

## THE UNIFORM FOREIGN-MONEY CLAIMS ACT

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When a Uniform Act, such as the Uniform Foreign-Money Claims Act ("the Act"),<sup>1</sup> is undertaken by the National Conference of Commissioners on Uniform State Laws<sup>2</sup> and involves a considerable change in prior law, those drafting the Act are obliged to ask and answer many questions.<sup>3</sup> This Article will describe the questions asked of

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<sup>1</sup> UNIF. FOREIGN-MONEY CLAIMS ACT 13 U.L.A. 23 (Supp. 1990) [hereinafter the Act].

<sup>2</sup> Commissioners from each state are appointed by the respective Governors. The Commissioners meet yearly at a national conference. Proposals for new uniform laws are considered first by the Scope and Program Committee of the Conference. If a proposal is approved, that approval is reviewed by the Executive Committee which can recommend that the Chairman appoint either a study committee or a drafting committee. At the Annual Meeting in the summer of 1987, the Executive Committee recommended that the Chairman appoint a drafting committee to work on the proposed Act. Chairman Michael Sullivan of Minnesota, appointed the following:

Howard T. Rosen, Esq. — New Jersey - Chairman  
Patricia Sommer, Esq. — Oklahoma - Drafting Liason  
(who resigned before completion of the drafting)  
John A. Chanin, Esq. — Hawaii  
M. Michael Cramer, Esq. — Maryland  
David T. Prosser, Jr., Esq. — Wisconsin  
Thomas H. Sponsler, Esq. — Louisiana

Additionally, Chairman Sullivan appointed the following Review Committee:

Jeremiah Marsh, Esq. — Illinois - Chairman  
Morey M. Myers, Esq. — Pennsylvania  
Frederick P. Stamp, Jr., Esq. — West Virginia

<sup>3</sup> This can be appreciated by briefly reviewing the history of the drafting. The Drafting Committee and its advisors\* met twice after its appointment and presented a third draft for a first reading at the 1988 Annual Meeting of the Commissioners. In December 1988, the Drafting Committee considered a fourth tentative draft in the light of the comments made at the Annual Meeting in the summer of 1988. A fifth draft was

and answered by this Act. It will do so by following the questions, advice, and remarks Lord Coke set out in *Heydon's Case*:<sup>4</sup>

[F]or the sure and true interpretation of all statutes in general . . . four things are to be discerned and considered:

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy the Parliament hath resolved and appointed to cure the disease [i.e. mischief]. . . .

And, 4th. The true reason of the remedy; and then the [courts shall construe the statute to] . . . suppress the mischief, and advance the remedy.<sup>5</sup>

### 1. THE MISCHIEF

In response to Lord Coke's second question, the mischief to be remedied is the tendency of the common law approach to foreign-money claims either to overcompensate or undercompensate an aggrieved party.

The Anglo-American law governing litigation of an obligation expressed or incurred in a money other than that of the country in which the court sits has produced results far different from those reached under other legal systems. Foreign-money claims have been treated differently under the laws of our trading partners in Europe, Asia, Africa, and South America. The civil law countries, when faced with a claim expressed in a foreign money, have entered judgments in one of two ways. Some have entered judgment for a specific amount of the foreign currency without more,<sup>6</sup> while others added an option for payment of

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studied in February 1989 and a sixth draft was prepared for the next annual meeting in Kauai, Hawaii. At that meeting, held in August 1989, the Act, with some changes, was approved. The vote by the states, the District of Columbia and Puerto Rico yielded 50 "aye" and 2 abstentions. Subsequently, in accordance with Conference procedure, the Style Committee reviewed the Act and clarified its wording. Thus far, Connecticut is the only state that has adopted the Act. 13 U.L.I.A. (Supp. 1990). \* The advisors and the organizations they represented were: Barry Beller, Esq., Chairman, American Bar Association Committee on International Financial Transactions of the Section on International Law and Practice; Henry Harfield, Esq., Council on International Banking; Norman Nelson, Esq., New York Clearing House Association; and Somerset R. Waters, III, Society of International Treasurers.

<sup>4</sup> *Heydon's Case*, 76 Eng. Rep. 637 (Ex. Ch. 1584).

<sup>5</sup> *Id.* at 638 (citations omitted).

<sup>6</sup> F.A. MANN, *THE LEGAL ASPECT OF MONEY* 339 (4th ed. 1982) [hereinafter MANN].

the judgment with an equivalent amount of the money of the forum rendering the judgment. Under the latter option, the day of payment is the conversion date used in civil law countries.<sup>7</sup> This is sometimes referred to as the "payment day rule."

Unlike civil law countries, Anglo-American common law has been interpreted to require a court to conduct its business in the money of the forum.<sup>8</sup> Indeed, for some years it was believed that a federal statute of 1792 required this procedure in the United States.<sup>9</sup> As Professor Ronald Brand noted in his seminal article on foreign-money obligations, eighteen states statutorily required that legal proceedings be expressed in United States dollars.<sup>10</sup> Thus, two rules evolved under which foreign-money claims were litigated. Under the breach day rule, foreign moneys were converted to the local money of the forum based on either the day that the contract required that payment be made or the day that the tort was committed. Under the judgment day rule, enunciated by Mr. Justice Oliver Wendell Holmes in *Deutsche Bank v. Humphrey*,<sup>11</sup> where foreign law governed, the foreign money was converted into United States dollars on the judgment day.<sup>12</sup>

The breach day rule was followed in the majority of the Anglo-American jurisdictions. As recently as 1960, the House of Lords, in *In re United Railways of the Havana and Regla Warehouses, Ltd.*,<sup>13</sup> regarded the breach day rule as one of long standing. The case involved recovery by United States investors for money furnished through a Pennsylvania trustee for the purchase of railway rolling stock for a Cu-

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<sup>7</sup> *Id.* at 340.

<sup>8</sup> Although this is still followed in some common law jurisdictions, England abandoned this view about ten years ago.

<sup>9</sup> See RESTATEMENT OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 823 reporter's note 1 (Tent. Draft 1985). Note that the requirement that "[t]he money of account of the United States shall be expressed in dollars . . . and all proceedings in the courts shall be kept and had in conformity to this regulation," contained in § 20 of the Coinage Act of 1792, was eliminated in the 1982 Revision of that act. See also ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, REPORT OF THE COMMITTEE ON FOREIGN AND COMPARATIVE LAW, *Foreign Currency Judgments* 41 REC. A.B. CITY N.Y. 335, 337 (1986).

<sup>10</sup> Brand, *Restructuring the U.S. Approach to Judgments on Foreign Currency Liabilities: Building on the English Experience*, 11 YALE J. INT'L L. 139, 169 & n.166 (1985). The states are Arkansas, California, Idaho, Iowa, Louisiana, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, New York, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin.

<sup>11</sup> 272 U.S. 517 (1926). The judgment was never enforced as the claimant received more in United States dollars from the United States Foreign-Claims Commission's settlement fund than was awarded by the decision. Justice Holmes can be read as referring to the date of the institution of legal proceedings, but most cite the opinion for the judgment day rule.

<sup>12</sup> *Id.* at 519.

<sup>13</sup> 1961 App. Cas. 1007 (1960).

ban railway that was expropriated by the Cuban government without adequate compensation. The House of Lords concluded that Pennsylvania law was applicable, but applied English law to determine the conversion date of the United States dollars involved into pounds sterling. Professor Goode of London University describes the breach day rule as a "procedural rule," characterizing its logic as "far from self-evident," and states that "it was recognised as capable of causing great injustice to the creditor, whose contractual right to a given number of units in a foreign money . . . was arbitrarily converted by a rule of procedure into a claim for sterling that might well depreciate" prior to payment.<sup>14</sup> As shown in Part II, the English courts now apply a "payment day" rule.<sup>15</sup>

In *Competex v. Labow*,<sup>16</sup> the creditor fared in a piratical fashion upon the application of the "breach day" rule by a New York federal court. A New Yorker named Labow went to London and lost heavily trading on the London Metals Exchange. Labow's London brokers paid the losses, sued him in an English court, and obtained a judgment for 187,900 pounds sterling. As Labow had no assets in England, a suit on the English judgment was brought in New York. The original New York judgment was entered for \$443,380. After judgment was rendered in New York, Labow paid the English judgment in pounds in London. Since the case had been brought to enforce the English judgment, Labow made a post-judgment motion to dismiss on the ground that there was no longer an unpaid English judgment to enforce.<sup>17</sup>

The post-judgment motion, to the effect that payment in England left the United States federal court with nothing to enforce, save interest and costs and the awarded attorney's fees, was denied.<sup>18</sup> The Second Circuit<sup>19</sup> affirmed the judgments below, thus refusing to dismiss the action. However, it did credit the New York judgment for the dollars used to procure the English pounds sterling which were used to pay the English judgment.<sup>20</sup>

Other examples of overcompensation or undercompensation

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<sup>14</sup> R. M. GOODE, PAYMENT OBLIGATIONS IN COMMERCIAL AND FINANCIAL TRANSACTIONS 136 (1983) [hereinafter GOODE].

<sup>15</sup> *Id.* at 136-37. See also *infra* notes 27-39 and accompanying text.

<sup>16</sup> 783 F.2d 333 (2d Cir. 1986), *aff'g* 613 F. Supp. 332 (S.D.N.Y. 1985).

<sup>17</sup> 613 F. Supp. at 335.

<sup>18</sup> *Id.*

<sup>19</sup> See *Competex*, 783 F.2d at 337. The court felt obliged to follow New York law, but expressed a preference for a payment day rule: "If we were free to choose a conversion rule, we would select either the judgment-day or the payment-day rule." *Id.* at 339.

<sup>20</sup> *Id.*

abound.<sup>21</sup> It would not be realistic to state that adoption of the judgment day rule<sup>22</sup> would altogether cure the mischief occasioned by conversion of the judgment to local currency before actual payment is made. The time-lag between breach day, or the date of the commission of a tort, and the day of judgment may, on the average, be longer than the time between a trial court's initial judgment and a payment made after remand from an appellate court. Yet the "mischief" of either overcompensation or undercompensation to the foreign-money claimant can be large in either time frame. Strangely, much of the discussion on the subject is couched in terms of preventing windfalls to one party or another.<sup>23</sup> The windfall analysis may result from an unconscious application of the approach to domestic money transactions under what is called the universal principle of nominalism,<sup>24</sup> expressed by Lord Justice Denning as follows:

A man who stipulates for a pound [sterling] must take a pound when payment is made, whatever a pound is worth at that time. Sterling is the constant unit of value by which in the eye of the law everything else is measured. Prices of commodities may go up or down, other currencies may go up and down, but sterling remains the same.<sup>25</sup>

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<sup>21</sup> See *Yorkshire Ins. Co. v. Nisbet Shipping Co.*, [1962] 2 Q.B. 330, a subrogation case brought in Canada by an insurance company for the repairs to a vessel in pounds sterling. The conversion of the judgment at the breach day rate into Canadian dollars yielded an over-recovery of 55,000 when compared with the actual expenditure in pounds. The court awarded the excess to the owners, not the insurance company which had sued the owners in England in order to obtain the full recovery. *But see Société des Hôtels Le Tourquet Paris-Plage v. Cummings* [1922] 1 K.B. 451 (C.A.) (After suit was started for an amount of pounds equal in value to its worth in French francs as of the breach date, the debtor paid the debt in France since the French franc had fallen considerably in value as compared to the pound sterling since that date. Permission to amend the pleadings to enter a plea of payment in full was affirmed because the Hotel Company had accepted the payment made to one of its cashiers.).

<sup>22</sup> *Deutsche Bank v. Humphrey*, 272 U.S. 517 (1926), used a "judgment day" rule. See also RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 144 (1971) (states that the "judgment day" rule is not very successful).

<sup>23</sup> See, e.g., *Librairie Hachette v. Paris Book Center, Inc.*, 62 Misc.2d 873, 309 N.Y.S.2d 701 (N.Y. Sup. Ct. 1970). The "windfall" argument exists only if there is (1) a time gap between the conversion date and the actual payment date, and (2) a substantial change in exchange rates between the two dates. Depending on which currency falls in value, the windfall can be to either party. Compensating the claimant in the money in which its loss was suffered eliminates the claimant's windfall, and puts the currency fluctuation risk on the non-paying party.

<sup>24</sup> The nominalistic principle is applied to all obligations expressed solely by reference to a domestic currency. It is said that the principle "applies across the world . . ." GOODE, *supra* note 14, at 33, 125. The same position is taken by MANN, *supra* note 6, at 80-176.

<sup>25</sup> *Treseder-Griffin v. Co-operative Ins. Soc. Ltd.*, [1956] 2 Q.B. 127, 144. Despite his opinion in *Treseder*, when a score of years later, an arbitrator's award came

In applying the breach day rule or the judgment day rule, courts were in fact adopting a rather insular attitude. Even if thinking and analysis start with the nominalistic principle that the value of domestic money does not change internally, is it still proper to convert a claim expressed in a foreign money to the domestic money on either the breach day or the judgment day, when it is understood that exchange values change? There are really two basic questions, the answers to which will yield the proper remedy for the mischief. First, how best may the injured party be compensated for the loss suffered? Second, do any administrative problems exist that will prevent the entry of a judgment that will comply with the answer to the first question?

To answer the first question, consider a case where a party who is not from the United States is injured in his own country and suffers a loss in his domestic currency, but must sue in the United States. Since that country has its own nominalistic principle, justice seems better served by compensating the plaintiff in his domestic currency rather than in United States dollars. Had this been a suit filed due to an injury caused by a local tortfeasor or wrongdoer, the courts of the claimant's country would have had jurisdiction and the judgment would have been granted in terms of the local currency. Should the injured party suffer or benefit from the fluctuation in value of its own money as compared to the money of the tortfeasor's currency just because the foreign court was the only forum that had jurisdiction? In this example, the wrongdoer committed the wrong in the claimant's country, which caused the claimant to suffer damages in that currency. Therefore, the claimant should be reimbursed in his domestic currency.

A contract case, though more complex, should yield the same result, provided that the analysis concentrates on how best to compensate the injured party, rather than focusing on windfalls to the wrongdoer. In this context, each party stays in his own country and the contract is made through communications passing from one country to the other. Assume that the seller is the injured party. If the price expressed was to be payable in the seller's home money, or for that matter in any currency other than the buyer's domestic currency, and the claim is for price, the damage to the seller is the failure to obtain the specified amount of that money at the specified time. An application of the nominalistic principle would require that the injured party be compensated with the specified amount of the foreign money with appropriate dam-

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before him expressed in a foreign currency, Lord Justice Denning affirmed the award stating: "Things are different now. Sterling floats in the wind. It changes . . . with every gust that blows." *Schorsch Meier G.m.b.H. v. Hennin*, 1975 Q.B. 416, 424 (C.A.).

ages for the delay in payment. Buyer's damages, too, should be calculated in terms of the money in which the particular damages were suffered.

The answer to the second question concerning administrative difficulties is that judgments can be entered in foreign moneys and executed upon.<sup>26</sup>

## 2. THE ENGLISH REMEDY

England has demonstrated that judgments can and should be entered in the currency that appropriately compensates the loss suffered. The House of Lords took the first step to construct a remedy to the "mischief" of overcompensation and undercompensation of injured parties resulting from application of the breach day rule. In doing so, however, the House was taking a step already approved by the Court of Appeal for arbitration cases. As Professor Goode has said:

Lord Denning stood out as a lone judicial campaigner against what he regarded as injustice, and in his dissenting judgment in *The Teh Hu*<sup>27</sup> emphasized the unsatisfactory nature of the rule, urging that it should not be extended to maritime cases of salvage; and once again, it was Lord Denning's heterodoxy that ultimately triumphed.<sup>28</sup>

The first and major step toward formulating the proper remedy for injured parties was taken in *Miliangos v. George Frank (Textiles), Ltd.*<sup>29</sup> This case involved Swiss francs owed to a Swiss cloth maker. The rate for Swiss francs had substantially increased with respect to sterling. Thus, the pound sterling calculated at the breach day rate would seriously undercompensate the Swiss seller when converted to Swiss francs upon payment at or following the judgment date. Lord Wilberforce and a majority of the House, in a holding that could have been narrowly construed, held that prior precedent did not correctly express the law as to debt claims for the payment of foreign money in a case where the proper law of the case was Swiss law. As a careful judge should, Lord Wilberforce spoke only of such a case. The House of Lords ruled that the judgment could be entered in the foreign currency. A debtor paying voluntarily could either pay in that foreign currency or in the sterling equivalent on that day. If no voluntary payment

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<sup>26</sup> Civil law countries have been doing this for a long time. See *supra* text accompanying notes 6 & 7.

<sup>27</sup> [1970] P. 106.

<sup>28</sup> GOODE, *supra* note 14, at 136 (citation omitted).

<sup>29</sup> 1976 App. Cas. 443.

was made, then the Swiss francs would be converted to sterling on the date that an application was made to enforce the judgment.<sup>30</sup> This conversion may still undercompensate the aggrieved party when payment is finally received, since issuing process often does not promptly result in total payment. Lord Simons dissented with respect to the ruling that precedent no longer correctly stated the law. His position was that the judicial process might not result in an evaluation of all the relevant data and issues that would be presented and evaluated in the English legislative process.<sup>31</sup>

The *Miliangos* principle did not remain limited to debt cases governed by foreign law on substantive matters for long, despite a Practice Direction requiring substantive foreign law.<sup>32</sup> Again, Professor Goode has ably summed up the course of the law:<sup>33</sup>

Since then, the rule has been so extended that it can now be fairly regarded as a rule of general application. It has been held to apply to a claim for unliquidated damages for breach of contract<sup>34</sup> or in tort<sup>35</sup> and to claims under contracts governed by English law where payment is to be made in foreign currency.<sup>36</sup> In addition, certain statutory obstacles to the

<sup>30</sup> *Id.* at 468.

<sup>31</sup> *Id.* at 480. When it came to whether *In re* United Railways of the Havana and Regla Warehouses, [1960] 2 All E.R. 332, should be overruled, Lord Simon of Glaisdale commented on the position of the majority:

The reasons why I cannot go along with them are closely interrelated, but can be summarised in two sentences. First, I do not think that this is a 'law reform' which should or can properly be imposed by judges; it is, on the contrary, essentially a decision which demands a far wider range of review than is available to courts following our traditional and valuable adversary system - the sort of review compassed by an inter departmental committee. Secondly, your Lordships' predecessors have wisely set limits on the use of the power to overrule previous decisions of your Lordships' House; and no sufficient reason has, in my view, been shown for overruling the *Havana* decision.

*Miliangos*, 1976 App. Cas. at 480.

<sup>32</sup> Practice Direction (Judgment: Foreign Currency), [1976] 1 W.L.R. 83 (Q.B.). Note that paragraph 3 was modified by [1977] 1 W.L.R. 197 by removing the requirement that the proper law of the case must be a foreign law.

<sup>33</sup> We have taken the liberty of renumbering or consolidating Professor Goode's footnotes to coincide with the numbers in this Article.

<sup>34</sup> *The Folias*, 1979 App. Cas. 685 (contract).

<sup>35</sup> *The Despina R*, 1979 App. Cas. 685 (tort); *Hoffman v. Sofaer*, [1982] 1 W.L.R. 1350 (Q.B.). Although not cited at this point by Professor Goode, see also *Barclays Bank Int'l, Ltd. v. Levin Bros. (Bradford), Ltd.*, [1976] 3 All E.R. 900 (Q.B.) (construing § 72(4) of Bills of Exchange Act). For the United States law, see U.C.C. § 3-107(2) (1987) which only applies to payments made on the due date and does not legislate a breach day rule.

<sup>36</sup> *The Folias*, 1979 App. Cas. 685. *Barclays Bank Int'l, Ltd. v. Levin Bros. (Bradford), Ltd.*, 1977 Q.B. 270; *Federal Commerce and Navigation Co., Ltd. v.*



application of the rule<sup>37</sup> have now been removed.<sup>38</sup>

Although the general rule under English law is conversion of foreign money claims upon application for enforcement in insolvency proceedings, the conversion is made as of the date of the winding-up order. The conversion date in voluntary proceedings is the date of the winding-up resolution.<sup>39</sup> Such proceedings require the earlier conversion because of the administrative necessity of computing shares.

### 3. A REMEDY FOR THE UNITED STATES

Against the backdrop set forth above, Lord Simon's suggestion for reform through the legislative process should be followed in the United States given that there are more than fifty jurisdictions. In the United States, a uniform law is of particular interest to nationwide businesses that are often subject to jurisdiction in many states.<sup>40</sup> Moreover, legislation to determine the currency in which a judgment should be awarded is desirable in light of the obstacles to judicial reform. One such obstacle is the existence of state statutes requiring all court proceedings be expressed in dollars.<sup>41</sup> The feeling of many that courts should not innovate is another. Additionally, the current drive to increase and create exports, coupled with the post-1985 decline and fluctuation of the dollar, call for a more rapid solution than the inherently *ex post facto* procedure of reform by judicial action.<sup>42</sup>

Almost all acts sponsored by the National Conference of Commissioners have freedom of contract as a cardinal principle. The Uniform Foreign-Money Claims Act is no exception, as it carefully preserves

Tradax Export, S.A., 1977 Q.B. 324.

<sup>37</sup> Bills of Exchange Act, 1882, §§ 57(2), 72(4); Foreign Judgments (Reciprocal Enforcement) Act, 1933, § 2(3); Arbitration (Investment Disputes) Act, 1966, § 1(3); European Communities (Enforcement of Community Judgments) Order 1972, art. 3(2).

<sup>38</sup> GOODE, *supra* note 14, at 137. All of the above provisions were repealed by the Administration of Justice Act, 1977, § 4.

<sup>39</sup> *In re Dynamics Corp. of Am.*, [1976] 1 W.L.R. 757 (Ch. 1975); *INSOLVENCY LAW AND PRACTICE*, Cmnd 8558 (1982) ¶¶ 1306-09 (insolvency); *In re Lines Bros., Ltd.*, [1982] 2 All E.R. 183 (voluntary wind-up).

<sup>40</sup> Indeed, forum shopping should be discouraged. In addition to the windfall aspects of forum shopping, the expense incurred by businesses in order for them to know and prepare for costs in advance when state laws are diversified, favors a uniform statute ending this diversity.

<sup>41</sup> See Brand, *supra* note 10.

<sup>42</sup> The confusion caused by changing established rules after parties have acted has caused some courts instead to announce a revised rule to be effective only in the future. The practice is called declaratory dicta. Other courts rule that a decision is not to have retroactive effect.

complete freedom of contract.<sup>43</sup>

The English cases have provoked some responses in other common law jurisdictions, but most have not been judicial. The province of Ontario in Canada has adopted a statute.<sup>44</sup> The Law Reform Commission of British Columbia has issued a Report urging the adoption of the British remedy for the "mischief."<sup>45</sup> And, there has been a plethora of legal and economic literature,<sup>46</sup> at least one decision in a United States federal district court, and a recently approved Canadian proposed Uniform Act.<sup>47</sup>

### 3.1. *The Uniform Foreign-Money Claims Act*

The draft statute presented by the Drafting Committee and approved by the Conference adopts the British remedy<sup>48</sup> with a few variations. It is not a long statute, nineteen sections in all, of which only twelve are substantive, but it does reflect the complexity of several aspects of the problem.

<sup>43</sup> Section 3(a) of the Act provides:

The effect of provision of this [Act] may be varied by agreement of the parties made before or after commencement of an action or distribution proceeding or the entry of judgment.

13 U.L.A. 26 (Supp. 1990).

Section 2(a) of the Act limits the scope of the Act to a "foreign-money claim in an action or distribution proceeding." *Id.* § 2(a).

All of the discussions in the following text are based on what the Act provides in the absence of agreement otherwise.

<sup>44</sup> Courts of Justice Act, 1984, Ont. Stat. ch. 11, § 131(1)-(5) (1984).

<sup>45</sup> LAW REFORM COMMISSION OF BRITISH COLUMBIA, REPORT ON FOREIGN MONEY LIABILITIES, LRC 65 (1983).

<sup>46</sup> See, e.g., Bowles and Phillips, *Judgments in Foreign Currencies: An Economist's View*, 39 MOD. L. REV. 196 (1976); Bowles and Whelan, *Law Commission Working Paper No. 80: Private International Law: Foreign Money Liabilities*, 45 MOD. L. REV. 434 (1982); Dufey & Mirus, Teaching Note No. 7 (U. of Mich. Law School): *The Theory of International Interest and Exchange Rates*, (1983); Dufey & Mirus, Teaching Note No. 12 (U. of Mich. Law School): *Corporate Foreign Exchange Risk: Assessment and Management*, (1985); Knott, *Foreign Judgments in Tort: An Illustration of the Wealth-Time Continuum*, 43 MOD. L. REV. 18 (1980).

<sup>47</sup> *In re Oil Spill by the Amoco Cadiz off the Coast of France on March 16, 1978*, No. 376, part 2 of 2 (N.D. Ill. Jan. 11, 1988) (LEXIS, Genfed library, Dist file)(opinion of McGarr, J.). One other case, *Chantier Naval Voisin v. M/Y Daybreak*, 677 F. Supp. 1563, 1571 (S.D. Fla. 1988), while entering a judgment in French francs, ordered immediate conversion to United States dollars. Judge McGarr did not. He directed Standard Oil to obtain the francs and pay in francs. The authors have been told that trial courts in Miami, Florida have entered judgments in foreign moneys, using the foreign rates for pre-judgment interest.

<sup>48</sup> See *supra* notes 27-39 and accompanying text.

### 3.2. *Pleading a Foreign-Money Claim*

One aspect of any remedy is a determination of whether it should be optional for a claimant to plead for a judgment in foreign money when that is the money in which the loss was suffered. While the British solution, in its Practice Directive, appears to give the foreign-money claimant the option to plead its case in sterling,<sup>49</sup> there is no guide as to when, if ever, the conversion to a foreign currency is made if the claim is not asserted in the foreign money. Presumably, if state law previously applied a breach day rule and plaintiff had the option to receive his award in a foreign currency, the plaintiff could convert that award to the foreign currency as of that date. One can be sure that if the dollar is rising relative to the foreign money, the claimant will revert to the breach day rule or to the earliest date allowed in the state in order to maximize the value of his judgment.<sup>50</sup> If, on the other hand, the dollar is falling with respect to the foreign money, the claimant will plead his claim in terms of the foreign money. Giving the claimant this option is a "heads I win, tails you lose" solution to the "mischief" of overcompensation and undercompensation. The foreign-money claimant will, in self-interest, take the option that gives him overcompensation wherever possible. All drafts of the Act were based on the proposition that the proper remuneration to the foreign-money claimant is the deserved compensation in the money in which the loss was suffered or in which it was agreed that payment be made; no more and no less should be awarded. Consequently, section 4 of the Act provides that a foreign-money claimant must plead the proper money of the claim.<sup>51</sup> It also provides that the defendant may contest the money asserted by the claimant and allege and prove that a different money is the proper money of payment or the money of account.<sup>52</sup>

It might be desirable to give the foreign-money claimant the option

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<sup>49</sup> The Queen's Bench Practice Directive, [1976] 1 W.L.R. 83, appears to give a plaintiff an option, as it refers only in paragraph 13 to "Where the plaintiff desires . . . to enforce a judgment expressed in a foreign currency . . ." There is no provision for a defendant to turn a case for pounds sterling into another currency.

<sup>50</sup> The jurisdiction may have adhered to the "judgment day" rule. *See, e.g.,* Shaw, Savill, Albion & Co. v. The Fredericksburg, 189 F.2d 952, 955 (2d Cir. 1951); *Sirie v. Godfrey*, 196 A.D. 529, 536, 188 N.Y.S. 52, 57 (1921); 2 J.H. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1340-41 (1935).

<sup>51</sup> A failure to plead does not mean that a pleading stating a dollar claim is subject to dismissal upon motion. An issue of fact must be asserted by an opposing party because a plain dollar claim would properly state a cause of action. Even though section 4(a) uses the permissive language "may," section 4(b) of the Act permits a third party to raise the issue that the claim is properly a foreign-money claim. The Act § 4, 13 U.L.A. 27 (Supp. 1990).

<sup>52</sup> The Act § 6(b) and comment 2, 13 U.L.A. 28 (Supp. 1990).

to avoid a dismissal of a complaint if a foreign-money claim is not asserted when it should be. A compromise in the Act permits a defendant to plead for the foreign-money judgment, even if the plaintiff pleads in dollars. Then, the proper money of the claim could be decided by the court as a threshold matter if such a preliminary decision would simplify the trial; otherwise, if there is a dispute over factual matters necessary to the determination, it can be resolved at trial.

A foreign-money claim arises, even if the obligation is to pay a sum in United States dollars, if the number of dollars is to be measured by a specified number of units of a foreign money. In such a case, the foreign money is the money of account.<sup>53</sup> A judgment should be entered for the payment of such number of dollars as would acquire the foreign money specified when payment is made, with no option to pay in the foreign money. Where a quantity of foreign money is specified as the money of payment of the contract price, section 7 of the Act requires that the specified number of monetary units in the judgment be foreign-money units. However, at the option of the debtor, payment can be made in the number of United States dollars that, on the conversion date, would have purchased the specified amount of the foreign money.<sup>54</sup>

### 3.3. *The Conversion Date*

The conversion date selected in the Act, for reasons of administrative convenience, is a bank-offered spot rate prevailing "at or near the close of business" on the business day next preceding the day of actual payment.<sup>55</sup> There is only a slight restriction on the market which the judgment debtor may use for the computation of the requisite sum of dollars or to obtain the foreign money to pay in kind. That is, the

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<sup>53</sup> An issue of contract interpretation might arise regarding whether the parties intended merely to shift currency fluctuation risks at the date of the maturity of the obligation to pay notwithstanding delays in actual payment. An analogy can be found in the law with respect to interest where the contract fixes a rate. In the field of insurance, the specified rate only applies after the maturity date until payment if the context expressly provides. See GOODE, *supra* note 14, at 83; see also *Miller v. Reading*, 369 Pa. 471, 476-77, 87 A.2d 223, 226 (1952); *Ludwick v. Huntzinger*, 5 Watts & Serg. 51 (Pa. 1842) (the legal rate applies after maturity when contract does not provide for continuance).

<sup>54</sup> The form of judgment giving a payment option to the defendant merely shifts the obligation to take dollars to the bank to be converted from the judgment debtor's money to the judgment creditor's money. The form of judgment requires that the dollars include the currency exchange commission but not a wire transfer fee unless specified by contract.

<sup>55</sup> Currency exchange publications in the daily newspapers provide this figure on the day of payment. Day-to-day variations are usually quite small, with the possible exception of weekends and holidays.

definition of “rate of exchange” limits the rate used, in the absence of agreement otherwise, to a rate prevailing in a financial market “convenient to or reasonably usable by” the party obligated to pay the judgment.<sup>56</sup> Since the differences between the markets in New York, San Francisco, Tokyo, Paris, Berlin, Zurich, and London, for example, are minor and are rapidly adjusted due to arbitrage, there is no real difference between them, except, perhaps, when the largest of transactions occurs and the parties have the option to contract for the market to be used.

### 3.4. *What is Foreign Money?*

Foreign money is defined to exclude United States dollars but to include measures of value such as Special Drawing Rights from the International Monetary Fund, European Currency Units and other composite measures of value now or hereafter created by intergovernmental agreements, whether or not the United States is a party to the agreement. The existing currency composites have not yet been issued in a form usable as legal tender. Hence, their use will be as money of account. Note that these currency composites are considered money under the Act, since the definition of money includes the words “or as a store of value”.<sup>57</sup>

### 3.5. *Exceptions to a Payment Day Rule*

Courts in England, as mentioned above,<sup>58</sup> use a conversion date other than the payment date in two situations. The first situation arises when an order is issued for legal enforcement of the judgment.<sup>59</sup> The

<sup>56</sup> Section 1(10) of the Act reads:

“Rate of exchange” means the rate at which money of one country may be converted into money of another country in a free financial market convenient to or reasonably usable by a person obligated to pay or to state a rate of conversion. If separate rates of exchange apply to different kinds of transactions, the term means the rate applicable to the particular transaction giving rise to the foreign-money claim.

13 U.L.A. 25 (Supp. 1990).

<sup>57</sup> Section 1(7) of the Act reads: “‘Money’ means a medium of exchange for the payment of obligations or a store of value authorized or adopted by a government or by inter-governmental agreement.” 13 U.L.A. 25 (Supp. 1990). This differs from the definition in the Uniform Commercial Code, § 1-201(24) (1987): “‘Money’ means a medium of exchange authorized or adopted by a domestic or foreign government as a part of its currency.”

<sup>58</sup> See *supra* note 39 and accompanying text.

<sup>59</sup> The English procedure for enforcement of judgments differs from that used in United States state courts or federal courts, where the attorney for the judgment creditor issues a praecipe to the sheriff at any time after judgment. The use of a certificate to show the amount of local money required, however, is the same in both countries.

other refers to foreign-money claims against, as the British put it, "a company being wound-up,"<sup>60</sup> in a voluntary<sup>61</sup> or involuntary proceeding.<sup>62</sup> In section 8 of the Act it was decided that the section would follow British precedent and use the date of the order or other action initiating the proceeding.<sup>63</sup> Situations other than judicial proceedings are included in the definition of the term "distribution proceeding."<sup>64</sup> This was done because of the necessity for providing a date early enough to allow all claims to be evaluated in the same currency in order to determine the percentage shares of an insufficient fund, or, perhaps, to determine if the fund is, in fact, insufficient in the first place and to avoid a constant recalculation of aliquot shares. If there are several classes of distributees, a situation can develop in which a foreign-money claimant is undercompensated in the foreign money due to the time-lag between the conversion date in distribution proceedings and the actual payment date. This may occur despite the fact that all domestic money claimants are paid in full and a surplus in the fund exists for lower priority claims.<sup>65</sup> When this happens, the issue is whether the administrative convenience of completing the distribution overrides the policy in favor of full compensation for the foreign claimant.<sup>66</sup> The Drafting Committee, after considering this subsidiary issue,

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<sup>60</sup> GOODE, *supra* note 14, at 137-38.

<sup>61</sup> The conversion date for corporate dissolutions would be that of the Director's resolution. For both corporate and individual debtor situations, or other voluntary proceedings, the date would be that of the actual document of assignment for the benefit of creditors.

<sup>62</sup> This would cover state or federal equity receiverships, based on diversity of jurisdiction, state insolvency proceedings for state banks and insurance companies, as well as for business and non-profit corporations. A state law does not necessarily affect federal bankruptcy proceedings or insolvency proceedings for national banks. It is questionable whether the conversion date should differ between state and national banks. If the rule in federal courts is based on the state law "breach day" and "judgment day" rules, then, when a state adopts the Act, a modification of the federal rule should follow.

<sup>63</sup> The decision was made at the December 2-4, 1988 drafting meetings and has not been altered.

<sup>64</sup> Section 1(4) of the Act defines "distribution proceeding" as:

[A] judicial or nonjudicial proceeding for the distribution of a fund in which one or more foreign-money claims is asserted and includes an accounting, an assignment for the benefit of creditors, a foreclosure, the liquidation or rehabilitation of a corporation or other entity, and the distribution of an estate, trust, or other fund.

13 U.L.A. 24 (Supp. 1990).

<sup>65</sup> Again, the conversion date would have to be different, as several months to a year could elapse between initiation of a proceeding and a final distribution. A similar problem exists whenever damages are claimed based on an exchange loss occurring after a conversion and before an actual payment. This matter is not covered completely by the Act, however.

<sup>66</sup> State law cannot control proceedings under federal statutes unless the federal

decided that it should be resolved pursuant to the Commissioner's standard section on the application of supplementary general principles of law,<sup>67</sup> a position taken by the Act.

In accordance with the policy against undercompensation or overcompensation of a foreign-money claimant, the Act does not follow the apparent British precedent of a final conversion when an order for enforcement of a judgment is issued. Procedure in the United States does not call for such an order, either. For example, a praecipe for execution is issued by the attorney for the judgment creditor and often does not result in the receipt of any money at all. Yet, the officers carrying out the execution process should be protected from claims for levying on or selling too much or too little of a debtor's assets. Hence, section 11 of the Act provides such protection by requiring an affidavit or certificate from the appropriate counsel or bank officer stating the rate of exchange on the banking day before the date of the request for issuance of process, the application for a bond, or the exchanging of costs. Moreover, the affidavit or certificate is also required to state the amount of United States dollars which will buy the units of foreign money expressed in the judgment.<sup>68</sup> Any claims for damages for seizure or restraining excess assets based on the amount stated in the certificate or affidavit will lie against a person executing an affidavit or certificate in bad faith which contains a gross overstatement of the needed amount of dollars.<sup>69</sup>

Another instance where foreign-money claims will be converted to dollars at a conversion date not immediately preceding the receipt of money is provided in section 7(g) of the Act; that is, the case of a successful claim and a successful defense, set-off or counterclaim in the same action, any one of which is a foreign-money claim. In this situation, the court will set-off the smaller claim against the larger one by converting all of the claims into United States dollars at the exchange

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statutes refer to state law for control of the matter. Hence, the Bankruptcy Code may preempt the statute. Of course, where the "breach day" rule prevails, the conversion made on that date would apply in bankruptcy.

<sup>67</sup> Section 13 of the Act states: "Unless displaced by particular provisions of this [Act] the principles of law and equity, including the law merchant, and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating causes supplement its provisions." 13 U.L.A. 33 (Supp. 1990).

<sup>68</sup> Section 11 of the Act provides that the amount so stated does not control the amount to be entered on the judgment as a payment. 13 U.L.A. 32 (Supp. 1990). A conversion of any money *received* as a result of an execution sale or other process is made as of the day before the sheriff receives the cash or its equivalent. This is consistent with the Ontario Statute, *supra* note 44, provided that receipt of funds by a court officer constitutes receipt by the judgment creditor.

<sup>69</sup> This follows the general principle of liability for acts done in bad faith.

rate prevailing on the day before the set-off. Then, the court will, if necessary, convert the remaining dollars of the larger recovery back into the foreign money at the same rate used for the initial conversion.<sup>70</sup> Obviously, if all claims are in the same money, the set-off will be accomplished without a conversion.

### 3.6. *Difficult Issues: The Approach*

Two issues of great difficulty are those of incidental and consequential damages and of the rates of interest to be applied for pre-judgment and post-judgment interest. After much consideration, the Act leaves such matters to the rules of substantive law applicable to the determination of damages.<sup>71</sup>

#### 3.6.1. *Incidental and Consequential Damages*

The determination of incidental and consequential damages is left to the substantive law governing the issue, as determined by the conflict of laws rules of the forum state. Prior drafts of the Act proposed unsatisfactory solutions to the question of how to calculate damage. One solution, labeled "incidental damages," recommended that the fees for a post-default forward exchange contract or option be recoverable in order to preserve an exchange rate existing on or after the breach date.<sup>72</sup> A second proposed solution, also labeled "incidental damages," suggested recovery of post-default interest. To prevent double recovery, section 9(a) of the then-proposed draft provided that recovery of loan interest under that section shall be in lieu of any recoverable pre-judgment interest on the amount of the loan from default to the earlier of

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<sup>70</sup> See the Act § 7(e), (g), 13 U.L.A. 29 (Supp. 1990). For example, in a suit for a price specified to be paid in Swiss francs, the American buyer might have an indemnity claim for warranty damages suffered in Japanese yen. Hence, a conversion of one of the moneys to another must be made so as to permit a set-off. *Id.*

<sup>71</sup> Section 9 of the Act does this specifically. 13 U.L.A. 30 (Supp. 1990). The text of the section is set forth *infra* note 127. Since the Act is silent with respect to damages, the state's conflict of laws rules apply.

<sup>72</sup> Protective arrangements made before default such as insurance or futures contracts are not covered, but the costs of effecting a conversion from United States dollars are incurred by the judgment debtor who elects to pay in the foreign money or must be included in the amount of United States dollars if the judgment debtor elects to pay in the home currency. See, e.g., *United Equities Co. v. First Nat'l City Bank*, 84 Misc. 2d 441, 374 N.Y.S.2d 937 (N.Y. Sup. Ct. 1975) (futures contract for Japanese yen, seller breached, buyer recovers amount it would have received on resale of yen at, or shortly after, the delivery date less what it did receive from seller) *rev'd on other grounds*, 52 A.D.2d 154, 383 N.Y.S.2d 6 (1976). The ability to "hedge" for some part of the gap between judgment and actual payment might be considered a mitigation of the damages.



the repayment of the loan or the entry of judgment.<sup>73</sup> Again, the matter was left to the states to deal with pursuant to their conflict of laws rules.<sup>74</sup>

A third element of damages was labeled "consequential" and related to exchange losses incurred during the period between the breach date and the date of judgment.<sup>75</sup> The label "consequential" adds the element of "foreseeability" to the proof needed for recovery. This raised the issue of the proper interpretation of *Hadley v. Baxendale*<sup>76</sup> as recently applied in England. Three interpretations of *Hadley v. Baxendale* are possible. The first involves a price stated in the money of the country of the breaching party as in the case of *Isaac Naylor & Sons, Ltd. v. New Zealand Co-operative Wool Marketing Association, Ltd.*<sup>77</sup> In that case, the plaintiffs were sellers suing for the price of the goods sold. The buyers were English and the price was expressed in sterling. The court found that the buyers "knew or should have known" that the sellers operated in New Zealand dollars, their home currency, and that upon payment they exchanged foreign moneys into

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<sup>73</sup> Similar damage recoveries have been allowed in domestic transactions. Interest on after-default continuation of a loan was awarded as incidental damages. *Bulk Oil (U.S.A.) v. Sun Oil Trading Co.*, 697 F.2d 481 (2d Cir. 1983). Some cases, however, have classified such interest as consequential damages. See *Larsen v. A.C. Carpenter, Inc.*, 620 F. Supp. 1084 (E.D.N.Y. 1985) (recoverable); *Groppel Co., Inc. v. United States Gypsum Co.*, 616 S.W.2d 49 (Mo. App. 1981) (recoverable); *Frank B. Bozzo, Inc. v. Electric Weld of Fort Pitt Div. of Spang Indus., Inc.*, 498 A.2d 895 (Pa. Super. 1985) (recoverable). But see *S.C. Gray, Inc. v. Ford Motor Co.*, 92 Mich. App. 789, 286 N.W.2d 34 (1974) (not recoverable).

<sup>74</sup> Although the drafters did not believe a uniform provision was necessary, they wanted to insure that one state would not legislate the damage rules of another.

<sup>75</sup> A judgment does not always mean payment will be prompt. Moreover, there are problems with carrying such a damage rule beyond the judgment. A formula could perhaps be developed to address the problems of exchange loss. Article 4 of the Annex to the proposed European Convention on Foreign Money Liabilities, provides for recovery of exchange loss. See MANN, *supra* note 6, at 579.

<sup>76</sup> 9 Ex. 341 (1854). The case stated two rules, or prongs, for contract damages. The first rule covered damages "ordinarily flowing" from the breach. The second covered damages based on particular needs of which the breaching party had been made aware at the time of contracting. The second rule apparently was originally considered as based on a "tacit agreement." But in the United States today, this concept appears to have been largely abandoned in favor of a "reason to know" approach. See U.C.C. § 2-715 and comment 2 (1987). A prior draft of the Act adopted this approach, but omitted as unnecessary the damages limit placed by the U.C.C., namely, that "which could not reasonably be prevented by cover or otherwise." *Id.* § 2-715(2)(a). The normal desire of a merchant is to minimize what is at risk in litigation. The normal rules as to minimizing damages and the complexity of proof as to appropriate future contracts or options lead to the desirability of the omission. But the decision was made to leave the whole matter to the rules of the conflict of laws.

<sup>77</sup> [1981] 1 N.Z.L.R. 361. See also GOODE, *supra* note 14, at 143 (citing G.E.F. Rickett, *Contract Damages for Exchange Losses, a New Zealand Development*, [1982] L.M.C.L.Q. 566).

their home currency. As the pound sterling declined with respect to the New Zealand dollar after the breach date, the trial court awarded not only prejudgment interest for the loss of use of money,<sup>78</sup> but also the exchange loss. This was calculated by subtracting the New Zealand dollars eventually obtained from the number of New Zealand dollars that would have been obtained had the sterling been paid when due.

The significance of the case appears to be that the price was payable in the home money of the buyer and the exchange loss was suffered in the home money of the seller. The trouble with a foreseeability test is that some things are more foreseeable than others. For example, it is foreseeable that a seller of agricultural products would, on the date payment is due, transfer receipts into the home money. In contrast, the foreseeability of the need for an international corporation to transfer money of a country in which it has substantial operations to money of the country of its home office is more remote, and may create issues for the triers of fact.

The second interpretation of *Hadley v. Baxendale* involves the money of a third country and is illustrated by *Ozalid Group (Export), Ltd. v. African Continental Bank, Ltd.*<sup>79</sup> That case involved an English seller, a Nigerian buyer, and a sale of machinery and equipment priced in United States dollars for which the defendant bank had issued its letter of credit. The payment was delayed. Ozalid Group (Export) Ltd. engaged in international trade and kept bank accounts in United States dollars in England. As the currency control laws of the United Kingdom required that "excess" dollars<sup>80</sup> be converted to sterling, Mr. Justice Donaldson ruled that the defendants "knew or should have known" of the transfer practices of the sellers. Apparently, the Bank of England's instructions required the exchange of excess dollars to be made at the end of the month. But, as the dollar was falling relative to the pound sterling, Mr. Justice Donaldson accepted a calculation of the exchange loss which allowed for the recovery of the difference between

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<sup>78</sup> Where two countries are involved, it is of considerable significance to determine whether the function of prejudgment interest is to compensate a successful plaintiff for the loss of use of money using the rate of plaintiff's country, or to wrest from an unsuccessful defendant his gains from retention of payment, in which case the rate used should be that of the defendant's country.

<sup>79</sup> [1979] 2 Lloyd's Rep. 231. Mr. Justice Donaldson indicated that the defendant had advanced no excuse for delaying payment on the letter of credit from October 5, 1977 to December 12, 1977.

<sup>80</sup> The exchange control laws permitted plaintiffs to have "foreign currency hold accounts," but they were obliged to sell "excess dollars" not later than the last working day of the month in exchange for sterling. The instructions of the Bank of England defined the term "excess dollars" as: "Funds in the account except those needed to make payments known to be due in the currency of the account within the ensuing month." [1979] 2 Lloyd's Rep. at 233.

the pounds recoverable on the contractual due date and those recoverable on the date of the actual payment.<sup>81</sup> Additionally, the calculation included the interest on the full recovery between the two dates, and on the exchange loss thereafter until the date of judgment.<sup>82</sup> Two elements of incidental damages were also recovered.<sup>83</sup> As in *Isaac Naylor*, the conversion was to the recipient's home currency, and foreseeability was enhanced by the legally required conversions.<sup>84</sup> The third interpretation of *Hadley v. Baxendale* can be read as casting considerable doubt on the other two, or it can be interpreted narrowly.<sup>85</sup> The case illustrating this scenario should be carefully analyzed, as the court issuing the opinion was the House of Lords. The case, *President of India v. Lips Maritime Corp.*,<sup>86</sup> involved a claim of demurrage by Greek ship owners

<sup>81</sup> *Id.* at 234. The exchange rates for those days were used instead of the last day of the month as it was felt to be foreseeable that, in view of the decline of the dollar with respect to sterling, plaintiffs would not have waited until the end of the month to convert. *Id.* at 233.

<sup>82</sup> Interest was based on 1% above the rough average Minimum Bank Lending Rate for the period. The case is a bit unusual as plaintiff had been paid the full number of dollars before the suit was instituted; but the exchange loss was 2,987.17 pounds sterling. *Id.* at 234.

<sup>83</sup> The two items of incidental damages were a fee paid to plaintiff's bank for urging payment, and a fee paid to plaintiff's solicitors. *Id.*

<sup>84</sup> Mr. Justice Donaldson rather cavalierly assumed that the entire payment would be converted rather than finding what percentage of the account was kept in dollars and not converted and awarding the exchange loss on the remaining percentage. The defendants, however, had submitted no oral evidence. The learned judge fixed the damages from "notional sales." *Id.* at 233.

<sup>85</sup> See, e.g., Mann, *Recovering Currency Exchange Losses*, 104 LAW. Q. REV. 3 (1988).

<sup>86</sup> [1987] 3 W.L.R. 572. The prior course of the case bears significantly on the result. Defendants had admitted and paid substantial demurrage. The arbitration umpire found that an additional four days and one hour were due, or \$24,250. The pound, at the bill of lading date (July 8, 1980) was at \$2.37, which is equivalent to 10,232 pounds sterling. The arbitrator also found that the Greek ship owner used United States dollar accounts. Hence, to repurchase the \$24,250 on subsequent dates, the ship owners would need:

*Pounds at Market*

Bill of Lading Date \$2.37	=	one pound 10,232
Award 2/22/83 \$1.54	=	one pound 15,746
Q.B. Final 4/3/85 \$1.21	=	one pound 20,209
H.L. 7/29/87 \$1.60	=	one pound 15,156

The arbitrator did not specify on which of the prongs of *Hadley v. Baxendale*, 9 Ex. 341 (1854), his award rested. The first prong deals with "general damages"; the second prong discusses "special damages." See *supra* note 76. According to Mr. Justice Staughton, the latter includes circumstances communicated at the time of contracting. The case was remanded to the umpire to determine which prong applied.

The arbitrator in *Lips* found that businessmen generally anticipated a decline in sterling with respect to the dollar; every ship owner knew that the government of India would insist on the clause; there would be a profitable change to the benefit of the charterer due to the inevitable delay of "three, four, or five months" before payment of demurrage would be made; and, the owners knew of this risk and accepted it as part of

from the charterer of the vessel. Demurrage was fixed in the charterparty at \$6,000 a day payable in British external sterling in London. Freight was also payable in British external sterling in London at the exchange rate ruling on the date of the bill of lading. Additionally, clause 30 of the charter provided that the exchange rate so determined would "also apply to other related payments/settlements including demurrage/despatch settlements under this charterparty. . . ."<sup>87</sup>

In *Lips* there was a service contract with a money of account determining the quantity of the money of payment for "discharge port demurrage"<sup>88</sup> at an exchange rate fixed as of a date that was a full voyage time before the payment date. In fact, the expected payment due date found by the umpire in arbitration was five months and three days after July 8, 1980, the bill of lading date.<sup>89</sup> But the arbitration finding as to the final amount of demurrage was not made until February 22, 1983.<sup>90</sup> An appeal was allowed on July 30, 1984, but referred the mat-

the deal. The umpire also found that the Greek ship owners operated in dollars and that this was a general practice of ship owners. Hence, the charterers "knew or should have known" of the practice. His final finding was:

Accordingly, I find that loss by the devaluation of sterling was something which was "reasonably foreseeable" by, or "within actual or assumed contemplation" of, the parties, and that such loss was "liable to result" or "a real danger," if payment at the appropriate time was not made. This case in my view comes within the second rule in *Hadley v. Baxendale*.

[1985] 2 Lloyd's Rep. 180, 186.

The findings were made sometime after Mr. Justice Lloyd's remand on July 30, 1984. On remand, Mr. Justice Lloyd cited *La Pintada*, a case which had been decided on May 24, 1984 and made the same statement about the second prong of *Hadley* as that of Mr. Justice Lloyd. [1985] 2 Lloyd's Rep. at 182. Mr. Justice Staughton, however, thought that what the charterers knew or should have known still had to be communicated to them by the ship owners in order to satisfy the second prong of *Hadley*. Hence, he believed the award was wrong in law, and, under the first prong of *Hadley*, only interest could be recovered. [1985] 2 Lloyd's Rep. at 188.

<sup>87</sup> *President of India v. Lips Maritime Corp.*, [1987] 3 W.L.R. 572, 575.

<sup>88</sup> All attorneys involved in the case "accepted" that the reasonable time for payment of demurrage or settlement of "despatch" (a reduction in charter-hire for early departure) was two months after the departure from the port on October 11, 1980, or December 11, 1980. [1985] 2 Lloyd's Rep. at 183.

<sup>89</sup> The time period includes two months' grace period which was accepted by all counsel. Justice Staughton did not discuss a possible argument that the fixed exchange rate was not intended to apply beyond the date accepted by counsel as the date payment should have been made. Regarding clause 30, he noted that it "was no doubt directed at punctual payment rather than late payment, it is in my judgment a case where the contract provides, as Lord Wilberforce said, an answer to the currency problem." *Id.* at 188.

<sup>90</sup> 90 With respect to using the terms of clause 30, two years, seven months and fifteen days after July 8, 1980, the arbitrator ruled in finding no. 15: "The provisions of clause 30 apply, for better or for worse, where the contract is correctly performed; but they do not apply to a breach. I have already found that the charterers were in breach in not making payment timeously." [1987] 3 W.L.R. at 575.

This clause of the findings is not mentioned in the Queen's Bench opinions, but

ter back to the umpire to determine which prong of *Hadley v. Baxendale* supported the award of the exchange loss.<sup>91</sup> On April 3, 1985, Mr. Justice Staughton reviewed the further findings and disallowed the exchange loss. The umpire had erroneously chosen the second prong of *Hadley*, as he had to find "any special fact communicated by the owners to the charterer which would not have been apparent to any other businessman in the same trade."<sup>92</sup> Then, with the matter resting on the first prong of *Hadley*, the court was faced with Lord Brandon of Oakbrook's prior decision that damages for a late payment of money are not recoverable if they are general damages within the first prong of *Hadley*, but may be recoverable under the second prong.<sup>93</sup>

In the *Lips* case, Lord Brandon of Oakbrook cited the *Isaac Naylor* case with apparent approval, but only in reference to the late payment of a debt. He concluded that demurrage was not a debt but damages, for which the only remedy was "the discretionary award of interest pursuant to statute."<sup>94</sup> He then ruled that the award of demur-

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was apparently accepted by the Court of Appeal. [1987] 2 W.L.R. 906, 914. It was also mentioned by Lord Brandon of Oakbrook in his speech before the House of Lords. He said: "It appears to me that this passage involves some confusion of thought." [1987] 3 W.L.R. 572, 577. The same comment applies to his Lordship's finding that non-payment of demurrage was not a breach and to his reasons for not limiting the clause to prompt payment. With respect to the latter, he said: "If clause 30 did not apply to determine the rate of exchange applicable in the case of a late payment, there was no provision for conversion in that case at all." *Id.*

The above raises the question of what role his Lordship assigns to the market rates when the contract has no applicable conversion rate.

<sup>91</sup> [1985] 2 Lloyd's Rep. 180, 183. For a description of the two prongs of *Hadley v. Baxendale*, see *supra* note 76.

<sup>92</sup> *Id.* at 186.

<sup>93</sup> *La Pintada Compania Navigacion, S.A. v. The President of India*, [1985] A.C. 104, [1984] 2 Lloyd's Rep. 9. In that case, Lord Brandon of Oakbrook said:

In my opinion the ratio decidendi of *Wadsworth v. Lyndall* [1981] 1 W.L.R. 598 that the *London, Chatham and Dover Railway* case [1893] A.C. 429 applied only to claims for interest by way of general damages, and did not extend to claims for special damages, in the sense in which it is clear that Lord Justice Brightman was using those two expressions, was correct and should be approved by your Lordships. On the assumption that your Lordships give such approval the effect will be to reduce considerably the scope of the *London, Chatham and Dover Railway* case by comparison with what it had in general previously been understood to be.

[1984] 2 Lloyd's Rep. at 21.

<sup>94</sup> [1987] 3 W.L.R. 572, 580. The exact language is:

Once it is recognised that a claim for demurrage sounds in damages rather than in debt, it becomes apparent that the two concepts, first, of a contractual date for the payment of such damages [i.e., the after two months used by the umpire], and secondly, of a claim for damages for breach of contract in not paying them by such date, have no basis in law. As I said earlier an owner's cause of action for demurrage, being one for damages, albeit liquidated damages, accrues *de die in diem* from the moment when

rage was covered by the conversion rate expressed in the contract, no matter how long after its due date the award was rendered.<sup>95</sup>

Unlike the first two cases, *Isaac Naylor & Sons* and *Ozalid Group*, the money of payment in *Lips* was not the home money of either party. The money of account, which was also the money in which the exchange loss was felt, was a foreign money used by the plaintiff to operate its business. The decision of the House of Lords, while reinstating the judgment of the Queen's Bench, specifically disclaimed approval of its reasoning. Hence, the decision can be construed to rest entirely on the interpretation of clause 30 in the charterparty specifying an exchange rate but no payment date.<sup>96</sup>

With respect to these three cases, the prior draft rested decisions relating to exchange losses in a late payment conversion on a court's conclusion as to what the payor knew or should have known under the foreseeability test. The Act addresses this problem only in a comment, since the issue is to be covered by the rules of the conflict of laws of the forum court. The comment indicates that there is no prohibition against an award for exchange losses.<sup>97</sup> There are two presumptions in the Act, the interpretation of which may be applicable only if the substantive law is covered by the law of the forum. One is that, when a contract specifies that the exchange rates are those prevailing at a date before default, it is presumed that the parties intended for that rate apply only to payments made during a reasonable period after default, not to exceed thirty days. The second presumption is that, where no specific

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the ship is detained beyond the stipulated lay days. There is no such thing as a cause of action in damages for late payment of damages. The only remedy which the law affords for delay in paying damages is the discretionary award of interest pursuant to statute.

It is to be sincerely hoped that the above language will not be interpreted as precluding variation of the stated rule by contract or usage of trade, and that his Lordship's statement that a failure to pay demurrage on time was not a breach of the charterparty can be avoided by appropriate drafting. The approach to the interpretation of clause 30 by Lord Mackay of Clashfern [1987] 3 W.L.R. at 582-83 left the way open.

<sup>95</sup> Interpreting the words "payments/settlements" following "demurrage/despatch," Lord Brandon of Oakbrook found that "settlements," as used in two other clauses in the charterparty included settlement by arbitration. *Id.* at 582. Lord Mackay of Clashfern interpreted the same in the context of clause 30. He believed that "payments" referred to "demurrage" and "settlements" referred to "despatch." According to Lord Mackay of Clashfern, the latter term applies to the rule that departure in less time than provided results in a reduction of the charter payments and hence is "settled" rather than "paid." *Id.* at 583-84.

<sup>96</sup> [1987] 3 W.L.R. at 582. See GOODE, *supra* note 14, at 83 (citing *Cook v. Fowler*, 1874 L.R. 7 H.L. 27); see also *id.* at 82 ("Interest continues to run only for the period and in the conditions prescribed in the contract. So in the ordinary way a bond, note or certificate of deposit ceases to carry interest after the specified maturity date.").

<sup>97</sup> See the Act § 2 and comment, 13 U.L.A. 26 (Supp. 1990).

exchange rate is stated but the amount to be paid in one money is measured by a different money, the recipient of a payment bears the risk of exchange fluctuations in that different agreed money of account until payment is made.<sup>98</sup> All matters of damages are eliminated from specific mention in the Act and therefore are left to be determined by the conflict of laws rules of the forum, or, if applicable, by the forum's own general rules of damages.

Another approach to the *Lips* decision is recounted in Lord Brandon of Oakbrook's opinion (although he does not ascribe to that approach). According to that approach, the plaintiffs should have initially asserted a claim for United States dollars as the money in which the loss was felt.<sup>99</sup> This is rather a severe extension of Lord Wilberforce's approach in *The Despina R* and *the Folias*,<sup>100</sup> where the phrase was used in reference to a conversion made *before* expenditure and provable by bank records. In contrast, the *Lips* situation covers the case of a delay in payment and an anticipated conversion of money to be received of which the defendant knew or should have known.<sup>101</sup> Perhaps the only difference is the quality of the proof to be offered.

The Act contains a provision which gives the judgment debtor an option to pay a quantum of dollars calculated at the rate of exchange prevailing at the conversion date for actual payments.<sup>102</sup> This is quite different from using a contractual money of account and fixed exchange rate to determine the amount of money to be paid at the contractual due date or to determine the damages for a breach of contract.

This approach was not adopted, however. Instead, the Act takes

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<sup>98</sup> Section 5(a) of the Act provides that where the amount of the money to be paid is measured by yet another money, the amount to be paid is determined by the rate of exchange between the two monies prevailing when a payment is made or when a distribution proceeding is begun. Section 5(b) contains a second presumption which limits fixed quantity exchange rates in contracts to the maturity date of the obligation and a reasonably short period thereafter. All of the above is, of course, subject to an agreement specifying another result. 13 U.L.A. 27 (Supp. 1990).

<sup>99</sup> [1987] 3 W.L.R. 572, 577.

<sup>100</sup> [1979] App. Cas. 685, 697 (1978).

<sup>101</sup> [1987] 3 W.L.R. 572.

<sup>102</sup> Section 7 of the Act merely provides the standard option to pay in equivalent money of the country where the debt is payable. Professor Goode states: "Where payment in foreign money is to be made in England the debtor *prima facie* has the option of tendering the foreign currency itself or its sterling equivalent." *See supra* note 14, at 130 (citing *Marrache v. Ashton*, 1943 App. Cas. 311; *Adelaide Elec. Supply Co. v. Prudential Assurance Co.* 1934 App. Cas. 122 (1933); *Barclays Bank Int'l, Ltd. v. Levin Bros. (Bradford) Ltd.*, 1977 Q.B. 270 (1976)).

However, usage can rebut the presumption that legal tender can be used. Since a current exchange rate is used in the Act, the burden on the creditor when dollars in the correct amount are tendered in an official bank check is nothing more than arranging a currency transfer with a bank.

no position on the matter, impliedly leaving the matter to general rules such as the forum's conflict of laws rules for the general rules of damages to be applied. In the United States, case law on the issue has not developed.<sup>103</sup>

### 3.6.2. *Prejudgment and Post-judgment Interest*

A second issue of enormous difficulty is the determination of proper interest rates for any awards of prejudgment and post-judgment interest. Determining the proper law to apply is very difficult. In addition, the economists have correctly noted that the interest rates of the country issuing a currency reflect anticipated fluctuations in exchange rates. This factor is explicitly accounted for in the price of short-term futures.<sup>104</sup> However, for short-term futures, economists and bankers use a market rate of interest which is compounded.<sup>105</sup> In contrast, both in the United States<sup>106</sup> and in some other countries,<sup>107</sup> rates of interest, at least on judgments, are often fixed statutory rates and, too often, are unchanging. In England, and in some English-influenced jurisdictions, although courts have discretion to fix an appropriate interest rate, there is a prohibition against compounding.<sup>108</sup> Since 1970, several states in the United States, the federal government of the United States, and the

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<sup>103</sup> No section expressly so provides, hence the usual rules would apply under section 13 of the Act (Supplementary General Principles of Law) providing for the application of the principles of law and equity, etc. "unless displaced." 13 U.L.A. 33 (Supp. 1990). In the situations discussed in the text accompanying this note, there is no displacement.

<sup>104</sup> For short-term futures, bankers, as well as economists, compute the price or discount based on the difference in interest rates. However, they use current short-term market rates, not the statutorily fixed rates used for both prejudgment and post-judgment interest in legal proceedings. Even in the United States states which have flexible rates, the percentage chosen is fixed for a given period, often only changing annually. For example, for the 1989 calendar year, New Jersey used the average rate earned on its funds for the fiscal year ending June 30, 1988. Thus, rates current from July 1987 to June 1988 influenced the rate for January to December 1989. The result is scarcely a current yield.

<sup>105</sup> See, e.g., Bowles and Whelan, Book Review, 60 CANADIAN B. REV. 805 (1982) (reviewing LAW REFORM COMMISSION OF BRITISH COLUMBIA, FOREIGN MONEY LIABILITIES, WORKING PAPER NO. 33 (1982)).

<sup>106</sup> Only Colorado and Kentucky allow compounding of interest in all cases. The United States permits compounding in non-diversity cases. See Marvell, *How Should We Set Interest Rates on Judgments of Appeal?*, JUDGES J., 36, 38 (Summer 1988). Both of these sources found that jurisdictions apply fixed rates, with the exception of fifteen which use indexed rates.

<sup>107</sup> Foreign country information on this point is hard to ascertain, but the available information indicates a variance in fixed rates between countries. England uses a discretionary rate for prejudgment interest and a rate fixed by court rules for post-judgment interest pursuant to 35A of the Supreme Court Act 1981, as amended by 15(1) of the Administration of Justice Act 1982. GOODE, *supra* note 14, at 85.

<sup>108</sup> See *President of India v. Lips Maritime Corp.*, [1987] 3 W.L.R. 572, 581.



District of Columbia have made ninety-six legislative changes in the interest rates on judgments, fifty-five of which occurred between 1979 and 1982.<sup>109</sup> Fifteen changes occurred from 1983 to 1987, and most of these seem to have effected a lowering of the previously increased rates.<sup>110</sup> Fifteen more recent statutes have adopted variable rates.<sup>111</sup> Eleven of these follow the interest rates on issues of United States securities (often adding approximately one percent) while still fixing a rate for a year, despite changes in the index. Seven of the states with variable rates use the fifty-two week Treasury bill rate. In four of these seven states the interest rates change monthly; the remaining three change annually. But, once the rate is selected, it apparently applies until the judgment is paid.<sup>112</sup>

Not much has appeared in English about foreign prejudgment and post-judgment interest rates. What has been found, however, indicates that rates are considerably lower than those found in most of the state statutes in the United States. As of January 1988, fixed rates in the United States varied from a low of 6% in Pennsylvania to a high of 15% in New Mexico.<sup>113</sup> In comparison, the Federal Republic of Germany has a statutory rate of 4% on civil cases and 5% on commercial cases. Similarly, as a general rule, Japan's prejudgment and post-judgment interest rate is 5%.<sup>114</sup> Hong Kong applies a rate equal to 1% over the mean weighted prime rate, as posted by the Hong Kong & Shanghai Bank.<sup>115</sup> Indonesia has a 6% rate,<sup>116</sup> Singapore an 8% rate,<sup>117</sup> and the Philippines, 12% running from "judicial demand."<sup>118</sup> In the United States, and in all countries that have made the relevant information available, a rate for prejudgment and post-judgment interest fixed by contract will often be used in place of the statutory rate. However, some jurisdictions place limits on the contract rate. For example, Texas has a minimum rate of 10%, variable up to 20% if the Treasury bill rate is over 10%.<sup>119</sup>

Many states use the judgment rate or a contract rate expressed to

<sup>109</sup> See Marvell, *supra* note 106, at table 1.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at table 3.

<sup>113</sup> *Id.* at table 2.

<sup>114</sup> Letter from Professor Fredrich Kübler, University of Frankfurt to Fairfax Leary (discussing West Germany); Letter from Professor Charles Mooney, University of Pennsylvania Law School to Fairfax Leary (discussing Japan).

<sup>115</sup> Letter from Hugh Verrier, attorney for White & Case (written from Singapore) to Fairfax Leary.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Marvell, *supra* note 106.

continue beyond maturity in order to calculate prejudgment interest. Among the states that do not follow this method, there is no set pattern for determining prejudgment interest. For example, the Alabama post-judgment rate is 12% or the contract rate, but the prejudgment rate is 8%.<sup>120</sup> In contrast, Pennsylvania's post-judgment rate is 6% but the prejudgment rate is 10%, except in special cases. In 1989, Pennsylvania amended its rules of civil procedure to use the prime rate for damages.<sup>121</sup> Also, in many states, prejudgment interest is awarded only for liquidated amounts or for damages that are an ascertainable sum certain. The date when prejudgment interest begins to accrue also varies among the states. Some states calculate them from the date the cause of action arose, others from thirty days after notice of the claim was given, and still others from the date of the service of process. Some states provide that offers of settlement must be made and threaten that penalties will accrue against the party refusing the offer if litigation continues and that party does not ultimately recover an amount exceeding the settlement offer. In Pennsylvania, the recovery must exceed the offer by at least twenty-five percent.<sup>122</sup> Hence, there are a myriad of rules among the states relating to the proper rate of interest to apply. To complicate matters, section 144 of the Second Restatement of Conflict of Laws treats the rates of interest to be allowed as matters of substance to be determined by the proper law of the case. In contrast, some writers treat the matter of the rate of interest as a rule of procedure to be determined by the law of the forum.<sup>123</sup>

<sup>120</sup> ALA. CODE § 8-8-1, -10 (1975); see also Burgess Mining and Constr. Corp. v. Lees, 440 So. 2d 321, 338 (Ala. 1983).

<sup>121</sup> See PA. STAT. ANN. tit. 42, § 238(a)(3) (Purdon Supp. 1989) (the prime rate used would be the one listed in the first edition of the Wall Street Journal for that calendar year, plus one percent, not compounded).

<sup>122</sup> See Wilson, Bosco, & Malone, *Prejudgment Interest in Personal Injury, Wrongful Death and Other Actions*, 30 Trial Law. Guide 105 (1986).

<sup>123</sup> See CHESHIRE & NORTH, *PRIVATE INTERNATIONAL LAW* 96-97 (11th ed. 1987) (citing *Shell Tankers (UK), Ltd. v. Astro Comino Armadora, S.A.*, [1981] 2 Lloyd's Rep. 40, 45-47):

The currency of the proper law . . . may be different from that of the currency of account, the currency of the loss and the currency of the forum . . . . If the rate of interest is governed by the *lex fori*, this means that, in England, the court has a discretion as to the rate and . . . prima facie, interest should be awarded at the rate applicable to the currency of the judgment. This might not be possible if the proper law of the contract governed the rate and the proper law had a fixed rate.

See also *Miliangos v. George Frank (Textiles) Ltd.* (No. 2), 1977 Q.B. 489, [1976] 3 All E.R. 599. This prima facie rule was displaced in *Helmsing Schiffahrts G.m.b.H. & Co., KG v. Malta Drydocks Corp.*, [1977] 2 Lloyd's Rep. 444.

Where the interest statute, as in England, confers discretion on the court with respect to the rate of interest payable on the judgment, the judgment can be awarded in foreign currency. CHESHIRE & NORTH *supra* at 100. The decision as to whether dam-

Section 8(b) of the October 15th, 1988 draft of the Act provided that contract rates should be followed both for prejudgment interest, if any, and for post-judgment interest. Additionally, section 8(b) provided that, in the absence of a contractual rate, the rate used should be the applicable rate of the jurisdiction whose law governs the case. Pursuant to that section, post-judgment interest would have been calculated at the rate of a one-year governmental obligation, or at the rate of the short-term governmental obligation nearest to one year. When calculating either prejudgment or post-judgment interest pursuant to this section, whether the interest should be simple or compounded would have been determined by the law of the forum.<sup>124</sup>

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ages can be awarded in a foreign currency is a procedural question. *Id.* at 102. In *Miliangos*, the judge wanted to apply a Swiss interest rate, but the Swiss borrowing rate incurred by the plaintiff was a compound interest rate and the English statute prohibited compounding. Justice Brandon ruled that whether interest was recoverable was a substantive question, while the rate to be used was a procedural matter. *See id.* at 97. But state courts in the United States are bound by either fixed rates or by indexed rates using only United States indices.

Note that the rate of interest was treated as procedural by Judge F.J. McGarr in *In re Oil Spill by the Amoco Cadiz Off the Coast of France* on March 16, 1978, No. 376, part 2 of 2, at 317, 322-23 (N.D. Ill. Jan. 11, 1988):

The discussion of prejudgment interest (and post judgment interest, later treated) begins with the assumption that both are procedural matters to be governed by the law of the forum.

. . . .

It has been the position of the court throughout that the determination of interest rates is a procedural matter and, thus, the suggestion of Amoco that the court is bound by the French statutory interest rate, is not valid . . . . The rationale of pre-judgment interest has to do with the loss by the plaintiff of the use of the funds properly claimed as indicated by the ultimate award of the court and the use by the defendant of such funds when, from the date of the events causing liability, they should have belonged to the plaintiffs. . . .

In the determination of the appropriate percentage rate of interest to be applied as heretofore described, the court, in its discretion, has a range of choices. Plaintiffs suggest the prime rate at the applicable periods; the defendant suggests the Illinois statutory rate of five percent.

This court notes recent legislation on the subject of post-judgment interest applicable in federal courts, and has utilized the same rule both for pre-judgment interest and post-judgment interest.

*Id.* at 322-23. In *Amoco*, the judge applied "the rate of 7.22% compounded annually." *Id.* at 324. Amoco's counsel has orally informed the authors that the difference between the prime rate suggested by France and the compounded rate awarded was approximately one-half of one percent of the award before interest was added.

<sup>124</sup> Preliminary draft of October 18, 1988 § 8, now replaced by a reference to the conflict of laws rules. The Act § 9(a), 13 U.L.A. 30 (Supp. 1990). If those rules select the law of the forum, then the interest rules of the forum will apply. However, Judge Bristow, in *Miliangos*, [1977] 3 All E.R. at 603, notes that DICEY & MORRIS, *THE CONFLICT OF LAWS* 866 n.166 (9th ed. 1973) states:

[T]he liability to pay interest, and the rate of interest payable in respect of a debt, e.g. in respect of a loan, is determined by the proper law of the

In the absence of satisfactory proof of the foreign law, the draft attempted, in the interest of uniformity, to provide the same rule for calculating prejudgment and post-judgment interest as that specified in the 1988 federal statute.<sup>125</sup> This approach seemed to satisfy few, however. The economists, by showing that interest rates varied with expected fluctuations in exchange rates, seemed to calculate interest by using the market rates for the country corresponding to the money in which the judgment was to be entered, compounded annually.<sup>126</sup> A reference to post-judgment interest rates under the law of the country issuing the money of the claim is feasible in unitary countries. This is not possible in federal states such as Canada or Australia, or, for that matter, in the United States of America, because the money is federal and the judgment interest rates are matters of state or provincial law.

The Act states that prejudgment interest should be determined in accordance with the forum's principles of the conflict of laws.<sup>127</sup> Although the economists would probably not support this, many others

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contract under which the debt is incurred, e.g., by the proper law of the contract under which the loan was made. The editors have now come to the conclusion that this rule should also apply to interest awarded by the court by way of damages, that is to achieve *restitutio ad integrum* where a contract has been broken which did not of itself provide for interest to be payable in case of a breach. Previously it had been thought by the editors that the award of such damages, being a matter of procedure, would be governed by the *lex fori*.

*Id.* Yet, under the English procedure, Judge Bristow found Swiss interest rates to be appropriate.

<sup>125</sup> 28 U.S.C. § 1961 (1988). The statute provides in pertinent part that:

(a) Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. . . . (b) Interest. . . shall be compounded annually.

<sup>126</sup> See generally Bowles & Whelan, *supra* note 105.

<sup>127</sup> Section 9 of the Act reads as follows:

(a) With respect to a foreign-money claim, recovery of pre-judgment or pre-award interest and the rate of interest to be applied in the action or distribution proceeding, except as provided in subsection (b), are matters of the substantive law governing the right to recovery under the conflict-of-laws rules of this State.

(b) The court or arbitrator shall increase or decrease the amount of pre-judgment or pre-award interest otherwise payable in a judgment or award in foreign-money to the extent required by the law of this State governing a failure to make or accept an offer of settlement or offer of judgment, or conduct by a party or its attorney causing undue delay or expense.

(c) A judgment or award on a foreign-money claim bears interest at the rate applicable to judgments of this State.

would. Those not advocating for this position thought it would enhance the chances of legislative enactment of the Act. The prejudgment and post-judgment interest problem would thus remain for a later uniform law addressed only to these issues.

### 3.7. *Miscellaneous Issues*

The Act also contains provisions detailing the treatment of judgments of other jurisdictions and the effect of currency revalorizations. Moreover, the Act provides for the enforcement of judgments of sister states exactly as entered in the sister states, even if a foreign-money claim is involved.<sup>128</sup>

The effect of currency revalorizations, where the issuing government provides a rate of exchange between the new and the old, is covered in section 12.<sup>129</sup> The Act attempted to incorporate a section controlling cases of complete repudiation, but the drafting committee decided to omit such a section, as in practically all instances the matter will be handled through diplomatic channels or by the use of the equity powers of the court.<sup>130</sup>

## 4. THE TRUE REASON FOR THE REMEDY

The true reason for the remedy<sup>131</sup> is the basic policy underlying Anglo-American law: The injured or aggrieved party should be placed in the position that the party would have been in had the injury not been sustained or had the contract been fully performed.<sup>132</sup> The tort victim should be reimbursed for injuries in the money in which the injury was actually sustained. Even if repairs or personal medical ex-

<sup>128</sup> See § 10 of the Act. 13 U.L.A. 31 (Supp. 1990). Subsections (a) and (b) cover the entry of truly foreign judgments. With respect to sister states, the rule of subsection (c) is thought to be required by the "full faith and credit" clause of the United States Constitution. U.S. CONST. art. IV, § 1.

<sup>129</sup> The Act § 12, 13 U.L.A. 32 (Supp. 1990). Mann calls it a "recurrent linking." See *supra* note 6, at 44 n.92 (quoting KNAPP, STATE THEORY OF MONEY 21, (Lucas & Bonar trans. 1924)).

<sup>130</sup> In some cases, courts have determined that a particular party had assumed the particular risk of money devaluations. See, e.g., *Ngoc Quang Trinh v. Citibank, N.A.*, 850 F.2d 1164 (6th Cir. 1988) (risk assumed by Vietnamese depositor); see also *Shanghai Power Co. v. Delaware Trust Co.*, 316 A.2d 589 (Del. Ch. 1974), *aff'd in part and rev'd in part sub nom.* *Judah v. Delaware Trust Co.*, 378 A.2d 624 (Del. 1988) (debenture holder to assume risk of currency repudiation under the trust indenture, but preferred stockholder given a share in settlement obtained through diplomatic negotiations. Power company was a Delaware corporation. A common stockholder was held not to be entitled to the entire settlement).

<sup>131</sup> See *supra* notes 40-130 and accompanying text.

<sup>132</sup> This is often termed the principle of *restitutio in integrum*. BLACK'S LAW DICTIONARY 1313 (6th ed. 1990).

penses were originally paid in a particular money, if it can be shown that a different money had been used to obtain the particular money used for payment, it is that different money that is considered the proper money of the claim in which the judgment should be entered.<sup>133</sup> For example, suppose two Greek-owned ships collided off the port of Shanghai and the ship not at fault obtained emergency repairs in Shanghai, further repairs in Tokyo, and final repairs in San Francisco. Three moneys were used to pay for the repairs—Chinese yuan, Japanese yen, and United States dollars—but the managers in each case obtained the funds used from a managerial bank account in Swiss francs located in Zurich. Thus, the money of the claim would be Swiss francs in order to reimburse the Zurich bank account for the money spent, including the exchange fees incurred.<sup>134</sup>

The first United States reported case proposing a foreign-money judgment was the decision entered on January 11, 1988 by Judge Frank J. McGarr in the United States District Court for the Northern District of Illinois.<sup>135</sup> The case involved claims for compensation by French claimants for damage done by oil spilled when the tanker "Amoco Cadiz" was breached on rocks off the coast of France. The recoverable damages exceeded 250,000,000 French francs with prejudgment interest from December 31, 1979. The opinion stated: "In summary, the judgment is in francs and Amoco must pay it in francs."<sup>136</sup> The core of the judge's reasoning was as follows:

In ordinary circumstance, the court would regard francs and dollars as merely separate measures of a single value and the judgment in francs should be translatable into dollars and a judgment in dollars into francs, without loss or fiscal consequence to either party. The dramatic recent variance in the exchange rate interjects an unfortunate element into this

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<sup>133</sup> Actually, the form of judgment suggested by § 7 of the Act gives the judgment debtor the option of paying in the specified foreign currency or in a number of dollars that, on the banking day before the day of payment, would purchase the requisite quantity of the specified foreign money, as increased by the specified rate of judgment interest. 13 U.L.A. 29 (Supp. 1990).

<sup>134</sup> The facts are taken from *The Despina R*, [1979] App. Cas. 685, except that Swiss francs are substituted for the source of the money used to buy the other moneys.

<sup>135</sup> *In re Oil Spill by the Amoco Cadiz Off the Coast of France* on March 16, 1978, No. 376, part 2 of 2 (N.D.Ill. Jan. 11, 1988). A minor part of the judgment was entered in pounds sterling. Damages awarded totalled 252,837,825.12 French francs. Prejudgment interest was awarded pursuant to 28 U.S.C. § 1961 (1988) at 7.22% interest compounded annually from December 31, 1979. *Id.* at 323-24. On the day of the award, this amount plus interest equaled approximately \$85,000,000. The award was later increased to some extent after post-trial motions. As of this writing, judgment has not been formally entered.

<sup>136</sup> *Id.* at 311.

computation, with which the court must deal.

. . . .

It is the conclusion of the court that France suffered its loss in francs, paid its damage claims in francs, proved its case in francs, and has a judgment in francs, however and at whatever expense is required to obtain francs. . . . In summary, the judgment is in francs and Amoco must pay it in francs.<sup>137</sup>

The judge's statement about a single value expressible in either United States dollars or French francs without fiscal consequences is correct at any given instant in time. But, given the time-lags between the date of expenditure, the date of the determination of damages, and the date of actual payment, the single value existing on an expenditure date can become two very different values at the later dates.<sup>138</sup> The issue is: Which party should bear the risks of the external fluctuations in exchange values in a currency foreign to one of the parties (since the nominalistic principle of each money prevents consideration of internal changes in the value of domestic money)?<sup>139</sup> In cases sounding in tort, the money in which the loss was ultimately felt should be the determining factor. Contract cases are more complicated as it must first be determined which party (either by express contract terms, by course of dealing, or by trade usage) has assumed the risk of changes in the external value of the money.<sup>140</sup> The determination of which party should bear the risk of external fluctuations in exchange values yields what the Act calls the "money of the claim."<sup>141</sup>

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<sup>137</sup> *Id.* at 309-11.

<sup>138</sup> Compare the fluctuations in the value of the pound against those of the dollar noted in *The President of India v. Lips Maritime Corp.*, [1987] 3 W.L.R. 572. The demurrage due was \$24,250 to be converted to pounds on the bill of lading date (\$2.37 to the pound). *Id.* at 575. The value of the award calculated on the date the voyage started was 10,237.07 pounds. *Id.* at 576. The judgment creditor operated in dollars, and planned to convert all payments to dollars upon receipt. At the date of the award, 10,237.07 pounds would only buy \$15,854.98, a shortfall of \$8,395. On the date of the decision of the Queen's Bench, 10,237.07 pounds would only buy \$12,588.14, a shortfall of almost 50%.

<sup>139</sup> See MANN, *supra* note 6, chs. IV, V & VI, at 80-175. The nominalistic principal has been questioned, however. See, e.g., *id.* at ch. VI ("Methods of Excluding the Effects of Nominalism"); see also Hammond, *Compensation for the Lost Value of Money: A Canadian Proposal*, 99 LAW Q. REV. 68 (1983); Wallace, *Inflation and Assessment of Construction Cost Damages*, 98 LAW Q. REV. 406 (1982).

For a discussion of the nominalistic principle, see *supra* notes 24-25 and accompanying text.

<sup>140</sup> See *supra* note 130.

<sup>141</sup> The solution to the issue lies in determining how much of claimant's home currency would be just compensation for the claimant, and for how long defendant, by agreeing to pay in a foreign money, should be held to assume the exchange risk of a

Freedom of contract should permit the parties to assign these risks among themselves by contract. This can be done with clarity and, if so, should be accepted. The money risk can be assumed by one party up to a specified point in time, and then passed to another party. Again, if clearly done, the result should be judicially accepted. Where a payment is to be made, or a loss is suffered in a particular money, the nominalistic principle should be applied to that money, insofar as all involved parties are concerned with such a loss or payment. However, where payment is made in one money but the quantum of that money is to be measured by another money, the Act provides rebuttable presumptions as to the intent of the parties.<sup>142</sup>

The Act should be construed to suppress the mischiefs of overcompensation and undercompensation. This can be done if the courts will implement the true commercial purpose of the parties to the transaction, guided by the trade usage, course of dealing, and the presumptions in the Act.

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currency foreign to that defendant. It is possible that the risk periods might differ in tort cases from the risk periods in contract cases. This difference is not specifically stated in the Act, but could be observed when evaluating the evidence necessary to rebut the presumptions in § 5 of the Act. *See* the Act § 5, 13 U.L.A. 27 (Supp. 1990).

<sup>142</sup> Section 4(a) of the Act provides that the money agreed upon as a payment is the money of the claim for that payment only. Section 4(b) provides for the application of the money 1) used in regular dealings; 2) used by trade usage or common practice; or 3) in which the loss is felt, whichever is appropriate in the circumstances before the court. 13 U.L.A. 27 (Supp. 1990).