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Judgments in Foreign Currencies

Hegemonic Currencies

In the twentieth century, sterling and the U.S. dollar have functioned successively as hegemonic currencies. The deutsche mark performs something like this role within the EMS, and in relation to some other countries as well even though they are not participants in the EMS. Switzerland and Austria, for example, take cognizance of the leadership of the deutsche mark in fashioning their own policies.

Hegemony can be exercised in the international monetary system, or within a region, even though that role is not assured by law or recognized in some other formal way. In the era of the gold standard and the gold-exchange standard, for example, no treaty provided that sterling was the hegemonic currency.

A hegemonic role comes about because of the combined effect of the power of a national economy and the stability of its currency, the size and openness of its markets, and the volume of its trade.[1] Other countries develop confidence in a country's currency because of the price and exchange rate stability the country has achieved and the conviction that the country intends to pursue policies to maintain that stability. Other countries can gear their own policies to those of the country that, in a sense, has leadership thrust upon it. That country can be said to export stability to the others. The exchange rates between their currencies and the hegemonic currency become a matter of paramount importance for them. One feature of the role of a heg-

[1] George S. Tavlas, "On the International Use of Currencies: The Case of the Deutsche Mark," IMF Working Paper, No. 90/3 (Washington: International Monetary Fund, January 1990).

emonic currency is the substantial use that is made of it as a currency of account and payment.

The country with a hegemonic currency derives benefits from this function of its currency, but the country accepts moral, though not legal, responsibility for maintaining the stability that qualified it for leadership. The collapse of the par value system can be attributed, to a substantial extent, to the loss of confidence that the U.S. dollar would remain stable. In present conditions, no currency has earned this confidence among countries so numerous that a new international monetary system can be anchored to a currency. As the result of experience, the Articles of the IMF manifest suspicion of a system in which the law would make provision for a currency to have this role. For example, the Articles state twice that members must collaborate to make the SDR the principal reserve asset in the international monetary system;[2] and that if the par value system regulated by Schedule C is brought into existence the common denominator must not be gold or a currency.[3] However, currencies have had a hegemonic role without legal requirement, and it might not be impossible for a currency to achieve this status without breach of the Articles by any member.

It is necessary to make the caveat that although the U.S. dollar does not have the hegemonic role it had in the world in the years in which the par value system was in force, the dollar remains the main reserve and international transactions currency. The power of the United States and of its economy that gives the dollar this function has legal effects, particularly in international financial organizations, even in the current system of discretionary exchange arrangements, as was seen in earlier chapters of this monograph.

The hegemonic role of a country's currency tends to produce the legal dogma in that country that its currency is stable. If the exchange rates between the currency and other currencies are unstable, it is presumed irrebuttably that the other currencies must be responsible for the instability. In a case decided in 1975[4] in which an English court was asked to deliver a judgment in a currency other than sterling, Lord Denning, then Master of the Rolls, explained that the judicial faith in sterling was the basis of the established rule that the monetary judgments of English courts could be expressed only in that currency. He said of sterling:

[2] Article VIII, Section 7; Article XXII.

[3] Schedule C, paragraph 1.

[4] *Schorsch Meier GmbH v. Hennin* [1975] 1 All E.R. 152.

> 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.[5]

Another member[6] of the court quoted Lord Denning in an earlier case, in which he had said, with equal eulogy and elegy, that the traditional assumption had been that sterling was a currency "of whose true-fixed and resting quality there is no fellow in the firmament."

English law did not purport to derive the rule that English courts could give monetary judgments only in sterling from the dogma of the hegemonic and stable character of the currency. The rule had to be justified with the aid of less overtly chauvinistic doctrines. The accepted legal doctrines relied on were that a foreign currency was a commodity, and that the remedy for failure to deliver a commodity was damages and not the recovery of debt. Even if it was assumed that a foreign currency was money and not a commodity, an English court could not order specific performance of a contract to pay foreign currency. The remedy, therefore, was to award damages for the sterling equivalent of the foreign currency as at the date of breach.

The original Articles of the IMF were not explicit in conferring on the U.S. dollar the hegemonic role that it exercised in fact in the Bretton Woods par value system. But the Articles implicitly recognized the probable central role of the dollar, although without imposing that function on the dollar. The main provision of this kind has been cited often in this study. The provision absolved a member from the obligation to take any further appropriate measures to ensure that exchange rates in exchange transactions involving its currency within its territories respected the prescribed margins if the member freely bought and sold gold for its currency in accordance with the provision.[7] The theory of the provision was that such a member was maintaining the stability of exchange rates for its currency in relation to gold. It was expected, and so it turned out, that the only member that would be able to give this undertaking in respect of its currency was the United States, which had in fact negotiated the provision at the Bretton Woods Conference. Keynes later regret-

[5] Ibid., at p. 155.

[6] Ibid., at p. 160.

[7] "A member whose monetary authorities, for the settlement of international transactions, in fact freely buy and sell gold within the limits prescribed by the Fund under Section 2 of this Article shall be deemed to be fulfilling this undertaking."—Second sentence of Article IV, Section 4(*b*) (original Articles).

ted that he had concurred in the provision on behalf of the United Kingdom, because the presumption of the stability of the dollar would give the United States favorable treatment that other members would not be able to enjoy.[8] Another provision, which clearly implied the special position of the dollar, gave other members the option of expressing the par values of their currencies either in terms of gold as the common denominator of the par value system or in terms of the U.S. dollar of the weight and fineness of gold in effect on July 1, 1944.[9]

Even after the President announced on August 15, 1971 that the undertaking of the United States to convert official holdings of U.S. dollars with gold had been abrogated, and that other assets would not be used for this purpose, John Connally, then Secretary of the U.S. Treasury, explained that if currencies floated as a result, the United States would not be responsible for that phenomenon. The dollar, he said was not being devalued, and if exchange rates were not in accord with the Articles of the IMF, it would be because other members allowed the exchange rates for their currencies to move up or down against the dollar. As other currencies were pegged to the dollar, the United States could not float or do anything unilaterally. When asked if the action of the United States relieved other members of their obligation to ensure observance of the margins prescribed for exchange rates in exchange transactions between their currencies and the dollar in their territories, he replied:

> I think not. I think the other rules will apply and will still be the convertibility of currency into currency. We are saying that we will no longer during this period convert the dollars they hold into gold or other assets.

What the Secretary of the U.S. Treasury, but not the IMF, overlooked was that as the United States was no longer buying and selling gold for its currency in transactions with other members when approached by them, it was required by the Articles to take other appropriate measures to see that the margins for exchange rates involving the dollar were respected in exchange transactions in the United States. The refusal of the United States to take such measures

[8] *The Collected Writings of John Maynard Keynes, Volume XXVI, Activities 1941–1946: Shaping the Post-War World, Bretton Woods, and Reparations* (London: Macmillan; New York: Cambridge University Press, 1980), ed. by Donald Moggridge, pp. 138, 143, 170–71.

[9] Article IV, Section 1(*a*) (original Articles).

placed the burden on other members according to the Secretary of the Treasury. This attitude was inconsistent with the basic principle of the par value system that each member was legally responsible for observing the obligations of the Articles in relation to its own currency. In an exchange relationship between two members, both members had to act to maintain consistency with the Articles of the exchange rate between the two currencies. A member's responsibility for its currency could not be transferred to other members. The evidence in the Articles of the expected hegemony of the U.S. dollar did not release the United States from this principle or from accountability if the United States did not discharge its obligations.

In the negotiation of the Second Amendment, the United States resisted any language that might express or imply a reduction in the role of the U.S. dollar. For example, the United States was opposed to any obligation of members to reduce the role of reserve currencies in the international monetary system when it was suggested that they should be treated in the same way as gold. Furthermore, the United States rejected any language that would seem to require that the SDR should be the largest element in global monetary reserves. The result of the controversy is the weak formulation of Article VIII, Section 7:

> Each member undertakes to collaborate with the Fund and with other members in order to ensure that the policies of the member with respect to reserve assets shall be consistent with the objectives of promoting better international surveillance of international liquidity and making the special drawing right the principal reserve asset in the international monetary system.

In view of this attitude of the United States, it is surprising that after the Second Amendment became effective the United States should have seemed to many observers to be willing for a time to concur in the creation of a Substitution Account into which members would have the privilege of depositing U.S. dollars in return for SDR-denominated claims. The project is thought to have foundered by 1980 for technical reasons and because of the strengthening of the dollar, but the return by the United States to its traditional view of the dollar should not be overlooked. The participation of the United States in summit meetings, the Group of Five, and the Group of Seven, however, can be considered an acknowledgment by the United States that economic power is more diffused than once it was.

Nevertheless, the World Bank's solution of the problem of interpreting the unit of account in which its capital is expressed—the fixed value of $1.20635 per gold dollar—implicitly accepts the view that the dollar continues to be the hegemonic currency. The effect of the solution is that members of the Bank, other than the United States and members that have discharged with U.S. dollars the so-called domestic currency portion of their paid-in subscriptions, perform their maintenance of value obligations on the basis of the exchange rates for their currencies against a unit that is assumed to have a fixed value in terms of the current U.S. dollar. In effect, their currencies are regarded as fluctuating while the dollar is, to paraphrase Lord Denning, a stable currency that has no equal. The adoption of the unit of account of MIGA is similar evidence of the leading role of the dollar. Even if the markets do not concur in the view that the dollar is steadfast while other currencies fluctuate, the United States has been powerful enough to insist on these two official actions that differentiate the dollar from other currencies. These actions imply a view of the dollar that is reminiscent of John Connally's, even though it is no longer possible to justify the view with the specious argument of maintenance of a par value for the dollar.

In other matters, however, the United States is recognizing that it is in the national interest to assimilate the dollar to other currencies. Later in this study there is a discussion of new attitudes to the expression of judgments by American courts in currencies other than the dollar. Another example is abandonment by the Federal Reserve Board on December 23, 1988 of its policy of discouraging U.S. depository institutions from accepting foreign currency deposits. This policy though not required by law had been inspired by the fear that such a practice would adversely affect stability of the exchange value of the dollar. The policy antedates the collapse of the par value system but was maintained as late as the date mentioned above. Weekly reports are compiled of the volume of foreign currency deposits under the new policy. The exchange rate used for this purpose is the rate quoted by the Federal Reserve Bank of New York every Tuesday at 10 a.m. (or noon in some cases) for major currencies.

The author of a detailed study of the policy argues[10] that, contrary to the expectations of the Federal Reserve Board, the volume of foreign currency deposits may be substantial. He argues also that the new policy will exert pressure on the exchange rate for the dollar and

[10] Dean C. Alexander, "The Legal and Economic Impact of the Federal Reserve Board's Ruling to Allow U.S. Depository Institutions to Accept Foreign Currency Deposits," *North Carolina Journal of International Law and Commercial Regulation*, Vol. 14, No. 3 (Fall 1989), pp. 459–81.

complicate the Federal Reserve Board's management of the exchange rate.[11]

Foreign Currency Judgments of English Courts

It is not too bold an assertion that while legalization of the discretionary system of exchange arrangements and creation of the EMS are the most radical consequences in international law of the breakdown and abrogation of the par value system, changes in the law relating to the expression of judgments and the effects of those changes are the outstanding new developments in the national law of some countries, including countries that have prominent roles in international trade and payments. This proposition does not overlook the fact that in some other countries judgments could be expressed in a foreign currency before the demise of the par value system. The proposition is that in the two countries whose currencies have had hegemonic roles in the international monetary system, and in some countries that follow their lead, a new view has been taken of the problem and that at least in England the law has already been changed. In the United States, change in the law is probably on its way. In countries that had already allowed judgments to be expressed in a foreign currency when justified, the explanation may be that the currencies of these countries were not widely used in international trade and payments. It might have been contrary to the interests of these countries, as well as too unrealistic, to indulge in the self-regard that led the courts in the countries of hegemonic currencies to insist that judgments could be expressed only in the domestic currency. It should not be overlooked, however, that the courts of countries that did not subscribe to this rule had concluded that justice to parties required a different rule.

It is clear that the change in English law has come about because the courts have realized that the established rule that judgments could be expressed only in sterling was contrary to English commercial and

[11] Two of the legal consequences that are discussed in the article referred to in the preceding footnote merit special notice here. First, if the holder of a foreign currency deposit can write checks against it in the currency and it becomes necessary to value the amount in dollars, which exchange rate should apply? The author compares this problem to the problem of translating a foreign currency amount into dollars for the purpose of judgments (ibid., p. 478). Second, the author suggests that Article VIII, Section 2(*b*) of the IMF's Articles may deter U.S. depository institutions from accepting deposits denominated in a currency that is or may be subject to exchange controls.

financial interests in a world in which it had to be admitted that sterling was fluctuating. In the case decided in 1975 from which a dictum of Lord Denning has been quoted,[12] the influence of the floating of sterling was acknowledged by another member of the court:

> Traders from overseas have been coming to this country for centuries. When the merchants from the Hanseatic towns and the Low Countries gathered together at Cambridge for the midsummer fair in the middle ages they would not have wanted to be paid with clipped coins which from time to time some kings put into circulation; and if the law merchant enforced in the pie poudre court at that fair had made them accept clipped coins, it is probable that they would never have come again. If the judgment under appeal in this case is right, a foreign trader who has agreed in his own country—in accordance with his own law—to sell and deliver goods here and who is entitled under his contract to be paid in his own currency, must accept the modern equivalent of clipped coins, now called devalued currency. If this be so, our courts and our law will have a poor reputation in the market places of the world as long as our currency is unstable.[13]

In the case from which this passage is quoted, the plaintiff, a company registered in Germany, claimed an amount in deutsche mark as a debt for goods supplied to the defendant, who did business in England. The court of first instance refused to grant such a judgment on the ground that there was no jurisdiction to give judgment in any currency other than sterling. The effect would have been to deprive the plaintiff of approximately one third of the debt because of the depreciation of sterling against the deutsche mark that had occurred. The plaintiff objected to judgment in sterling, arguing that the rule

[12] See footnote 4 above. In an earlier case, *Jugoslavenska Oceanska Plovidba v. Castle Investment Co. Inc.* [1973] 3 All E.R. 498, the Court of Appeal had held that arbitrators had authority under English law to make an award in U.S. dollars. A member of the court said (at p. 504):

> "[I]f such an award is to be held to be bad solely because of the currency in which it is expressed, grave inconvenience will be caused to those who bring their disputes to this country for decision. They want an award which will enable them to recover the same amount as that which they ought in the first instance to have received. They do not want that recovery to be exposed, if it can be avoided, to exchange fluctuations between the currency in which they ought to have received the amount initially and the pound sterling, especially since the latter was allowed to float."

[13] [1975] 1 All E.R., at p. 158.

that an English court could award only sterling was incompatible with Article 106 of the Treaty of Rome, under which

> [e]ach 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.

The Court of Appeal found that the traditional principle had been based on a rule of procedure on the formulation of judgments that restricted execution of them to sterling. But formulation of the procedural rule had been changed in 1966, and two of the three members of the court held that the new form of judgment could be applied as appropriately to a sum in foreign currency as to a sum in sterling. The change in the language of the rule is not impressive when read now, but it enabled a majority of the court to take account of the economic and financial disadvantages of the old principle. All three members of the court agreed, however, on the effect of the Treaty of Rome. Lord Denning, that creative iconoclast, was willing to go further and take the same attitude to currencies issued by countries that did not belong to the European Community:

> This is the first case in which we have had actually to apply the Treaty of Rome in these courts. It shows its great effect. It has brought about a fundamental change. Hitherto our English courts have only been able to give judgment in sterling. In future when a debt is incurred by an English debtor to a creditor in one of the member states—payable in the currency of that state—the English courts can give judgment for the amount in that money. This change will have effects, too, beyond the Common Market. It has already made us think again about our own laws. As a result, it is my opinion, that, whatever the foreign currency, be it United States dollars or Japanese yen, or any other, the English courts can give judgment in that money where it is the currency of the contract.[14]

Miliangos v. George Frank (Textiles) Ltd.[15] is the case that has brought about a fundamental modification in the branch of the law discussed here and that has been the inspiration for similar developments in other countries as well as in areas of the law not involving judgments. In this case, the Swiss plaintiff claimed a sum in Swiss francs as a debt under a contract with the English defendant. If the judgment

[14] Ibid.

[15] [1975] 1 All E.R. 1076; [1975] 3 All E.R. 801; [1976] A.C. 443.

were given in Swiss francs, the defendant would have needed half as much sterling again to discharge his obligation. The court of first instance held that only sterling could be awarded, notwithstanding the earlier decision of the Court of Appeal. The court pointed out that Switzerland was not a member of the European Community. The Court of Appeal now held, however, that the decision in the earlier case must be applied on the ground that it established two separate principles: English courts had the power to give judgment in a foreign currency when it was the currency of the contract, and the countries of the Community had similar authority under Article 106 of the Treaty of Rome. The first principle standing alone enabled an English court to give a judgment in Swiss francs.

The *Miliangos* case then went on appeal to the House of Lords as the highest judicial tribunal. By a majority of four to one, it confirmed that an English court can give judgment in a foreign currency when a debt is expressed and payable in that currency under a contract governed by the foreign *lex monetae.*[16] The decision included important qualifications, but it was held to be unnecessary to adopt a broader proposition for the purpose of the case at hand. The argument that an earlier decision of the House of Lords[17] was inconsistent with the conclusion now reached and prevented change was rejected for a number of reasons, one of which was the brave reason that a doctrine in conformity with commercial experience was preferable to one that had nothing but precedent to commend it. The argument of the change in formulation of the procedural rule was given much less weight than in the first case decided by the Court of Appeal. A more important reason was that the substance of the debtor's obligation was governed by Swiss law, and that English law should not be allowed to transform the obligation into something else.

A reason that weighed heavily with the House of Lords, however, is apparent from the following passage in Lord Wilberforce's opinion:

> 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', ie they have no fixed exchange value even from day to day. This is true of sterling. This means that, instead of a situation in which changes of relative value occurred between the 'breach-date' and the date of judgment or payment being the exception, so that a rule which did not provide for

[16] Ibid.

[17] *In re United Railways of the Havana and Regla Warehouses, Ltd.* [1960] 2 All E.R. 332; [1961] A.C. 1007.

> 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.[18]

In the *Miliangos* case, the House of Lords awarded the amount that was due in the foreign currency but permitted the defendant to discharge the judgment in sterling, in which event the rate of exchange at the date of actual payment would be applied. By this form of judgment, the court rejected the practice of awarding the equivalent in sterling of a debt expressed and payable in foreign currency at the rate of exchange at the date when the debt should have been paid. Under the earlier practice, the plaintiff suffered a loss when sterling declined in exchange value after the maturity of the unpaid debt. The argument that the earlier rule gave certainty while a later date subjected the defendant to the risk of uncertain fluctuations in the exchange rate for the currency was rejected because it was indeed the debtor as the party in default on whom the burden of fluctuation should rest.

The need to deal promptly and pragmatically with the consequences of fluctuating exchange rates was recognized in the following remarkable passage in the opinion of Lord Wilberforce:

> [D]ifficult as this whole matter undoubtedly is, if once a clear conclusion is reached as to what the law ought now to be, declaration of it by this House is appropriate. The law on this topic is judge made; it had been built up over the years from case to case. It is entirely within this House's duty, in the course of administering justice, to give the law a new direction in a particular case where, on principle and in reason, it appears right to do so. I cannot accept the suggestion that because a rule is long established only legislation can change it—that may be so when the rule is so deeply entrenched that it has infected the whole legal system, or the choice of a new rule involves more far-reaching research than courts can carry out. . . . [F]rom some experience in the matter, I am led to doubt whether legislative reform, at least prompt and comprehensive reform, in this field of foreign currency obligation, is practicable. Questions as to the recovery of debts or of damages depend so much on individual mixtures of facts and merits as to make them more suitable for progressive solutions in the courts. I think that we have an opportunity to reach such a solution here. I would accordingly depart from the *Havana Railways* case and dismiss this appeal.[19]

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[18] [1975] 3 All E.R., at p. 809; see also pp. 838 and 841.

[19] Ibid., at pp. 814–15 (footnote omitted). According to Lord Simon of Glaisdale, who dissented (at p. 824),

The House of Lords took this decision before the par value system had been abrogated by the Second Amendment. Exchange rates were fluctuating in fact, and this development was considered sufficient justification for the pragmatic solution of the problem created by fluctuation. The decision in the *Miliangos* case has properly been called revolutionary and has disposed of the once common assumption that English courts had to treat a foreign currency as a commodity.[20]

The *Miliangos* case recognizes that the debtor may discharge his foreign currency debt in sterling at the rate of exchange prevailing at the date of actual payment. It is fair to assume that the use of this exchange rate was a primary objective of recognizing that judgments can be expressed in a foreign currency. The practice now is that the exchange rate prevailing at the date of actual payment applies if the debtor pays without the compulsion of the court's order to execute a judgment debt. If the court issues such an order, the exchange rate prevailing at the date of the order applies, on the theory that the officers executing the order need to be instructed on the rate. Either this rate is deemed by a fiction to be the rate prevailing at the time of actual payment or the rate is the closest practicable approximation to the rate prevailing at the date of actual payment. The latter theory is preferable.

Discharge of a foreign currency debt with sterling does not change the character of the debt. The basic principle of the *Miliangos* case is that a debt properly considered in the circumstances of a case to be a debt in foreign currency must not be transformed in character into a sterling debt.[21] The argument that a change from the former rule was unnecessary because sterling might appreciate after the date of judgment has not impressed the courts. They have responded that the new rule is more equitable for both parties. It may be added that the old rule was equitable in the days of the par value system because even though a change in the par value of sterling was possible, a

"The instant appeal raises questions the answer to which imperatively demands the contribution of expertise from far outside the law—on monetary theory, public finance, international finance, commerce, industry, economics—for which judges have no training and no special qualification merely by their aptitude for judicial office. All such experience as I have had of decision making within and without the law convinces me that the resolution of this issue demands a far greater range of advice and a far more generally based knowledge than is available to a court of law. . . . Law is too serious a matter to be left exclusively to judges."

[20] *Barclays Bank International Ltd. v. Levin Brothers (Bradford) Ltd.* [1976] 3 All E.R. 900, at p. 911; [1976] 3 W.L.R. 852, at p. 863.

[21] *Re Dynamics Corporation of America* [1976] 2 All E.R. 669.

change was likely to take place, if at all, only after a long period of fixity. It was reasonably safe, therefore, for foreign parties to contract in sterling and to have the benefit not only of the stability of the currency but also of English exchange and financial markets.

Expansion of the *Miliangos* Doctrine

The decision in the *Miliangos* case was carefully limited to the facts of that case, but the House of Lords realized that the decision might have wider application. It is appropriate once again to quote Lord Wilberforce:

> I would make it clear that, for myself, I would confine my approval at the present time of a change in the breach-date rule to claims such as those with which we are here concerned, i.e., to foreign money obligations, . . . obligations of a money character to pay foreign currency arising under a contract whose proper law is that of a foreign country and where the money of account and payment is that of that country, or possibly of some other country but not of the United Kingdom.
>
> I do not think that we are called upon, or would be entitled in this case, to review the whole field of the law regarding foreign currency obligations: that is not the method by which changes in the law by judicial decision are made. 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. . . . 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.[22]

It is now firmly established that the principle of the *Miliangos* decision goes far beyond the circumstances of that case. As Lord Denning has said:

> Once it is recognised that judgement *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 fluctuation of the exchange.[23]

[22] [1976] A.C. 443, at pp. 467–68.

[23] *Federal Commerce and Navigation Co. Ltd. v. Tradax Export SA* [1977] 2 All E.R. 41, at p. 51.

In one case,[24] the *Miliangos* principle was applied to a debt payable in U.S. dollars in circumstances in which English law was the proper law of the contract and in which the place of payment was in England. In another case,[25] the defendants failed to accept cloth for which they had agreed to pay in Swiss francs under a contract governed by Swiss law. The court held that the remedy of damages for breach of contract—as distinguished from recovery of the debt the defendants had failed to pay in the earlier case referred to and in the *Miliangos* case—could be awarded in Swiss francs as claimed by the plaintiffs. The judgment was based on the fact that the contract the defendants had failed to perform by not accepting the cloth included an obligation of a monetary character to pay foreign currency, and under Swiss law the plaintiffs were entitled to be placed in the same position as if the contract had been performed.

In the *Miliangos* case and the two cases cited above that involved application of the *Miliangos* principle to circumstances different from those in the *Miliangos* case, the plaintiffs were exporters who were nonresidents of the United Kingdom and who were asserting claims in foreign currency against importers who were residents of the United Kingdom. British businessmen must decide, therefore, whether, especially in longer-term contracts, they are willing to denominate prices in foreign currency, particularly if the other party is a resident of a country with a domestic currency that is expected to remain strong against sterling.

A Controversial Decision

Ozalid Group (Export) Ltd. v. African Continental Bank Ltd.,[26] decided by the Queen's Bench Division (Commercial Court) of the English High Court, has been the subject of some controversy in connection with the *Miliangos* doctrine. The case deserves discussion notwithstanding its ambiguity because of the issues of principle it suggests. Ozalid, an English company, agreed to sell certain machinery and equipment to a Nigerian concern for a price expressed in U.S. dollars. Payment was to be made by irrevocable letter of credit valid for six months and negotiable through a bank based in London. The seller arranged for the defendant, a Nigerian bank with a branch in London,

[24] *Barclays Bank International Ltd. v. Levin Brothers (Bradford) Ltd.* See footnote 20 above.
[25] *Jean Kraut AG v. Albany Fabrics Ltd.* [1977] 2 All E.R. 116.
[26] [1979] 2 Lloyd's Rep. 231.

to issue a letter of credit. The defendant should have made payment not later than October 5, 1977, but did not pay until December 12, 1977. Dollars received by the plaintiff were credited to an account, from which, not later than the last working day of each month, an amount of "excess dollars" determined in accordance with English exchange control regulations had to be sold to an authorized bank for sterling. Dollars were sold under this exchange control instruction on November 1, 1977, November 30, 1977, and on January 3, 1978. The last of these sales included dollars received from the defendant on December 12, 1977 that should have been paid on October 5, 1977. The dollar was depreciating against sterling in the period that was relevant in this case.

The court concluded that the defendant bank must have been aware of the facts, and that the plaintiff's loss was foreseeable by the defendant. The court held, however, that it may not have been foreseeable that Ozalid would delay selling dollars until the latest date for sale, the end of the month of receipt, instead of selling them on the day of receipt. It was appropriate, therefore, for Ozalid to base its claim on notional sales on October 5, 1977, when the defendant should have paid, and on December 12, 1977, when the delayed payment was made. The plaintiff was entitled to an amount of sterling that reflected the change in the exchange rate between the dollar and sterling between October 5 and December 12, 1977, but not between October 5, 1977 and January 3, 1978.

The court awarded sterling and not dollars. The court held that the *Miliangos* doctrine did not require a plaintiff to make its claim in foreign currency:

> The overriding reason for changing the law was to provide a procedure which would enable the Courts to compensate the claimant in full for the wrong which he had suffered. A change which *required* the plaintiff to claim in foreign currency and to accept sterling at the rate prevailing at the date of judgment could in some circumstances work as great an injustice as the old procedure requiring him to claim in sterling and to adopt the date of breach rate of exchange.[27]

Nevertheless, the court continued, a plaintiff does not have a free choice. In the circumstances of the *Miliangos* case, only a judgment in Swiss francs could compensate the plaintiff. Later cases[28] had de-

[27] Ibid., p. 234.

[28] *Services Europe Atlantique Sud (SEAS) v. Stockholms Rederiaktiebolag SVEA (The Folias)* and *The Despina R* [1979] 1 Lloyd's Rep. 1; [1978] 3 W.L.R. 804.

cided that it was for the plaintiff to select the currency in which to make his claim and to prove that an award or judgment in that currency would most truly represent his loss and most fully and exactly compensate him for that loss. The currency of account was a factor of considerable importance but not decisive.

In the *Ozalid* case the dollar was both the currency of account and the currency of payment. Although the dollar had this double function, the plaintiff's loss was incurred in sterling, and this fact was reasonably foreseeable by the defendant.

> In the light of the foreign exchange regulations of this country, the value of foreign currency to an English company engaged in the export trade must be the amount of sterling which that currency will buy.[29]

It was irrelevant that the plaintiff had accepted the risk of the depreciation of the dollar between the date of the contract and the due date for payment (October 5, 1977), because the risk was accepted for that period only. The plaintiff's claim was proper even though the defendant had paid the full dollar amount payable under the contract before the writ making the plaintiff's claim was issued. That payment had to be credited at the rate of exchange on the date of actual payment against the sterling amount that would have been realized on the due date.

It is difficult to understand why the due date was considered relevant if the plaintiff was claiming a dollar debt. The plaintiff received the dollars payable to it, and the reference to the due date seems to be in conflict with the rejection of the breach date principle in the *Miliangos* case. If the claim was for damages for the delayed payment of a debt, special, but not general, damages would be recoverable under English law. The discussion of foreseeability suggests that the court might have understood the case as one of special damages caused by the delayed payment.

Another troublesome feature of the decision is the possible reading that a plaintiff has an option to claim sterling even though his claim properly considered is to a foreign currency. This view of the decision, and of the law, is rejected by the English Law Commission's Report:[30]

> [I]t is clear that to allow the plaintiff to seek judgment in sterling in the case of a foreign-currency claim would be contrary to the prin-

[29] *Ozalid Group (Export) Ltd. v. African Continental Bank Ltd.* [1979] 2 Lloyd's Rep., at p. 234.

[30] Paragraph 3.9.

> ciple in *Miliangos*. It would be unjust to the defendant, since the plaintiff would be able to make his claim in whichever of the two currencies happened to be the more favourable from his point of view.[31]

There are perhaps two ways of looking at the case. One is that the court considered that in fact a sterling claim was involved, even though the currency of account and payment was the U.S. dollar, because the plaintiff felt the loss most realistically in sterling. The possible alternative view is that when special damages can be awarded as compensation for a late payment, the damages can be awarded in sterling as the true currency of loss even though the plaintiff has a foreign currency claim. The English Law Commission prefers this alternative analysis of the case, although the Commission does not say expressly that sterling should have been awarded as damages.[32]

In the *Miliangos* case, the court was inspired by the wish to treat the Swiss exporter fairly in circumstances in which sterling had depreciated against the Swiss franc. In the *Ozalid* case, the court was probably impressed by the desirability of doing justice to the English exporter in circumstances in which sterling had appreciated against the U.S. dollar. The case makes it clear that sometimes the conflict between contracting parties will be about the currency in which the plaintiff really suffered a loss. This problem is discussed later in more detail.

Another aspect of the *Ozalid* decision that is difficult to understand is the emphasis placed on the defendant's foreseeability of loss because the U.S. dollar might depreciate against sterling. Parties should be taken to foresee the possibility of the fluctuation of exchange rates in the present discretionary system of exchange arrangements and the fact that loss will be suffered by a party if the exchange rate of the relevant currency changes in a direction unfavorable to him. Perhaps the courts demand more and require foresight of the way in which an exchange rate actually has developed. If this is indeed the judicial meaning of foreseeability, the standard is unjustifiably high.

A foreign currency debt claimed by a creditor in English proceedings cannot be transformed into a sterling debt, which a defendant might prefer if that would lead to application of the breach date rule when sterling has depreciated after the due date or if sterling appre-

[31] Ibid.

[32] See footnote 171 to paragraph 3.9 and paragraphs 2.34–2.35 of the Report.

ciates and the payment date rule is applied. The question whether a foreign currency debt that remains a foreign currency debt can be discharged in sterling if the debtor elects to follow this course rather than pay in the foreign currency is a separate question. On this question, the Queen's Bench Division (Commercial Court), in the decision on the effect on Eurodollars of the freeze of Libyan official assets by the United States, reviewed the relevant case law and concluded that the defendant was entitled to discharge a foreign currency debt with sterling. The principle of payment in the sterling equivalent is not confined to the case in which the court orders execution of a judgment expressed in a foreign currency. The court attached two caveats to the proposition recognizing the debtor's right to discharge his foreign currency debt with sterling. First, the rate of exchange is the one prevailing at the date of actual payment. Second, if payment of the debt in the foreign currency or in sterling is blocked, while the other form of payment is not blocked, the defendant cannot elect to pay in the blocked currency and allege that the obligation is discharged or suspended.[33]

True Currency of Loss

The House of Lords, in *The Folias*,[34] has confirmed the principle that a plaintiff may choose the currency he claims as damages for breach of contract, provided that his choice represents the true currency in which he feels the loss. A French corporation, with its place of business in Paris, entered into a time charter of a vessel from the Swedish owner. Hire and other items were payable in U.S. dollars. The contract was governed by English law. Cargo shipped by the cargo owner from Valencia to Brazil was damaged because refrigeration failed during the voyage. The charterer settled the claim for damage to the cargo in Brazilian cruzeiros, which the charterer purchased with French francs, the currency with which the charterer conducted its business. The owner accepted liability to the charterer because of the breach of the warranty of seaworthiness in the charter.

The issue in the case was whether judgment should be expressed in French francs, Brazilian cruzeiros, U.S. dollars, or sterling. The

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[33] *Libyan Arab Foreign Bank v. Bankers Trust Company* [1988] 1 Lloyd's Rep. 259. See also *Libyan Arab Foreign Bank v. Manufacturers Hanover Trust Co.* [1988] 2 Lloyd's Rep. 494.

[34] *Services Europe Atlantique Sud (SEAS) v. Stockholms Rederiaktiebolag SVEA (The Folias)* (see footnote 28 above).

arbitrators awarded French francs because the charterer had expended that currency to obtain cruzeiros. The court of first instance held that damages should be awarded in the currency of the country, Brazil, where the loss was incurred. The effect would have been that the charterer would suffer a substantial loss in terms of its own currency because of the depreciation of the cruzeiro. The Swedish owner would enjoy a fortuitous benefit because it would be able to buy cruzeiros with Swedish currency more cheaply than at the date of the settlement by the charterer of the claim for damage to the cargo. The Court of Appeal restored the arbitrators' award of the French franc as the currency most appropriate to the circumstances.

The House of Lords held that the *Miliangos* case had made it possible to give judgment for a breach of contract in a currency other than sterling. If contracting parties have agreed on a particular currency as the currency of account and payment in respect of all transactions arising under the contract, including the payment of damages for breach, judgment should be given for damages in that currency. But although a currency is specified for the discharge of obligations under a contract, it does not necessarily follow that the parties have agreed that damages for breach of the contract should be awarded in the same currency. The obligation to pay hire and other amounts in U.S. dollars in this case did not mean that damages for breach of the contract had to be awarded in dollars. If the contract fails to provide a decisive answer to the question of the currency intended by the parties as damages for breach, the currency should be the one that most truly expresses the plaintiff's loss. That currency is not necessarily the one in which the loss is immediately sustained. The currency that will most effectively compensate the plaintiff must be taken to be the one that was within the contemplation of the parties in entering into the contract. In *The Folias*, the currency was the French franc. Although the contract was governed by English law, the contract had no connection with sterling. The House of Lords showed no disposition to choose, as a matter of principle, the currency for which the applicable exchange rate would be most favorable to the plaintiff.

A subsequent case[35] elaborates a code-like set of principles for the choice of the appropriate currency in which to express a judgment awarding damages for breach of contract. Cargo was shipped on a Belgian vessel from a port in the United States to a port in France.

[35] *Société Française Bunge SA v. Belcan NV (The Federal Huron)* [1985] 3 All E.R. 378; [1985] 2 Lloyd's Rep. 189.

On arrival, part of the cargo was found to be damaged. The receiver of the cargo sued the owner of the vessel for damages for breach of contract and incidental expenses. The sole question for the court was the currency in which judgment for the plaintiff should be expressed. The plaintiff claimed U.S. dollars; the defendant argued for French francs, which had depreciated between the date of the damage and the date of the hearing. The court recognized that changes in the relationship between the two currencies and turbulence in the exchange markets meant that the question of the appropriate currency in which to express damages for breach of contract was financially important and that it would recur, for which reasons the court codified the applicable principles.

The court drew the following principles from the *Miliangos* line of cases:

(1) Where it is inappropriate to give judgment in sterling but there is more than one possible currency for this purpose, the choice must depend on general principles of the law of contract and on rules of private international law. (It will be recalled from Chapter 11 that Section 2(b) of the Uniform Foreign-Money Claims Act proposed by the Commissioners on Uniform State Laws in the United States would clarify that the *lex fori* decides when it is appropriate to translate a foreign currency into the currency of the forum.)

(2) General principles of contract law require that so far as possible there should be *restitutio in integrum,* with due regard to what was in the reasonable contemplation of the parties.

(3) Where, as in this case, the law governing the contract is English law, the first step is to see whether, expressly or implicitly, the contract provides an answer to the question of the appropriate currency to award as damages.

(4) If the contract shows agreement on the currency of account and payment, judgment can be given in that currency as the currency with respect to which the parties have agreed that payments relating to the contract have the closest and most real connection.

(5) If the contract does not show that the parties agreed on the currency of account and payment, the plaintiff should receive damages calculated in the currency in which the loss was felt or in the currency that most truly expresses his loss. This currency may or may not be the currency in which the loss first and most immediately arose. In ascertaining the currency in which the plaintiff should receive damages, the court must ask (a) in what currency payment will as nearly as possible compensate the plaintiff in accordance with the principle

of restitution, and (b) whether the parties must be taken reasonably to have had this currency in contemplation.

(6) A decision to award damages in whatever currency a loss was borne or felt can be expressed as equivalent to finding the currency sum that most appropriately or justly reflects the recoverable loss.

These principles are too imprecise to give much guidance. One of the soft elements is the emphasis in paragraphs (2) and (5) on the reasonable contemplation of the parties. Another is the difficulty of reconciling considerations (a) and (b) in paragraph (5).

Similarly, it is not clear what the difference is between the tests of the currency in which the plaintiff feels the loss and the currency that most truly expresses his loss. Perhaps the second test is meant to apply when the currency of loss is not obvious and the court must evaluate the circumstances so as to arrive at the currency in which it would be most realistic to hold that the plaintiff suffered loss. However, the plaintiff can feel loss in more than one currency even though it is understood that they need not be the currencies of expenditure. There should be no reason why the court should not express its judgment in different currencies for different items of loss if the plaintiff truly felt losses in these currencies.

In the case under consideration, the commodity shipped as cargo was usually purchased by the plaintiff, a French company, in the United States or Brazil, or to a small extent in France, for processing in France. The price was always fixed in U.S. dollars and sales of the product after processing might be in dollars, or in francs if the sale was made in France, or in the currency of the purchaser. If the sale was not in dollars, the proceeds were converted at once into dollars. If a forward sale was made for payment in a currency other than dollars, the plaintiff sold the currency forward and at once bought dollars for the date of payment. The reason for this practice was that the dominant currency in trade in the commodity was the U.S. dollar, so that all of the plaintiff's expenses and receipts were quantified in that currency in order to minimize the effects of exchange rate fluctuations. Futures were bought and sold in the Chicago Futures Market. The cargo in the case was purchased for dollars.

The parties had not expressly agreed on the currency of compensation for breaches of contract. The bills of lading mentioned dollars, but the court did not give this fact great weight in choosing, between U.S. dollars and francs, the appropriate currency in which damages should be expressed or the currency in which the parties would have expected loss to be measured. The court decided, on the basis of all the facts, that the currency in which the judgment should be expressed was the U.S. dollar.

English Law Commission's Conclusions

The major purpose of the English Law Commission's Report was to determine whether legislation should be recommended that would change the law on foreign money liabilities that had grown up largely as a result of the *Miliangos* decision. The Commission concluded that there was no need to recommend legislative changes. The following paragraphs are the main conclusions and recommendations of the Commission on substantive law:

(1) The principle underlying the decision in *Miliangos* and the consequences which flow from it are greatly to be preferred to the rules which that decision superseded.
(2) (*a*) A plaintiff should not be able to obtain judgment in sterling in the case of the enforcement of a claim which ought properly to be expressed in a foreign currency; but
 (*b*) legislative intervention to secure that result is not necessary, since the matter can appropriately be left to judicial decision.
(3) No change is necessary or desirable in the present rule that conversion of a foreign-currency judgment into sterling is to be effected at the date of actual payment or the date on which the court authorises enforcement of the judgment, whichever is the earlier, because in general that rule provides the best practical implementation of the *Miliangos* philosophy.
(4) Parties should continue to be free to agree:
 (*a*) that payment in England and Wales should be made in a particular foreign currency alone (with no option for the debtor to pay in sterling); and
 (*b*) in relation to any currency conversion, the date at which it is to be made or the exchange rate to be applied.[36]

In defense of the first conclusion, the English Law Commission answered as follows the question whether judgments in foreign currency are desirable:

3.3 In the working paper we examined the principle underlying the form of judgment approved in *Miliangos*—namely, that the defendant "do pay, say, 1,000 U.S. dollars or their sterling equivalent

[36] Paragraph 6.2 (cross-references to other paragraphs have been omitted from the quotation).

> at the time of payment", and we concluded, for the following reasons, that this principle was greatly to be preferred to the sterling-breach-date rule which it has replaced. By ensuring that the value of the debtor's foreign money liability is measured in terms of the foreign currency, the new approach obviates the injustice to the creditor caused by a fall in the relative value of sterling after the due date but before judgment is given; it prevents a corresponding injustice from arising to the debtor in the converse case (i.e., where the relative value of sterling *rises* after the due date); and the *Miliangos* form of judgment preserves the value of the debtor's obligation in terms of the foreign currency after judgment. None of these advantages applied when the sterling-breach-date rule governed the enforcement of foreign-currency claims. [Footnote omitted.]

The report explains that the time of payment means the date when the court orders enforcement of a judgment if the debtor has not already made payment.

As an addendum to the English Law Commission's Report on the English law of foreign currency liabilities, it is fitting to quote an English judge's approval in a lecture of the policy that has inspired the *Miliangos* line of cases. He described the doctrine as "a revolution reversing a practice which had been regarded as immutable." He said:

> From the point of view of this country's position as the leading centre for the settlement of commercial disputes the importance of this decision cannot be overstated. Foreigners have confidence in our legal system. But they no longer have confidence in sterling. They can now continue to contract in stabler currencies, but continue to come here for the resolution of their disputes without the danger of having to accept payment in sterling at a devalued rate. . . . [I]t would seem to follow that the entire straightjacket of sterling has gone. A claimant entitled to compensation of whatever kind will now be compensated in the currency or at the rate of exchange which in all the circumstances will afford him the most appropriate measure of compensation. Although the effect of this change is only confined to international cases, it is difficult to think of a more radical change in our law since . . . 1932.[37]

Set-Off

Set-off creates an interesting puzzle as a result of the *Miliangos* doctrine. X establishes a claim against Y in one currency and Y es-

[37] Sir Michael Kerr, "Modern Trends in Commercial Law and Practice," *Modern Law Review* (London), Vol. 41, No. 1 (1978), at pp. 10–11.

tablishes a claim against X in another currency in circumstances in which, if no foreign money were involved, Y would be allowed to set off his claim so as to reduce or extinguish the amount for which X is to have judgment. Difficulties can arise when both currencies are foreign or when one is foreign and the other is the currency of the forum. Lord Simon cited problems of set-off and counterclaim as one of the reasons for his dissent in the *Miliangos* case.[38]

The problem is discussed in the English Law Commission's Report.[39] Even if the claims by X and Y are governed by different legal systems, English law settles issues of set-off because they are classified as procedural and are resolved, therefore, by English law as the law of the forum. The core of the problem to be faced by English law is that a successful claim in one currency cannot be set off directly against a successful claim in another currency. Furthermore, the court has to determine which is the larger claim so as to decide for which party judgment is to be given for the residual amount of its claim. In the absence of a procedure directing that one party's judgment is subject to the other's judgment, set-off can be applied by the court only by translating the currency of one claim into the currency of the other claim, or both into the currency of the forum, as at a date no later than the date of judgment.

As there was no post-*Miliangos* decision on this problem, the English Law Commission had canvassed three options:

(i) The two currencies should be translated into sterling at the exchange rates prevailing at the date of judgment.

(ii) The translation into sterling should be made at exchange rates prevailing at some specified earlier date, such as the date when the later of the two claims arose.

(iii) Set-off should be excluded in cases involving a foreign currency or currencies, so that each party would be given a separate judgment expressed in the appropriate currency for his claim; but the Commission considered the possibility of introducing procedural rules by which one party could not enforce his judgment without taking the other party's judgment into account.

The Commission chose the third option as the one that accorded with the *Miliangos* doctrine. The solution denies set-off understood

[38] [1976] A.C., at p. 487.

[39] Paragraphs 2.12–2.21, 3.20–3.33, 6.2(5). For a brief treatment of the problem see Philip R. Wood, *English and International Set-Off* (London: Sweet & Maxwell, 1989), pp. 671–72 under the misleading title "Multiple Rates of Exchange."

as a procedure that results in a single judgment for a net amount.[40] The Commission left to the appropriate authorities the task of determining whether procedural rules could be adopted to give effect to the possibility raised by the Commission. If, however, it proved impracticable to adopt such rules, the Commission would prefer the first option listed above.

The English Law Commission formulated its conclusion as follows:

> The problem of set-off which arises where the parties' judgments against each other are expressed in different currencies should be resolved:
>
> (*a*) if a procedure can be introduced whereby neither party's judgment can be enforced without taking account of the other's, by giving judgment for each party in the currency applicable to his claim and directing that the judgments should be subject to such procedure in the event that enforcement of either judgment is subsequently sought; but
>
> (*b*) in the absence of such a procedure, conversion should be effected at the date of judgment, and judgment given in the currency of the claim of the party whose claim on that basis is the larger.[41]

Under subparagraph (*a*), the exchange rate for the necessary translation of currency in order to arrive at a net amount would be the one prevailing at the date on which an enforcement procedure was initiated.

The solution favored by the Commission would mean that the judgments awarded to both parties must be enforced at the same time, even if one party precedes the other in initiating proceedings to enforce the judgment in favor of the one taking the initiative. If this result did not follow from the initiative, a curious situation would arise if the party with the judgment for the smaller sum had taken the initiative. The other party would be forced to protect itself by seeking enforcement of the judgment in its favor, although it might be that in any event the court would treat him as having done so. Either step would permit the Commission's solution to be applied, but the effect would be that the party taking the initiative would have

[40] S. Rory Derham, *Set-Off* (Oxford: Clarendon Press, 1987), p. 105 points out that a party might be vulnerable in the case of an assignment of a claim against it if the other party assigns this claim. If the right to set-off arises only on enforcement of the claim, the debtor would not be able to assert his right to set-off against the assignee of the claim, because the assignee takes subject only to prior equities or defenses.

[41] Paragraph 6.2(5).

been able to select a date for enforcement at which the rate of exchange was favorable to him. It may be expected, however, that in most instances the party awarded the larger sum would take the initiative to collect the net amount payable to him.

Whether or not the Commission's preferred solution is considered set-off, it is distinguishable from the approach taken by the law of Germany. Under that law, set-off is not permissible unless the two obligations to be offset are of the same kind. This rule has been taken to preclude set-off between obligations payable in different currencies. Part at least of the rationale for refusing to permit set-off seems to be that if a creditor has a claim to deutsche mark, he should not be compelled to accept a smaller amount of deutsche mark because the debtor has a claim in a foreign currency. This reasoning has been criticized not only as specious if both currencies are convertible, but also because it promotes further litigation and is costly. A Berlin court has responded to objections of this kind, citing as justification the impact of fluctuating exchange rates. Set-off is permitted if a debtor has an obligation to be discharged in Germany that is expressed in but not necessarily payable in a foreign currency and also a claim to deutsche mark. In such a case, the debtor can transform his foreign currency obligation into a deutsche mark obligation, and as the obligations are then similar in kind, he is permitted to offset them.[42]

The Third Restatement contains provisions on judgments when foreign currency is involved. These provisions are discussed in Chapter 15 of this volume, but it is useful to note here how the Restatement deals with set-off. It will be seen that although the provisions in the Restatement have been influenced to a large extent by the *Miliangos* and subsequent English cases, there are deviations from the English doctrine. The rule on set-off in the Restatement is formulated as follows in a Comment endorsed by the American Law Institute:

> If adverse parties in a single suit prevail in respect of separate claims, each claim is subject to a judgment in accordance with this section. If the judgments so rendered are in different currencies, the judgment for the smaller sum may be converted into the currency of the judgment for the larger sum as of the date of payment and used as set-off.[43]

[42] WuB IV A. § 387 BGB 1.88, pp. 1501–1502 (KG Berlin, Urteil vom 29 Juni 1988; 24 U 6446/87 – WM 1988, 1385), with Note by Reinhard Welter; Ulrich Drobnig, *American-German Private International Law* (Dobbs Ferry, New York: Oceana Publications, 2nd. ed., 1972), p. 259.

[43] Comment (*f*) to Section 823.

The rule in the Restatement resembles the solution favored by the English Law Commission, but there may be a difference. Under the Commission's solution, it seems that each foreign currency would be translated into sterling at the exchange rate prevailing, as at the date of payment, between the foreign currency and sterling, and the two sterling amounts would be offset against each other. The Restatement, however, seems to choose the exchange rate, as at the date of payment, between the two currencies in which judgments have been awarded, and an offsetting in the currency of the larger sum, with translation of the net amount into dollars (if necessary because the currency of the net amount is foreign and judgment is to be given in dollars).

The English Law Commission left open the question whether the necessary procedures could be instituted to give effect to its preferred solution. Clearly, difficulties were envisaged in "taking account" of an adversary's judgment. Perhaps for this reason the rule in the Restatement declares that the translation and offsetting may be made in the manner described.[44]

The Uniform Foreign-Money Claims Act deals with set-off in Section 7(e):

> A judgment or award made in an action or distribution proceeding on both (i) a defense, set-off, recoupment, or counterclaim and (ii) the adverse party's claim, must be netted by converting the money of the smaller into the money of the larger, and by subtracting the smaller from the larger, and specify the rates of exchange used.

A comment on the provision declares that:

> Subsection (e) provides for netting the affirmative recoveries of a defendant and plaintiff, whether in the same money or in different moneys, but preserving the quantum of each for appellate purposes. The theory is that when claims are reduced to money, they become mutual debts and should be set-off, so that a person's exchange rate fluctuation risk continues only for the surplus in its money of the claim. The set-off is made by the judge or arbitrator.

The recommended Act clearly makes set-off mandatory, while the Restatement uses the word "may." Another contrast between the two is that the Restatement provides that the set-off shall be made on the

[44] The rule in the Restatement is not well-drafted. It provides that the "judgment for the smaller sum may be converted into the currency of the judgment for the larger sum," but it is the currency of the judgment for the smaller sum that would be "converted."

basis of the rate of exchange between the two currencies of the recoveries prevailing at the date of actual payment of the net amount. The Uniform Act chooses the exchange rate between the two currencies, but the rate is the one prevailing at the date of judgment. This solution is not consistent with the *Miliangos* doctrine if it is accepted that the foreign currencies of the claims of both plaintiff and defendant should be translated into the currency of the forum at the exchange rates prevailing at the date of actual payment. The solution embodied in the Uniform Act is comparable to solution (*b*) of the English Law Commission, which was endorsed by the Commission, however, only if satisfactory procedural rules could not be adopted to give effect to its preferred solution. Solution (*a*), which the Commission preferred, would seem to require the translation of foreign currencies at the exchange rate prevailing at the date of execution of the two judgments.

Only the Uniform Act is explicit that it deals with both set-off and counterclaim. The Commission's Report and the Restatement use only the expression "set-off," but perhaps it is intended to apply to counterclaims as one species of set-off. Yet, a distinction exists between the two concepts, and perhaps the distinction should affect the solution of the problem that arises whenever different currencies are involved in adverse claims. A set-off constitutes a defense to the plaintiff's claim; a counterclaim is a separate cause of action that does not constitute a defense in this sense. It might be argued, therefore, that if there exists a set-off as thus defined, it is justifiable to translate the currencies according to the exchange rate prevailing at the date of judgment, because the party claiming the larger amount has claimed too much. The proper amount of his claim must be adjudged by the court.[45] On this hypothesis, the Uniform Act could not be challenged in respect of set-off, but the question of the best solution in relation to counterclaims could still be raised in light of the *Miliangos* doctrine.

[45] D.F. Libling, "Questions & Answers (?); Miliangos v. Frank Textiles (Limited)," *Law Quarterly Review* (London), Vol. 93 (April 1977), pp. 212–31, at pp. 228–29.