange rate at the time of the breach, at the time of the judgment, or at the time of the eventual payment? The third alternative seems to be the one the courts currently favour as being the most consistent with present-day financial practice, as well as being the fairest.

V. Relevance to Canada

At first glance, this discussion seems to have very little relevance to Canadian law as it now stands. This follows from a reading of section 11 of the *Currency and Exchange Act*:

> [A]ny statement as to money or money value in any indictment or legal proceeding shall be stated in the currency of Canada.[71]

The Quebec Court of Appeal recently had occasion to apply this provision in the case of *Baumgartner* v. *Carsley Silk Co.*[72] There, Johnson J. of the Superior Court, granted the plaintiff company judgment in U.S. dollars based on the following reasons:

> In its written notes the defendant submitted that, because plaintiff's action concluded for a sum in U.S. funds, such conclusions are illegal in virtue of s.12(1) of the *Currency, Mint and Exchange Act*, R.S.C. 1952, c.315. However, as stated in such notes, U.S. funds are readily available and persons here are all accustomed to dealing with them. In the circumstances, the Court does not consider that it would be justified in accepting the argument of the defendant in this respect in this case.[73]

The three appeal court judges correctly overturned the trial judge on the basis of what is now section 11. Montgomery J.A. added a further argument:

> In any event, the judgment as rendered appears to be not susceptible of execution and therefore in violation of art.469 of the *Code of Civil Pro-*

[70a] *Ibid.*
[71] R.S.C. 1970, c.C-39.
[72] (1971) 23 D.L.R. (3d) 255.
[73] *Ibid.*

cedure, 1965 (Que.), c.80. I am unable to understand how officers of the Court would go about executing a judgment for payment of a sum in a foreign currency.[74]

Such "procedural difficulties", as was noted above, did not hamper the English Court of Appeal or the House of Lords and should pose no greater problems in Canada than anywhere else in the world where judgments are given in foreign currency. Carruthers J. of the Ontario Supreme Court, however, does not seem to agree. In a recent case dealing with the recognition of an American judgment in Ontario,[75] he cited Castel's *Canadian Conflict of Laws*[76] to support his reluctant decision not to select the effective date of payment as the governing date for determining the exchange rate for U.S. dollars.[76a] Besides mentioning a possible conflict with a provision of the *Currency and Exchange Act*, he noted that he could not be satisfied that there were no procedural or practical problems in using a date other than that of the rendering of judgment.[77] The learned judge was obviously either unaware or dubious of the merit of the method proposed therefor by Lord Denning in *Miliangos*.[78]

In any event, there seems to be little doubt that a plaintiff does not have the right to sue in a Canadian court for an amount expressed in a foreign currency, Parliament having directly legislated on what was only a common law rule in England. However, the story does not end there. Three related issues remain to be explored. First, is section 11 of the *Currency and Exchange Act* constitutionally valid? Second, even if the first question is answered in the affirmative, could these recent British decisions affect the conversion date rule in Canadian courts? And finally, should the competent legislature amend section 11 to put it more in line with present-day thinking?

A. *Constitutionality*

A strong argument could be made that section 11 is *ultra vires* the Parliament of Canada, being in relation to "The Administration of Justice in the Province... including Procedure in Civil Mat-

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[74] *Ibid.*, 256.

[75] *Batavia Times Publishing Co.* v. *Davis*, S.C.Ont. No 7299/71, Nov. 23, 1977 (Carruthers J.).

[76] *Canadian Conflict of Laws* (1975).

[76a] *Supra*, note 75, 18.

[77] *Ibid.*, 19.

[78] *Supra*, note 39, 504.

ters".[79] It is true that section 91:14 of the *British North America Act* gives Parliament exclusive legislative jurisdiction over "Currency and Coinage", and the greater part of the *Currency and Exchange Act* seems to be dealing with exactly that: denominations (section 3), current and defaced coins (section 6), legal tender (section 7), redemption of coins (section 8), counterfeit coins (section 9), melting down coins (section 10).[79a] However, section 11 appears to be an anomaly. It clearly does not seem to relate to the same subject matter to which the rest of the Act is directed (currency and coinage). Given this, it is easier to argue that its "pith and substance" relates to "procedure in Civil Matters", which would make it *ultra vires* Parliament and of no effect. This would result notwithstanding the fact that there is no provincial legislation in this area; section 92 of the 1867 Act gives *exclusive* legislative authority to the provinces.[80]

If section 11 were to disappear with no provincial legislation to replace it, Canadian courts would probably resort to the common law rule as expressed in *United Railways of Havana, Miliangos* and *Federal Commerce*, at least until the provincial legislatures had time to enact their own provisions. It would be the only avenue open to them having some force of authority behind it. Moreover, since section 11 is no more than a codification of the common law rule, Canadian courts, including those in Quebec, have often used English case law in determining different aspects of its application.[81]

As a result, the foregoing discussion does appear to have some, albeit conditional, relevance to Canadian law in the context of the constitutionality of the existing statutory provisions on the topic.

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[79] *British North America Act, 1867*, 30-31 Vict., c.3, s.92:14 (U.K.). Note the reference made by Carruthers J. to this issue in the *Batavia Times* case, *supra*, note 75, 2.

[79a] Section 12 states that every contract, *etc.*, involving the payment of money is made in the currency of Canada, unless it is expressed in the currency of a country other than Canada. This provision is interesting in itself because it recognizes the right of Canadians to contract in foreign currencies. The rest of the Act deals with the Exchange Fund.

[80] *A.G. B.C.* v. *A.G. Canada* [1937] A.C. 377 (P.C.) (*Re Natural Products Marketing Act*); *In re The Insurance Act of Canada* [1932] A.C. 41 (P.C.); *A.G. Canada* v. A.G. B.C. [1930] A.C. 111 (P.C.) (*Re Fisheries Act, 1914*); *Toronto Electric Commissioners* v. *Snider* [1925] A.C. 396 (P.C.).

[81] *Brilliant Silk Mfg Co.* v. *Kaufman* [1925] S.C.R. 249; *Blucher* v. *The Custodian* [1926] Ex. C.R. 77, [1927] S.C.R. 420. See generally: Johnson, *Conflict of Laws* 2d ed. (1962) 721 *et seq.*

B. *Conversion date*

As was the case in England before *Miliangos,* courts in Canada will generally convert the foreign sum into Canadian dollars at the rate of exchange prevailing at the time the debt came due.[82] In the beginning, they cited English case law to justify this practice, since there was no legislative guideline as to which date to choose.[83] There is still no legislation on this point and, as a result, the Canadian "breach date" rule is based on a series of Canadian cases which adopted a now obsolete British rule.[84] A strong argument could be made for Canadian judges to permit themselves to be swayed by the same logic which has recently prevailed in English courts. Even admitting that section 11 of the *Currency and Exchange Act* regulates the matter with respect to currency of suit, Canadian judges still have final say as to when to convert foreign sums into dollars. It is time they re-examined the "breach date" rule in light of the issues considered in *Miliangos* and *Schorsch Meier.*

At this point, I would like to propose a rule for the Canadian judiciary to follow. As noted earlier, the guiding principle should be not only that the creditor should not suffer from the fluctuation in exchange rates but also that the debtor should not gain thereby. To allow a debtor to do so would be to sanction his unjust enrichment. Consequently, where the currency of eventual payment has appreciated with respect to our dollar, the creditor should receive an amount of dollars based on the payment date exchange rate, and where the Canadian dollar has appreciated in the interim, he should receive an amount of dollars based on the breach date exchange rate. This, in essence, means leaving the choice up to the plaintiff. By doing so, the judiciary would effectively mitigate the unfair disadvantage that section 11 of the *Currency and Exchange Act* has on "international plaintiffs", Canadian or otherwise.

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[82] *Ibid.*

[83] Legislative precedent is not entirely lacking, however, the *Carriage by Air Act,* R.S.C. 1970, c.C-14, s.2(6) says: "Any sum in francs mentioned in Article 22 of Schedule I shall, for the purposes of any action against a carrier, be converted into Canadian dollars at the rate of exchange prevailing on the date on which the amount of any damage to be paid by the carrier is ascertained by the court", whereas the *Bills of Exchange Act,* R.S.C. 1970, c.B-5, s.163 seems to follow the breach date rule: "Where a bill is drawn out of but payable in Canada, and the sum payable is not expressed in the currency of Canada, 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." This provision clearly shows that the exchange date rule is not of public order, so the parties to a contract are free to adopt their own rule if they so please.

[84] See *Batavia Times Publishing Co.* v. *Davis, supra,* note 75, 3, 15.

C. *Law reform*

Having quickly examined how the Canadian judiciary might be affected by the *Miliangos* decision, it is appropriate to look at the potential reaction of the Canadian legislators. Having gone one step further than their English counterparts by codifying the old common law rule, Canadian legislators now find themselves in a situation not unlike that of the general who charges the enemy lines only to look back and see his troops going the other way.

The idea of suing for an amount expressed in foreign currency was not born with *Schorsch Meier;* it has been done in other Western countries for a number of years.[85] It is time that Canada followed suit, particularly in view of the significance of foreign trade to this country's economy. Such a change in court practice should pose no greater procedural problems to our provincial and federal courts than it does in any of the other countries permitting such suits, and more importantly, it would provide the type of flexibility and responsiveness to modern judicio-economic problems that justice, common sense and ever-increasing international trade demand: *Caveat legislator.*

VI. **Conclusion**

The most surprising aspect of the whole question is not how or why it happened, but rather *when,* especially in light of the situation in other Western countries. The English common law system was uncommonly slow in permitting suits for foreign sums to be instituted in its courts, and chances are that the change would have been even more delayed had the pound sterling maintained its position of relative strength on world money markets. As it was, the pound, beginning with the fourteen per cent devaluation of 1967, has become one of the least stable of the so-called hard currencies. Consequently, and much to their credit, English courts felt obliged to modify their rules in an effort to be fair to all parties, although the main beneficiaries would logically appear to be non-Englishmen.

The question remains as to why Canada lags behind. It is probably for some of the same reasons that England did: a stable currency and long-established rules of procedure, among other things. And, for the same reasons that England did, Canada should now change. Our currency has seen great fluctuations in the period following November 15, 1976: the date that international money traders suddenly were motivated to take a long, hard look at what an over-valued currency the Canadian dollar really was. It is time our judicial system responded to this new reality.

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[85] Mann, *supra,* note 5.

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