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Other Consequences of Miliangos *in English Law*

The effects of the *Miliangos* doctrine have been felt in English law far beyond claims for debt or damages for breach of contract. Numerous areas of the law have been affected, and it is possible that the process has not come to an end. The process should not come to an end, because it brings about a modernization of the law in the era of fluctuating exchange rates. The consequences of the process so far in some areas of the law are examined in this chapter.

Tort

In tort, some of the issues have been similar to those involving contractual liabilities, although some differences are inevitable. For example, it is unlikely in most cases that the plaintiff and the defendant contemplated the possibility of the tort and therefore the currency in which compensation would be appropriate.

In *The Despina R*[1] a collision occurred off Shanghai between two Greek ships, one of which was owned by the plaintiff, a Liberian company that had its head office in Greece. The vessel was managed by a company that maintained its principal place of business in the State of New York. As a result of the collision, repairs were carried out at Shanghai, Yokohama, and Los Angeles. In each city the national currency was used to pay for the repairs. Other expenses resulting from the collision were discharged in these same currencies, apart from a small amount that was paid in sterling. All payments in

[1] [1977] 3 W.L.R. 597; [1977] 3 All E.R. 874; [1978] 3 W.L.R. 804.

U.S. dollars were made by the managing company on behalf of the plaintiff from a U.S. dollar account in New York. The renminbi, yen, and sterling in which payments were made were purchased with U.S. dollars drawn from the New York account. The main issue in the case was the currency in which the English court should express its award of damages in tort against the defendant, the Swedish owner of the other vessel involved in the collision. The three possibilities considered in the proceedings were the currency in which the expense or loss was immediately sustained ("the expenditure currency"), the currency in which the loss was effectively felt or borne by the plaintiff because of the currency in which the plaintiff normally operated or with which it had the closest connection ("the plaintiff's currency"), or sterling as the currency of the forum.

The House of Lords decided that the *Miliangos* case had made it possible to adopt the most equitable solution, the plaintiff's currency, even though, unlike the case of debt, it was not reasonable to assume that the parties had contemplated that damages in tort would be available in a particular currency. Lord Wilberforce, who delivered the most forceful opinion in the *Miliangos* case, explained that the principle in such cases of tort had to be flexible. Sometimes, the plaintiff might not be able to establish that in the normal course of events he would use, and be expected to use, the currency in which he usually conducted his operations. In such cases, the appropriate currency in which the plaintiff would be considered to have felt the loss would be the expenditure currency (as defined above).

In another case,[2] the plaintiff claimed damages for personal injury suffered as the result of negligent medical treatment in England. The plaintiff was a U.S. national who sustained the injury while on holiday in England. The court held that as the plaintiff's pecuniary losses were closely linked with U.S. dollars as his national currency, the claim would be expressed in dollars in the judgment. The damages claimed for pain, suffering, and loss of amenity, however, would be expressed in sterling, because in the opinion of the court it would be impossible to assess these damages in dollars. The decision may be an illustration of Lord Wilberforce's caveat about the impossibility in some cases of establishing the currency in which loss is felt, or the case may demonstrate the difficulty of quantifying damages in the foreign currency in which loss is felt.

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

Company Law

In *In re Scandinavian Bank Group Plc,*[3] an English bank owned by five Scandinavian banks resolved to reorganize its capital and to change the denomination of its share capital from sterling to specified amounts in four separate currencies (sterling, U.S. dollar, Swiss franc, and deutsche mark). The purpose was, of course, to have a safeguard against the depreciation of sterling. Ever since the bank was founded, it had kept its accounts in sterling, although most of its assets were denominated in foreign currencies. As sterling depreciated against other currencies, the bank had frequently found it necessary to raise new sterling capital to preserve the ratio of capital to total balance sheet set by the Bank of England. This necessity placed a heavy burden on the owners. The proportions of the four currencies in the reconstituted capital corresponded roughly to the composition of the bank's assets.

The bank, as an English company, petitioned the court to approve this reorganization under the Companies Act 1985. The question whether under the Act capital can be expressed in a multicurrency form was one of first impression, which the court regarded as "a point of considerable importance and public interest."[4] Among specialist company lawyers there were different opinions on the lawfulness of multicurrency share capital.

One problem was raised by the language of section 2(5)(*a*) of the Act, which requires the memorandum of a company having a share capital to state "the amount" of the share capital and the division of the share capital into shares of "a fixed amount." One aspect of the problem was whether the words in the singular were satisfied if the separate amounts in four currencies appeared in the memorandum. The next question was whether a "fixed amount" meant an amount in "lawful money," which has to be paid in English legal tender. The court found, invoking the Interpretation Act, that the language of the provision was no bar to the proposed capital structure.

The following passage in the court's opinion is of particular interest for the present purpose:

[3] [1988] 1 Ch. 87. For the tax consequences of the denomination of share capital in a foreign currency, see paragraphs 11.13–11.21 of the U.K. Board of Inland Revenue's consultative document entitled *Tax Treatment of Foreign Exchange Gains and Losses* (London, March 1989).

[4] [1988] 1 Ch. 87, at p. 99.

> For myself I do not doubt that there was before and throughout the first half, or perhaps the first two-thirds, of the present century a usually unstated assumption that English companies must have their capital and draw their accounts in English currency. The pound had for so many years been properly called "a pound sterling"; that is a unit with a value in precious metal. Such a unit may fluctuate in internal purchasing power, but can be taken as having a stated value. But the United Kingdom went off the gold standard many years ago, and has ceased to have any fixed rate of exchange for the pound in any foreign currency since the collapse of the Bretton Woods Agreement in 1971. In these changed circumstances the law has had to adjust its perceptions so as not to cause injustice to individuals.
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> The House of Lords decided in *Miliangos v. George Frank (Textiles) Ltd.* [1976] A.C. 443 that the long established rule that an English court could only give judgment in what was called sterling, meaning pounds of Great Britain, should be altered. Judgment, it was held, could be given for a sum of money expressed in a foreign currency where the obligation under the contract sued upon was expressed in that foreign currency. The House recognised that the decision was a departure from a decision of the House itself, but that a new rule was needed to keep in step with commercial needs. . . . The decision has had far-reaching effects and is applied very frequently nowadays.[5]

The court held that an "amount" and a "fixed amount" meant an amount or a fixed amount in any currency. The amounts expressed

[5] Ibid., at pp. 102–103. Articles 4 and 38 of the European Commission's proposal for a European Company Statute provides that companies subject to the statute will denominate their capital in ECUs. (*Business Law Review* (London), Vol. 10, No. 11 (1989), p. 269; *Common Market Law Reports,* Vol. 57; Part 742 (January 16, 1990), pp. 120–72.) A European company would be subject to a separate legal order. The Statute, if adopted, will permit the creation and management of companies with interests within the EC not confined to a single member state. Such a company might be formed by the combination of businesses operating in different states. A company subject to the Statute would be free from the obstacles arising from the disparity and limited territorial application of national company laws. The Statute would not deprive companies of the alternative of subjection to a national company law. Companies subject to the Statute would exist alongside companies subject to a national law, because the Statute as a Community regulation would be directly applicable in all member states.

At present (early 1990), the share capital of companies incorporated in Belgium, Denmark, France, Germany, Greece, perhaps Italy, the Netherlands, Portugal, and Spain must be denominated in the national currency, but this requirement may not prevent a company from conducting financial activities denominated in the ECU. Ireland, Luxembourg, and the United Kingdom permit share capital to be denominated in foreign currency or the ECU.

in foreign currencies are fixed and do not change because the auditors will translate both sides of the balance sheet of a company having a multicurrency share capital into a single currency, sterling, at the exchange rates ruling on the date of the balance sheet. The amounts resulting from the translation may change in successive balance sheets, but this fact does not alter or affect the amount of the underlying asset or liability. The court approved the company's proposed multicurrency reorganization of its capital.[6]

The petition created much interest because multicurrency capital can reduce the strain on many companies, including other banks. In monetary matters, the courts have shown sensitivity to national policy considerations.[7] The *Miliangos* case and its progeny are outstanding examples of this disposition. A similar sensitivity was shown by the IMF when it moved to the basket method of valuing the SDR before the Articles, which defined the SDR in terms of gold, were amended.

Whose views of national policy should be brought to the attention of the courts on an issue of monetary importance? The court stated that neither the Bank of England nor the Treasury nor any other public authority held the view that multicurrency capital would cause problems for it. In addition, the Official Receiver saw no difficulty if called upon to administer the liquidation of insolvent companies with multicurrency capital.[8]

A court of the State of South Australia[9] has considered a different problem of company practice. The issue was the interpretation of a provision in a debenture trust deed under which the company was empowered to issue debenture stock from time to time on such terms and conditions as the company determined, and under which all new stock was to rank pari passu with stock already issued. The main question, which was whether the company could issue new stock and stock certificates denominated in a foreign currency, raised the question whether such stock could be said to rank pari passu with

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[6] For a skeptical note on the court's interpretation of the Companies Acts, see Ralph Instone in *Law Quarterly Review* (London), Vol. 103 (1987), pp. 168–70. He asks whether the interpretation was a signal example of judicial enterprise. It reflected common sense but may have been a usurpation of the legislative function.

[7] See a detailed discussion of this issue in Joseph Gold, *The Fund Agreement in the Courts*, Volume III (Washington: International Monetary Fund, 1986), pp. 591–622.

[8] According to a newspaper report, the Registrar of Companies and the Inland Revenue were among the authorities that had been consulted, probably by the company or its legal advisors, and had expressed no opposition.

[9] *Elder's Trustee and Executor Company Limited v. Beneficial Finance Corporation Limited* [1979] 21 S.A.S.R. 216; *Australian Law Journal* (Sydney), Vol. 54 (February 1980), p. 96.

stock having a face value expressed in Australian dollars. The debenture stock certificates were to be issued to an overseas bank to be held as security for an advance to be made to the company, which undertook an obligation expressed and payable in a foreign currency.

It was argued that stock denominated in a foreign currency would not rank pari passu with stock expressed in Australian dollars, because a fluctuation in exchange rates might produce a change in the proportionate share of the company's assets, per unit of paid-up stock issued, that one class of stockholders might expect against another class in the event that the company was wound up. The argument was that the pari passu clause assured stockholders not only of equal rank in their security but also equal treatment in other respects.

The court did not accept this construction of the pari passu provision. The sole function of the provision was to set aside the principle that successive debentures ranked in priority for the purpose of security according to the respective dates of issue. The only effect of the provision was that all stockholders ranked equally without regard to the dates of issue of the different classes of debentures.

Another objection advanced in argument was that fluctuation in the exchange rate for the foreign currency might cause the total amount of stock created or issued to exceed a limit expressed in Australian currency in the debenture trust deed. The court considered this objection to be a serious one, but its bearing was on the exercise of a power to issue debenture stock expressed in a foreign currency and not on the existence of the power itself. The effect of fluctuating exchange rates on legal limits is discussed in Chapter 5 under the subheading "Transcending Legal Limits."

No mention was made of the *Miliangos* case in any one of these reactions, but one member of the court, citing a case in the series leading up to the *Miliangos* decision, said that he saw no reason why general expressions referring to money in the deed should not have the ordinary and natural meaning that includes money in a foreign currency.

Garnishment

Under the provisions of English law governing attachment, only "debts" can be attached to satisfy a judgment. In the past, a sum standing to the credit of a creditor in foreign currency was not regarded as a "debt." A debt is a claim to money. Foreign currency was regarded as a commodity or some other object. Only a sum standing to the credit of a creditor in sterling in a current or deposit account could be attached by garnishee proceedings.

In *Choice Investments Ltd. v. Jeromnimon (Midland Bank Ltd. garnishee),*[10] the C. Company obtained a judgment expressed in sterling against J. in respect of a debt in sterling and costs. J. had a credit balance in U.S. dollars in a deposit account with a London bank. Withdrawals were subject to seven days notice. The company obtained a garnishee order nisi against the bank attaching a sufficient amount of the dollar account to satisfy the judgment. An order nisi directs the bank to pay such an amount into court or to the judgment creditor within a stated period unless (nisi) the bank has a sufficient reason not to comply. The order nisi is an attachment that prevents the bank from paying the money to its customer, so that the court will have the opportunity to decide whether the garnishee order shall be made absolute, unless the debt is discharged in the meantime. The order is made absolute in the absence of sufficient reason why it should not be. In this case, the bank challenged the legality of the garnishee order nisi.

The Court of Appeal held that since the *Miliangos* case the dollar account must be considered a debt owed to the customer J., because as a result of that case the customer can obtain judgment in dollars for the amount of the account as a debt in dollars owed by the bank to the customer. The procedure that a bank must follow now on receiving a garnishee order nisi is to freeze the amount of dollars that will realize the amount of the sterling judgment at the buying rate of sterling on the day the bank receives the order. The bank makes the purchase of sterling as soon as reasonably practicable after it receives notice that the order has been made absolute. If the dollars are more than enough to satisfy the judgment debt at the rate of exchange for purchasing sterling with dollars at that date, the balance can be released to the customer on demand. If the amount realized is not sufficient to satisfy the judgment debt, the full amount realized is paid to the judgment creditor as *pro tanto* satisfaction.

The Master of Rolls (Lord Denning) stated that the principles of the decision would be adaptable to other circumstances.[11] For example, the judgment creditor might have a judgment in Swiss francs and then find that the judgment debtor had a bank account in U.S. dollars. There was no reason why a garnishee order could not be made to attach the account in an amount sufficient to meet the judg-

[10] [1981] 1 All E.R. 225.

[11] Ibid., at pp. 228–29.

ment in Swiss francs.[12] In such a case, the exchange rate would have to be determined not between the currency of the forum and a foreign currency but between two foreign currencies.

Taxation

It is obvious that fluctuations in exchange rates produce consequences for taxpayers. One expert has written of the tax law of the United Kingdom and the United States that

> [t]he relevant law in both countries is both complex and unsatisfactory. It typically is based on statutes and cases that were enacted and decided when currency fluctuations were not major problems. The American literature, in particular, has tended to assume that other currencies, and not the dollar, fluctuate.[13]

In England, the decision of the House of Lords in *Pattison v. Marine Midland Ltd.*[14] has been influenced by the present state of exchange arrangements. The company carried on the business of international commercial banking. In October 1971 it borrowed US$15 million by issuing unsecured subordinated loan stock at par for that amount, redeemable in ten years. The sterling equivalent of the borrowing when made was £6,024,096. When the company repaid the loan of US$15 million and redeemed the stock, the sterling equivalent of that

[12] In *In re Scandinavian Bank Group Plc.* [1987] 2 All E.R. 70, at p. 76, the garnishment case was referred to in these words:

> "That decision [*Miliangos*] was followed and applied in *Choice Investments Ltd v. Jeromnimon (Midland Bank, garnishee)* [1981] 1 All ER 225, [1981] 1 QB 149 where it was held that a sum standing to the credit of a judgment debtor at an English bank in a foreign currency deposit account was a 'debt' within the meaning of the Administration of Justice Act 1956 and the County Courts Act 1959. It is, in my judgment, clear that had the question arisen in the late 1950s or during the 1960s no court would have so construed the word 'debt' in an English statute. But the Court of Appeal unanimously so held, basing themselves on the reasoning in *Miliangos*'s case."

[13] John Chown, "The Tax Treatment of Foreign Exchange Fluctuations in the United States and the United Kingdom," *George Washington Journal of International Law and Economics* (Washington), Vol. 16 (1982), at p. 235. But see now Jim Fuller, "Internal Revenue Service Issues New Foreign Currency Regulations," *Tax Notes International* (Arlington, Virginia), Vol. 1, No. 5 (November 1989), pp. 480–89; David P. Hariton, "Integrated foreign currency borrowings: new U.S. tax rules," *International Financial Law Review* (London), December 1989, pp. 17–20; *PH Tax Bulletin*, January 11, 1990, p. 6.

[14] [1984] 1 A.C. 362.

amount was £8,465,011. The tax authorities viewed the difference of £2,440,915 as a capital loss and not deductible in computing the profits subject to corporation tax.

The company had used the loan to lend U.S. dollars to its banking customers. The company did not speculate in foreign exchange transactions. Its profits consisted of differences between interest paid and interest received. The company repaid the loan after five years when the customers had completed repayment of the loans made to them by the company. The tax authorities claimed that the difference of £2,440,915 between the sterling value of the company's loans to customers and the sterling value of their repayments was subject to corporation tax as an income profit.

The House of Lords decided that the company had made neither a capital loss nor any other kind of loss when it repaid the loan it had received and that the company did not make any income or other profit when its customers repaid the loans they had received. The company was taxable on the profit it had made as a result of the difference between the interest paid to the holders of loan stock and the interest received from customers. The principle, the House of Lords held, was that a profit may be earned or a loss may be suffered if a borrower exchanges the currency he borrows for another currency, but that profit or loss is the result of the exchange transaction and not the borrowing. There was no exchange profit or exchange loss in the circumstances of the case because the company's dollar assets and dollar liabilities had been matched, there had been no conversions, and a separate set of accounts had been kept for the dollar assets and dollar liabilities. As changes in the exchange value of these assets and liabilities balanced out because of the matching, nothing was brought into the company's profit and loss account. In the company's annual accounts, the monetary assets and liabilities denominated in a non-sterling currency had been valued in sterling at the exchange rate prevailing at the date of the balance sheet, but because of matching no profit or loss was shown.

In reaching this conclusion, the House of Lords affirmed the decision of the Court of Appeal, in which the Master of the Rolls (Sir John Donaldson) drew an analogy between the pre-*Miliangos* law on the currency of judgments and the position taken by the tax authorities. That position, the House of Lords held, was, in effect, that an English company can have only sterling assets and sterling liabilities and make sterling profits and incur sterling losses, whatever might be the currencies in which those assets, liabilities, profits, and losses were expressed. The Master of the Rolls did not agree that there was any such basic concept.

> Prior to 1976, the English courts adopted an attitude which is analogous to that of the revenue [tax authorities] in the instant case. Foreign currencies did indeed exist as a fact of life and they had a distressing habit of changing their exchange values, but it was their value and not that of sterling which changed. All transactions must therefore be converted into sterling and, when this was done, justice would prevail. In *Miliangos v. George Frank (Textiles) Ltd.* [1976] A.C. 443, the House of Lords recognised that this was far too insular a view and that treating sterling as the only true money of account was in some circumstances to work very grave injustice. And so a new rule was introduced which allowed other currencies to be used as the money of account and, where that was done, brought in sterling purely as a money of payment of last resort.[15]

The case has provoked much debate and difference of opinion on the proper understanding of the decision, as noted in a consultative document, that is to say a document inviting the public to respond, issued by the Board of Inland Revenue and entitled *Tax Treatment of Foreign Exchange Gains and Losses*.[16] The document, which is really a substantial report on possible changes in the law, notes that since the breakdown of the par value system of the IMF's original Articles companies have operated in an environment of fluctuating and volatile movements in exchange rates in which sizable changes can occur. These conditions have increased the likelihood that profits will be affected by movements in exchange rates.[17] The report notes that under the present tax system of the United Kingdom, gains and losses are not treated in the same way for tax purposes, or are not treated at all. For example, some gains and losses may be treated as trading profits and losses, and some as capital gains or losses, while others fall outside the tax system altogether, so that these gains are not taxed and these losses give rise to no relief.[18]

The report focuses on three difficulties in particular:

(1) the absence of relief for exchange losses on capital borrowing (although, as a corollary, gains are not taxed);

[15] [1983] 2 W.L.R., at p. 827.

[16] London (March 1989). *Pattison v. Marine Midland Ltd.* is discussed in Annex B of the document.

[17] Ibid., paragraph 2.2.

[18] Ibid., Summary, paragraph 1.

(2) the hedging of currency exposures may be made ineffective because the hedge is treated differently from the underlying transaction; and

(3) changes in the sterling value of share capital denominated in foreign currency are not taken into account for tax purposes.[19]

The document considers how these problems might best be tackled for the corporate sector within the framework of the present tax system so as to ensure equitable treatment without unjustifiable costs for the Exchequer. The present legislation of the United Kingdom is almost completely silent on the tax consequences of exchange rate fluctuations. Only a few sections of the tax legislation refer to these consequences specifically. Beyond this extremely limited guidance, the tax treatment of differences in exchange rates is derived from the application of general principles of nonstatutory tax law.[20]

Restitution

The *locus classicus* of English law on the appropriate currency and rate of exchange for granting restitution is the opinion of Robert Goff J. in *B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2)*,[21] which was affirmed by the Court of Appeal[22] and the House of Lords.[23] The case

[19] Ibid., Summary, paragraph 2.

[20] Ibid., paragraphs 4.1–4.8. For the applicable exchange rates in calculating income tax and capital gains tax, see paragraphs 4.3–4.8. The two regimes are not congruent in dealing with exchange gains and losses. The report by the Organization for Economic Cooperation and Development entitled *Tax Consequences of Foreign Exchange Gains and Losses*, Issues in International Taxation, No. 3 (Paris, 1988) also notes the need to examine these consequences more thoroughly as a result of the abandonment of the par value system. The purpose of the report is to examine the issues in an international context and to indicate the extent to which it may be possible for tax administrations to agree on what needs to be done to enable them to (1) provide equitable and internally consistent national systems for dealing with the issues; (2) improve the international compatibility of such systems; (3) ensure the avoidance of international double taxation; and (4) solve any other international problems arising from the impact of different national tax systems on these issues. For a discussion of international comparisons and the OECD report, see Annex C of the U.K. Board of Inland Revenue's consultative document entitled *Tax Treatment of Foreign Exchange Gains and Losses* (London, March 1989). See also Jill C. Pagan, *Taxation Aspects of Currency Fluctuations* (London: Butterworths, 1983).

[21] [1979] 1 W.L.R. 783, at pp. 837–45.

[22] [1981] 1 W.L.R. 232.

[23] [1982] 2 W.L.R. 253. See H.O. Hunter, "Measuring the Unjust Enrichment in a Restitution Case," *Sydney Law Review* (Sydney), Vol. 12 (March 1989), pp. 77–95.

involved a contract for the exploration and development by the plaintiff of an oil concession in Libya owned by the defendant, in return for specified benefits that included an interest in the concession. The contract was deemed to be frustrated by the Libyan Government's expropriation of the plaintiff's interest in the concession as retaliation against the U.K. Government. The plaintiff had conferred certain benefits on the defendant before the contract had been frustrated. The principles laid down in the Queen's Bench Division, as summarized below, were strongly influenced by the *Miliangos* line of cases.

Three currencies (sterling, U.S. dollar, and Libyan dinar) were the possible candidates in which restitution could be awarded in the circumstances of the case, but the contest between the parties related solely to the choice between sterling and the U.S. dollar. A dollar award would have been substantially more valuable than a sterling award, because of the weakening of sterling against the dollar over the relevant period. Sterling had been devalued in November 1967 before accrual of the cause of action and then was allowed to float after the date of accrual. The combined effect was that the pound had been reduced in value against the dollar from US$2.80 to about US$2.

In considering the currency of the award, the court took account of the decisions of the House of Lords in *The Despina R*, a case of tort, and *The Folias*, a case of contract, both of which, in their relation to the *Miliangos* doctrine, have been considered earlier in this monograph. The cases were concerned with the choice of currency in which to calculate the damages to be awarded for a legal wrong. In view of the principles of *restitutio in integrum* and of the test of the reasonable foreseeability of damage, the courts concentrated their attention in these cases on the plaintiff's foreseeable loss, and the chosen currency in each case was the currency in which the plaintiff felt the loss. A claim for restitution, however, does not involve a legal wrong. The claim is based on unjust enrichment, and therefore presupposes (1) receipt by the defendant of a benefit, (2) at the plaintiff's expense, (3) in such circumstances that it would be unjust to allow the defendant to retain the benefit.

The award is related to the benefit obtained by the defendant. The cost to the plaintiff is a prerequisite of his claim, but cost does not limit or control the amount awarded by way of restitution. It follows that the court, in selecting the currency of the award, must look to the defendant's benefit rather than the plaintiff's expense.

If the benefit consists of money, there will usually be little difficulty in determining the amount of the benefit or in selecting the currency of the award. In such a case, the defendant's benefit and the plaintiff's expense are likely to be the same, subject to such matters as a change in the defendant's circumstances. The solution will usually take the form of the award of repayment of a like sum in the same currency.

The solution is not so easy if the benefit takes some other form, such as services rendered by the plaintiff to the defendant. The award of restitution then is reasonable remuneration for the services. The criterion of reasonableness will be the market value of the services. The plaintiff's expenses in rendering the services may be greater or less than the market value of the services, but although the plaintiff's expenses may sometimes be a factor in assessing the market price, the award is not controlled by the plaintiff's expenses. The criterion for choosing the currency of the award, in all cases of restitution, whether resulting from the payment of money or the rendering of services, should be comparable to the one applied in *The Despina R* and *The Folias*: the currency in which the defendant's benefit can be most fairly and appropriately valued.

That criterion is not self-executing. If the services have been rendered under a contract involving an international element, the contract often may specify the currency in which the services are to be valued and paid for if the contract is fulfilled in accordance with its terms. In such a case, this currency will frequently be the currency in which the benefit can be most fairly and appropriately valued for the purpose of an award, because it is the currency chosen by the parties themselves for the purpose of paying for the services, even though the choice was made for the purpose of the contract and not restitution. The contractual choice, however, is neither decisive nor presumptive, but in many cases it will be a factor of such importance that it will be applied in accordance with the criterion for restitution.

At this point, the court introduced what it described as a refinement. A contract sometimes distinguishes between the currency of account (in which indebtedness is to be measured) and the currency of payment (in which indebtedness so measured is to be discharged). Frequently, the two currencies are the same, but occasionally the contract may specify different currencies for the two functions.

> Where they are the same, the practical effect is that the parties take the risk of fluctuation in the specified currency between the date of the contract and the date of payment, by which I mean fluctuation in that currency in relation to all other relevant currencies. If, however, they differ, the practical result is a little different. Strictly speaking, the parties are taking the risk of fluctuation in the currency of account, between the date of the contract and the date when the debt falls due, in relation to the currency of payment; for it is on

> that date that the indebtedness crystallises and so falls to be converted from the currency of account to the currency of payment. Thereafter, the parties take the risk of fluctuation in the currency of payment; but if the debt is promptly paid, that has little practical effect on the risk taken by the parties, since the money once paid can be converted at the prevailing rate of exchange into any other currency, including of course the currency of account. If however there is for any reason delay between the date when the debt falls due and the date of payment, then between those dates the parties will be taking the risk of fluctuation in the currency of payment in relation to all other relevant currencies. I have found it necessary to refer to this refinement because in the present case there has been some argument whether, where they differ, the currency of account or the currency of payment should be preferred as the currency in which the defendant's benefit is to be valued for the purposes of making an award of restitution. It follows from what I have said that the currency of account is generally to be preferred to the currency of payment, unless the contract envisages an appreciable delay between the date when the debt falls due and the date of payment, in which event it may be desirable to make some different award.[24]

The English Law Commission has questioned the preference for the currency of payment over the currency of account if for any reason there is delay between the date when indebtedness is crystallized according to the currency of account and the date for payment in the currency of payment. This distinction, it will be observed, was made for the purpose of payment under a contract, and was then applied by the court for the purpose of an award of restitution. The Commission has pointed out that the distinction is inconsistent with the principle underlying the *Miliangos* doctrine.[25]

[24] [1979] 1 W.L.R., at p. 841.

[25] English Law Commission's Report, paragraph 2.11, footnote 51.