Exchange Loss Damages and the Uniform Foreign-Money Claims Act: The Emperor Hasn't All His Clothes

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EXCHANGE LOSS DAMAGES AND THE UNIFORM FOREIGN-MONEY CLAIMS ACT: THE EMPEROR HASN'T ALL HIS CLOTHES

RONALD A. BRAND*

In 1989, the National Conference of Commissioners on Uniform State Laws approved a new Uniform Foreign-Money Claims Act. This Act is designed to change and clarify the law regarding judgments on obligations denominated in a foreign currency. It does so by recognizing that old rules preventing judgment in a foreign currency—developed in times of a strong dollar—are inappropriate. Unfortunately, in seeking fairness for plaintiffs when the U.S. dollar is weak, the Act replaces rigid old rules with stiff new rules that fail to address the basic issue of appropriate damages for exchange rate losses. While the Uniform Act acknowledges the lessons available from England and New Zealand in their common law approach to the problem, it fails adequately to apply those lessons. This Article reviews the history of damages law (particularly in contract cases), discusses the lessons of common law change in England and New Zealand, reviews the Uniform Act, and offers an amendment that both takes account of the lessons to be learned from others' efforts and creates rules aimed at properly compensating for exchange loss damages in all situations.

TABLE OF CONTENTS

I. INTRODUCTION .......................................................... 3
II. THE TRADITIONAL HOME-CURRENCY-JUDGMENT RULE IN THE UNITED KINGDOM AND THE UNITED STATES .... 5

* Professor of Law, University of Pittsburgh. I am indebted to Professor Fairfax Leary, Reporter for the Uniform Foreign-Money Claims Act, for enlightening and enjoyable correspondence regarding the Act during the course of its development. I wish to thank Professor Edward L. Symons for helpful comments on earlier drafts of this Article. John Foster and Jacqueline Benkin provided valuable research assistance. Any errors that remain are of course my own. Portions of this Article are developed from my earlier article, Restructuring the U.S. Approach to Judgments on Foreign Currency Liabilities: Building on the English Experience, 11 YALE J. INT'L L. 139 (1985) and are used here with the permission of the Yale Journal of International Law (all rights reserved).
# LAW & POLICY IN INTERNATIONAL BUSINESS

## Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A.</strong> The Rule</td>
<td>5</td>
</tr>
<tr>
<td><strong>B.</strong> Problems with the Rule</td>
<td>7</td>
</tr>
<tr>
<td><strong>III. MILIANGOS, THE RESTATEMENT, AND THE UNIFORM FOREIGN-MONEY CLAIMS ACT AS A SOURCE OF A NEW RULE</strong></td>
<td>10</td>
</tr>
<tr>
<td><strong>A.</strong> Miliangos</td>
<td>10</td>
</tr>
<tr>
<td><strong>B.</strong> The Restatement (Third) of Foreign Relations Law</td>
<td>14</td>
</tr>
<tr>
<td><strong>C.</strong> The Uniform Foreign-Money Claims Act</td>
<td>16</td>
</tr>
<tr>
<td><strong>IV. EXCHANGE LOSS DAMAGES IN CONTRACT LAW AS THE TEST OF A NEW RULE</strong></td>
<td>18</td>
</tr>
<tr>
<td><strong>V. CURRENCY EXCHANGE LOSSES IN THE UNITED KINGDOM: FROM HADLEY v. BAXENDALE TO THE LIPS</strong></td>
<td>20</td>
</tr>
<tr>
<td><strong>A.</strong> The History of Hadley v. Baxendale and Damages for Non-Payment of Debt</td>
<td>20</td>
</tr>
<tr>
<td><strong>B.</strong> The Lips: Failure to Consider Miliangos in a Foreign-Money Claims Case</td>
<td>29</td>
</tr>
<tr>
<td>1. Reaching the Courts through Arbitration</td>
<td>29</td>
</tr>
<tr>
<td>2. The Two Decisions of the Commercial Court</td>
<td>30</td>
</tr>
<tr>
<td>3. The Court of Appeal</td>
<td>32</td>
</tr>
<tr>
<td>4. The House of Lords</td>
<td>33</td>
</tr>
<tr>
<td><strong>VI. HADLEY v. BAXENDALE AND CURRENCY EXCHANGE LOSSES IN THE UNITED STATES</strong></td>
<td>38</td>
</tr>
<tr>
<td><strong>VII. THE INAPPLICABILITY OF NOMINALISM TO A NEW RULE</strong></td>
<td>42</td>
</tr>
<tr>
<td><strong>VIII. NECESSARY DISTINCTIONS IN FORMING A NEW U.S. RULE</strong></td>
<td>46</td>
</tr>
<tr>
<td><strong>IX. THE UNIFORM FOREIGN-MONEY CLAIMS ACT: A VEHICLE FOR CHANGE IN THE UNITED STATES</strong></td>
<td>54</td>
</tr>
<tr>
<td><strong>A.</strong> The Restatement as a Catalyst for Change</td>
<td>54</td>
</tr>
<tr>
<td><strong>B.</strong> The Uniform Foreign-Money Claims Act as the Vehicle for Change</td>
<td>57</td>
</tr>
<tr>
<td><strong>C.</strong> Reasoning From a False Premise: Denial of the Foreseeability Factor as the Undoing of the Uniform Foreign-Money Claims Act</td>
<td>64</td>
</tr>
<tr>
<td><strong>D.</strong> Salvaging the Act: Some Suggested Amendments</td>
<td>71</td>
</tr>
<tr>
<td><strong>X.</strong> CONCLUSION</td>
<td>82</td>
</tr>
<tr>
<td><strong>APPENDIX</strong></td>
<td>84</td>
</tr>
</tbody>
</table>
EXCHANGE LOSS DAMAGES

The principle of the Act is to restore the aggrieved party to the economic position it would have been in had the wrong not occurred.

UNIFORM FOREIGN-MONEY CLAIMS ACT
Prefatory Note.

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.


I. INTRODUCTION

Both the United Kingdom and the United States have recognized the need to change outmoded law governing judgments on claims denominated in foreign currencies. In 1976, the House of Lords abandoned 350 years of precedent and discarded the rule that English judgments must be rendered only in sterling. Miliangos v. George Frank (Textiles) Ltd.,¹ acknowledged that the victim of a tort or the non-breaching party to a contract may sustain additional injury from the fluctuation of currency exchange rates after the injury or breach. In the United States, the Restatement (Third) of Foreign Relations Law² and a new Uniform Foreign-Money Claims Act³ provide direction for a similar change.

1. 1976 App. Cas. 443 (appeal taken from C.A.). It was Judge Bristow, in the Court of Appeal, who wrote that allowing judgment in a foreign currency, "says that a rule of English law taken for granted by the Court of Appeal and the House of Lords for some 350 years is no longer a rule of English Law." Miliangos v. George Frank (Textiles) Ltd., [1975] 1 Q.B. 487, 492 (Eng. C.A.). This assertion is borne out by Ward v. Kidswin, 82 Eng. Rep. 283 (Lat. 1661), which held that judgment in English currency was required in English courts on a claim stated in Flemish currency. For a detailed discussion of the development of both English and United States law on the home currency judgment rule, see Ronald A. Brand, Restructuring the U.S. Approach to Judgments on Foreign Currency Liabilities: Building on the English Experience, 11 Yale J. Int'l L. 139 (1985).


While Miliangos proves the need to discard discredited rules of the past, care is necessary to avoid replacement with rules that may be similarly inappropriate. Inequitable rules should be supplanted with a new system founded not upon mechanical new formulae but rather upon a clear understanding of basic principles of the law of damages. In President of India v. Lips Maritime Corp. (The "Lips"), the House of Lords demonstrated the limitations encountered when rigid rules are given precedence over basic principles. The decisions in The Lips unfortunately neglect the foreign currency issue involved, thus failing to consider the progress made in Miliangos. In contrast, the New Zealand case of Isaac Naylor & Sons, Ltd. v. New Zealand Co-operative Wool Marketing Association, Ltd. demonstrates that proper attention to basic principles can lead to just results in transactions affected by currency exchange rate fluctuations.

Past rules on foreign currency claims have not adequately addressed either post-breach or post-judgment exchange rate damages. Early drafts of the Uniform Foreign-Money Claims Act acknowledged this concern and provided rules for "incidental" and "consequential" damages. The deletion of these rules from the final Act intentionally leaves much of the substantive law of damages to the vagaries and uncertainties of the conflict of laws rules of each state adopting the Act.

The determination of damages is inseparable from consideration of the proper currency in which to grant judgment. Failure to include this determination in a uniform act on foreign-money claims renders the act of little value. This Article demonstrates that the "money of account" determination governed by section 4 of the Uniform Act improperly presumes that whenever parties to a contract allocate risk of exchange rate fluctuation during the term of the contract, they also allocate risk of exchange rate fluctuation after contract performance was to have occurred. This presumption is inconsistent with traditional contract damages law and disregards the foreseeability tests originating in Hadley v. Baxendale. It does, however, necessarily control the substantive issue of damages, thereby doing exactly what its drafters say the Act does not do. Further, to the extent the Act does not provide rules governing damages, it will encourage undesirable forum shopping based on differing conflict of laws rules.

This Article begins with a brief discussion of the rules governing judgments on foreign currency liabilities prior to the early 1970's disruption in exchange rate mechanisms. It then summarizes the legal developments occasioned by these changes in the English courts and proposals for modification of U.S. rules. In order to test these proposals, it next reviews the history and development of the rule of Hadley v. Baxendale, with particular emphasis on the issue of damages and its consideration in judgments on foreign currency liabilities. Finally, the Article challenges both the assumption that the Act does not address the substantive law of damages and the conclusion that such an omission is appropriate. Amendments to the Act are proposed that would properly address the issue of damages and discourage forum shopping. These amendments reflect four premises developed throughout this Article: (1) that the Uniform Act must state a proper rule for the determination of damages; (2) that such a rule must be founded on basic concepts of foreseeability; (3) that in applying this foreseeability test to contract cases, overemphasis of distinctions between rule one and rule two damages under Hadley v. Baxendale is likely to be counterproductive; and (4) that although the availability and amount of post-injury and post-judgment interest are important aspects of damage determinations in foreign currency cases, the confusion existing in state law on these issues mandates that they not be addressed directly in the Uniform Act, but rather left for another day.

II. THE TRADITIONAL HOME-CURRENCY-JUDGMENT RULE IN THE UNITED KINGDOM AND THE UNITED STATES

A. The Rule

The rule that a judgment can be rendered only in the currency of the forum was well-entrenched in U.K. law and remains so in U.S. law.8

While simply stated, this rule requires a second rule to determine the date when the currency in which a claim is measured is to be converted into the currency of the forum in order to state the value of the judgment.

In England, simplicity governed the choice of the conversion date, with the application of a single breach-date rule.9 Regardless of which party benefitted by the result, any exchange rate fluctuations beyond the date of breach were ignored. The rule had the advantage of simplicity and was seldom challenged so long as sterling was strong relative to other currencies and exchange rates were controlled to prevent wide fluctuation.

In the United States, federal courts, guided by Justice Holmes’ opinions in *Deutsche Bank* and *Hicks*, have viewed the conversion issue as a conflict of laws problem.10 Thus, if a liability expressed in a foreign currency is payable in the United States, federal courts tend to apply the exchange rate existing on the breach date.11 The theory behind this position is that the innocent party should receive what he otherwise would have been entitled to on the performance date in the case of a contract claim, or on the date of injury in the case of a tort claim.12 On the other hand, if a similar liability is payable or otherwise arises in a foreign jurisdiction, the federal courts will apply the exchange rate existing on the date the judgment is rendered.13 On the theory that no right of recovery exists in the United

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10. See Restatement of Conflict of Laws §§ 423, 424 (1934); see also Restatement (Second) of Conflict of Laws § 144 (1971).
11. See Hicks, 269 U.S. at 80.
12. Id.
13. Justice Holmes, writing for a majority of the Court in *Deutsche Bank*, never once spoke of the judgment day rate of exchange. Rather he spoke in terms of “when the suit is brought,” “before the suit is brought,” and “at the moment . . . the suit is brought.” 272 U.S. at 519–20. In his dissent, Justice Sutherland took issue with using “the date of judgment for determining the value.” Id. at 523. The Attorney General of the United States, responding to the Supreme Court’s decision, specifically interpreted the case as holding “that in calculating the amount of a decree in favor of the plaintiff upon a debt owing in marks in Germany the rate of exchange as of the date the suit was brought should be adopted.” Letter of Dec. 15, 1926, from the Attorney General to the United States Attorney in San Francisco, quoted in Harry L. Jones, The Spurious Judgment Day Rule for Converting Foreign Currency into Dollars When Suit is Brought Upon an Obligation Governed by Foreign Law: Deutsche Bank Filiale Nurnberg v. Humphrey Revisited, 3 Int’l Law. 277, 282 (1969) (emphasis added by Jones). Despite the language used by Justice Holmes, subsequent cases and commentators have generally cited *Deutsche Bank* for the judgment-date rule. See, e.g., Tramontana v. S.A. Empresa de Viacao Aerea Rio Grandense, 350 F.2d 468, 478 (D.C. Cir. 1965); Tillman v. Russo Asiatic Bank, 51 F.2d 1023, 1025 (2d Cir. 1931); Restatement (Second) of Conflict of Laws § 144 & cmt. c (1971); 11 Samuel Williston, A Treatise on the Law of Contracts § 1410a (3d ed. 1968); 2 Joseph Beale, A Treatise on the Conflict of Laws § 424.1 (1935); Charles McCormick, Handbook on the Law of Damages § 49 (1935). Any foundation for the judgment day rationale in the Holmes opinion is effectively rebutted in the revealing article by Jones, supra.
EXCHANGE LOSS DAMAGES

States until an action is filed on the claim, the right is first determinable in U.S. currency on the date of judgment.\(^{14}\)

Under the doctrine of *Erie Railroad Co. v. Tompkins*,\(^{15}\) federal courts sitting in diversity cases apply state law when considering the issue of converting a foreign-money obligation into a U.S. currency judgment.\(^ {16}\) Some state courts have followed the federal rule while others have adopted the single breach-date conversion rule attributed primarily to New York.\(^ {17}\) A simple date-of-conversion rule avoids the nuances of Justice Holmes’ choice-of-law analysis. Neither rule, however, provides equitable results in all circumstances.

**B. Problems with the Rule**

A simple breach-date conversion rule provides some protection for the economic expectations of the injured party when the home currency has been the stronger currency over time. The injured party similarly benefits from the judgment-date rule when the home currency has been the weaker currency. Neither, however, provides consistently appropriate results in all circumstances. For example, consider the following circumstances adapted from the case of *Competex v. LaBow*,\(^ {18}\) and used in the Prefatory Note to the *Uniform Foreign-Money Claims Act*:

An American citizen (A) owes 18,790 pounds sterling to a British corporation (BCo) suing in New York, and the pound is falling against the dollar. Due to the declining value of the pound, [the results are] as follows:

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problems are further demonstrated by consideration of the hypothetical transaction discussed in this Article. See infra notes 273-74 and accompanying text.


15. 304 U.S. 64 (1938).

16. See, e.g., *Vishipco Line v. Chase Manhattan Bank*, 660 F.2d 854, 865-66 (2d Cir. 1981); *Compania Engraw Commercial E. Indus. S.A. v. Schenley Distillers Corp.*, 181 F.2d 876, 879 (9th Cir. 1950); see also *Tramontana*, 350 F.2d at 474-77, where the court adopted the judgment-date rule for the District of Columbia as the "sounder rule." There is no Federal Rule of Civil Procedure covering the issue of judgments on foreign-money claims.


18. 783 F.2d 333 (2d Cir. 1986).

1991-1992]
If a breach-date rule is used, the creditor receives a judgment for $41,228. If, however, a judgment-date rule is applied, the judgment will be for $28,185 in the U.S. court. Thus, the judgment creditor is best off with a breach-date rule when the forum (not the foreign) currency is the stronger of the two. On the other hand, the same judgment creditor, in times of a weak forum currency, would argue for exactly the opposite result. Accordingly, under these facts, where a strict rule is applied the judgment creditor will suffer under a breach-date rule and perhaps receive a windfall under a judgment-date rule. The results are thus heavily influenced by the fluctuation of exchange rates; an external factor over which neither party has any control.

The inequities of a home-currency-judgment requirement combined with a fixed-exchange-date rule have been emphasized by the dramatic currency fluctuations occurring since the United States abandoned the Bretton Woods system of fixed exchange rates in 1971. In those courts traditionally applying a breach-date rule, parties seeking to recover during periods of a weak dollar have been forced to argue for changes in the rules. The result has been that, even in New York, with its traditional breach-date rule, courts have become more flexible in order to reach equitable results.

An example of the latitude courts have assumed in applying traditional rules can be found in the case of Teca-Print A.G. v. Amacoil Machinery.

EXCHANGE LOSS DAMAGES

Inc. The Swiss plaintiff, a machinery manufacturer, kept its books in Swiss francs and billed the defendant in Swiss francs. The New York County Supreme Court (Justice Glenn) noted that the loss resulting from the defendant's failure to pay the account stated was incurred in Swiss francs, and recognized that the small plaintiff company "had no desire to engage in foreign exchange speculation and wants to ensure that its purchasers remit an agreed-upon price to cover plaintiff's labor costs, manufacturing expenses, etc., plus a reasonable profit." Even so, the court refused to abandon the "unquestioned" home-currency-judgment rule, despite its acknowledged uncertainty as to the origin of the rule. Thus unable to grant judgment in Swiss francs, the court was limited to selecting the date to be used in determining the applicable exchange rate. The court found that, rather than necessarily creating a strict breach-date rule, prior New York cases focused on equitable results. It then awarded judgment in the dollar equivalent of the 71,224 Swiss francs due at the December 2, 1986 judgment-date rate of $0.6085 per franc, rather than the November 30, 1983 breach-date rate of $0.45 per franc.

While Teca-Print exemplifies the problems inherent in the home-currency-judgment rule, it also demonstrates that merely adjusting the date used to determine the applicable exchange rate will not overcome those problems. In Teca-Print, interest on the judgment was awarded (presumably at the New York legal rate) from the breach date. Economists have argued that fluctuations in exchange rates are accompanied by corresponding adjustments in interest rates offered on the currencies being compared. If this is correct, then accounts in the weaker dollar should have demanded a higher interest rate while accounts in the stronger Swiss franc, over the same period of time, should have attracted a lower rate of interest. By granting interest at the rate applicable to dollar accounts (assuming, perhaps inappropriately, that the legal rate is reasonably representative of market rates over the same period of time), it is arguable that the court effectively awarded the plaintiff a double recovery for the interest rate component of the exchange rate fluctuation over time.

Teca-Print illustrates a further problem arising from the failure to allow judgment in a foreign currency. Although conversion to U.S. dollars at the judgment-date exchange rate compensates the plaintiff for exchange rate losses through the course of the litigation, it does not necessarily com-

21. Id. at 536.
22. Id. at 537.
pensate for the continuing loss suffered from further fluctuations between the judgment date and the date of actual payment. In Teca-Print, the judgment was rendered on December 2, 1986. The court took more than fourteen months to decide the appropriate rate of exchange for determining the U.S. dollar value of the judgment (February 17, 1988). If the dollar remained in decline over this period, the plaintiff suffered further loss consistent with the court’s analysis, but for which the court afforded no right to compensation. On the other hand, if the dollar strengthened against the Swiss franc during this period, the plaintiff obtained a windfall as a result of the court’s attempt equitably to compensate for exchange rate fluctuations between the date of the breach and the date of the judgment.

III. MILIANGOS, THE RESTATEMENT, AND THE UNIFORM FOREIGN-MONEY CLAIMS ACT AS A SOURCE OF A NEW RULE

A. Miliangos

In Miliangos v. George Frank (Textiles) Ltd.,24 the House of Lords reconsidered the home-currency-judgment and breach-date rules in the context of a contract for yarn between a Swiss national and an English company. The contract was governed by Swiss law and called for payment in Swiss francs to a Swiss bank. The injured Swiss seller initially issued a writ claiming payment of the sterling equivalent of the contract price at the breach date. Between that date and the date of the hearing, however, sterling fell in value against the Swiss franc. The Swiss plaintiff then obtained leave to amend the statement of claim, so as to avoid both the sterling-judgment and breach-date rules and to claim the amount due him in Swiss francs. The defendants did not dispute liability but contended that the plaintiff was not lawfully entitled to judgment for a sum of money expressed in a foreign currency.

The trial court in Miliangos followed the House of Lords decision in United Railways, holding that an English court could grant judgment only in sterling.25 The Court of Appeal reversed,26 following its own decision in Schorsch Meier GmbH v. Hennin,27 which had distinguished United Railways and held that an English court could give a money judgment in a foreign currency when that currency was the currency of the contract.

24. 1976 App. Cas. 443 (Eng.).
26. Id.
Lord Wilberforce, relying on a declaration of the House of Lords in 1966, which allowed deviation from principles of stare decisis to prevent injustice and to foster "the proper development of the law," found that the home-currency-judgment rule no longer served its original purpose. Four legal considerations compelled a decision that the foreign creditor should receive full damages in foreign currency. First, the basis for Lord Reid's statement in *United Railways*—that the sterling judgment rule was "primarily procedural"—no longer held true. In times of floating currencies, foreign currency damage awards could be both more equitable and "procedurally workable." Second, the instability of exchange rates caused by the "floating" status of the "main world currencies" meant that "the search for a formula to deal with it becomes urgent in the interest of justice." Third, citing recent London arbitration awards in foreign currency and the accompanying trend of courts to uphold those awards, Lord Wilberforce stated that there were no longer any "practical objections" to enforcement of such awards, and that a situation in which a different rule existed for arbitration awards than for judicial actions on similar debts was intolerable. Finally, Lord Wilberforce found that the 1974 decision in *The Halcyon the Great,* in which the court held that the sale of a ship pursuant to compulsory liquidation of the company owning it could be made in dollars, compelled the conclusion "that the courts can easily adapt their procedure so as to give effect to foreign money claims in specie."
Following his discussion of these four legal developments, Lord Wilberforce made three general observations. The first of these equitable considerations was the idea that "justice demands that the creditor should not suffer from fluctuations in the value of sterling." Lord Wilberforce then cited Beswick v. Beswick, for the proposition that specific performance of an agreement may be ordered to pay a sum of money expressed in sterling, submitting that foreign currency is of a "more specific" character than sterling, and, therefore, at least as suitable an object for specific performance. Finally, he relied upon the 1966 declaration of the House of Lords that recognized the power to depart from a previous decision. Stating that such a departure "would not involve undue practical difficulties, [and] that a new and more satisfactory rule is capable of being stated," Lord Wilberforce declared that the Miliangos case "falls within the terms of the declaration."

The Miliangos decision was specifically limited to cases for collection of a debt where the money of account, the money payment, and the "proper law" of the contract were that of a foreign country. However Lord Wilberforce acknowledged the demand for broad application of Miliangos stating that: a period of floating currencies demands adjustment in procedural rules; the word "money" in judicial parlance must be construed in today's world to include foreign currencies; certainty is more likely obtained through judgment in a foreign currency than by application of a rule which had been consistently applied for some 350 years; and granting judgment in a foreign currency allows a court to further all of these considerations in a manner which is most likely to fairly compensate a plaintiff for the damage suffered. In subsequent cases, the requirements

38. Id. at 465.
39. 1968 App. Cas. 58, 63 (Eng.).
41. Practice Statement, supra note 28.
43. Id. Lord Wilberforce explicitly confined his “approval at the present time of a change in the breach-date rule” to “obligations of a money character to pay foreign currency arising under a contract whose proper law is that of a foreign country and where the money of account and payment is that of that country, or possibly of some other country, but not of the United Kingdom.” Id. However, a strong inference that the rule was not intended to be strictly limited is found in the statement that “[i]t is for the courts . . . to work out a solution in each case best adapted to giving the injured plaintiff that amount in damages which will most fairly compensate him for the wrong which he has suffered.” Id. at 468.
44. Id. at 463.
45. Id. at 464.
46. Id. at 459, 466.
47. Id. at 468.
EXCHANGE LOSS DAMAGES

that the money of payment as well as the money of account be foreign, and that the contract be governed by foreign law were dropped. The limitation to an action in debt was dropped when the rule was extended to damages for breach of contract and for tort in The Folias, and The

48. See George Veplings Rederi A/S v. President of India, [1979] 1 W.L.R. 59, 63 (Eng. C.A.). The court, per Lord Denning, held that there was reasonable inference that the payment should be in dollars, which was the money of account, even though the contract provided for no specific currency of payment.

49. See Barclays Bank Intl Ltd. v. Levin Bros. (Bradford) Ltd., [1977] 1 Q.B. 270, 279 (Eng.) (despite the fact that the contract was governed by English law, the court granted judgment in U.S. dollars); see also Federal Commerce & Navigation Co. v. Tradex Export S.A. (The Maratha Envoy), [1977] 1 Q.B. 324, 342 rev’d on other grounds 1978 App. Cas. 1 (appeal taken from C.A.) (Lord Denning rejected the post-Miliangos Practice Direction language that ostensibly limits the power to grant foreign currency judgments to contracts “governed by the law of some country outside the United Kingdom,” Practice Direction (Judgment: Foreign Currency), [1976] 1 W.L.R. 83, 84, and stated that “[o]nce it is recognized that judgment can be given in a foreign currency, justice requires that it should be given in every case where the currency of the contract is a foreign currency.”). In BP Exploration Co. (Libya) v. Hunt (No. 2), [1979] 1 W.L.R. 783, 842-43 (Eng.), the English courts went so far as to grant judgment in U.S. dollars even where the contract was governed by English law and did not set forth a money of account or payment.

50. Owners of m.v. Eleftherotria v. Owners of the m.v. Despina R (“The Despina R”) and Services Europe Atlantique Sud (SEAS) v. Stockholms Rederiaktiebolag SVEA (“The Folias”) (combined cases), 1979 App. Cas. 685, 686. The case involved two separate complaints. In the first complaint, Services Europe Atlantique Sud, the French charterer of a ship (The Folias) rented from the Swedish company Stockholms Rederiaktiebolag SVEA, brought suit for damages sustained when the ship’s refrigeration machinery malfunctioned while carrying a cargo of onions to Brazil. The French charterer had settled with the Brazilian cargo receiver in Brazilian cruzeiros, which had been purchased with French francs. Although the franc was neither the currency of account, nor the currency of payment, the House of Lords approved the judgment against the Swedish vessel owner in francs. After noting that the “essential question is what was the loss suffered,” Lord Wilberforce found that “it was reasonable to contemplate that the charterers, being a French corporation and having their place of business in Paris, would have to use French francs to purchase other currencies to settle claims arising under the bills of lading.” Id. at 702.
Despina R.51 "[T]he rule has been so extended that it can now be fairly regarded as a rule of general application."52

B. The Restatement (Third) of Foreign Relations Law

Section 823 of the Restatement (Third) of Foreign Relations Law reflects both the drafters' acknowledgment of judicial precedent and their dissatisfaction with that precedent. An earlier draft took an approach calling for the type of wholesale change accomplished in England by the Miliangos decision and its progeny.53 The final version acknowledges existing judicial limitations but proposes development of a rule that would allow judgments stated in foreign currencies where appropriate. The Restatement also recognizes that, a strict rule requiring judgment in a foreign currency would be no better than a rule always requiring judgment to be in U.S. dollars. Section 823 reads as follows:

§ 823 Obligations in Foreign Currency: Law of the United States
(1) Courts in the United States ordinarily give judgment on causes of action arising in another state, or denominated in a foreign currency, in United States dollars, but they are not precluded from giving judgment in the currency in which the obligation is denominated or the loss was incurred.

51. Id. at 685-86. In the second complaint, The Despina R, a Greek ship managed by a company with headquarters in New York, was damaged in a collision with another Greek ship off Shanghai. Temporary repairs were done in Shanghai and paid for in renmimbi yuan. Further repairs were made in Yokohama and paid for in Japanese yen, with permanent repairs being made in Los Angeles and paid for in U.S. dollars. The managing company used a U.S. dollar account in New York for all the payments.

Lord Wilberforce first determined that judgment in sterling would be inappropriate as it "commits [the plaintiff] to the risk of changes in the value of a currency with which he has no connection." Id. at 697. He then considered both "the expenditure currency" and "the plaintiff's currency," applying the "principles of restitutio in integrum and that of the reasonable foreseeability of the damage sustained." Id. He ultimately found that it was reasonable for the American charterer to receive all damages in U.S. dollars, which had been the currency used to purchase the yuan and yen. Id.


53. Restatement (Revised) of Foreign Relations Law § 853(1) (Tentative Draft No. 5, 1984):

Courts in the United States may give judgment on causes of action arising in another state or denominated in a foreign currency.
(a) in the currency in which the obligation is denominated or the loss was incurred;
or
(b) in United States dollars.
EXCHANGE LOSS DAMAGES

(2) If the court gives judgment in dollars in accordance with Subsection (1), the conversion is to be made at such rate as to make the creditor whole and to avoid rewarding a debtor who has delayed in carrying out the obligation. 84

While the Miliangos rule has been interpreted by the British Law Commission as requiring that judgment be in foreign currency in similar fact situations, 55 the Restatement comments suggest that judgment be in a foreign currency "only when requested by the judgment creditor, and only when it would best accomplish the objective stated in Subsection (2)." 56 Thus, while a plaintiff could not require a foreign currency judgment where it would otherwise be inappropriate, he may be able to dictate a U.S. dollar judgment when a foreign currency judgment would be most appropriate. Presumably, the choice of the conversion date would mitigate any unjust advantage otherwise gained by this choice. At best, the rule is unclear.

This lack of clarity is exacerbated by the comments. They suggest adherence to common rules of damages by stating that

"[t]he objective of civil money judgments is, in general to place the judgment creditor (i.e., the injured party) in a position as close as possible to that in which he would have been if the obligation had been carried out by the judgment debtor or if the injury had not occurred." 57

At the same time, the comments go on to suggest that when a judgment is given in U.S. dollars (which the plaintiff may apparently require), the conversion date should be the breach date "if the foreign currency has depreciated since the injury or breach," and the date of judgment or date of payment "if the foreign currency has appreciated since the injury or breach." 58 Ultimately, "[t]he court is free . . . to depart from those guidelines when interests of justice require it." 59

56. Restatement (Third) of Foreign Relations Law § 823 cmt. b.
57. Id. § 823 cmt. c.
58. Id.
59. Id.
C. The Uniform Foreign-Money Claims Act

After several years of study and development, the National Conference of Commissioners on Uniform State Laws approved the Uniform Foreign-Money Claims Act at its 1989 Annual Meeting. The Uniform Act seeks to remove any obstacles to the granting of foreign currency judgments. Like the Restatement, it encourages realization of a judgment in the currency appropriate to the case. The Act, however, does not state this as briefly as the Restatement does.

Although the Act allows judgment in a foreign currency, it is built upon the adoption of a payment-date rule. Thus, by allowing judgment in a foreign currency, the judgment creditor receives the U.S. dollar value of the foreign currency computed as of the date of actual payment. This is accomplished by defining a “money of the claim.” If the parties to the transaction have agreed that payment on the transaction is to be made in a certain currency, that currency is the money of the claim. If no such agreement exists, then the money of the claim is the money:

1. regularly used between the parties as a matter of usage or course of dealing;
2. used at the time of a transaction in international trade, by trade usage or common practice, for valuing or settling transactions in the particular commodity or service involved; or
3. in which the loss was ultimately felt or will be incurred by the party claimant.

These gap fillers “normally apply in the order stated.”

Section 6 of the Act changes existing law by providing that the plaintiff’s claim, and any defense, set-off, recoupment, or counter claim may be asserted in a specified foreign money. If a foreign-money claim is not asserted, the claim will be in U.S. dollars. If the money of the claim is contested, the matter is an issue of law for decision by the court. The money of the claim may be a currency different from that in which the

62. Id. § 4.
63. Id. § 4(a).
64. Id. § 4(b).
65. Id. § 4 cmt. 2.
66. Id. § 6.
67. Id. § 6(a).
68. Id. § 6(d) & cmt. 2.
EXCHANGE LOSS DAMAGES

loss occurs, if the money of the claim was used "to procure the money of expenditure." 69

When a money of the claim is determined, the judgment must be stated in an amount of that currency. 70 The judgment is then payable in either that foreign money of the claim or in U.S. dollars. 71 If payment is made in U.S. dollars, the exchange rate used is the bank-offered spot rate on the date immediately preceding the date on which the money is paid (the conversion date). 72 The following judgment form is provided as complying with the requirements of the Act:

IT IS ADJUDGED AND ORDERED, that Defendant (insert name) pay to Plaintiff (insert name) the sum of (insert amount in the foreign money) plus interest on that sum at the rate of (insert rate—see Section 9) percent a year or, at the option of the judgment debtor, the number of United States dollars which will purchase the (insert name of foreign money) with interest due, at a bank-offered spot rate at or near the close of business on the banking day next before the day of payment, together with assessed costs of (insert amount) United States dollars. 73

Thus, even though judgment is given in the foreign currency, the judgment debtor has the option of paying "in dollars which are, at the payment date, the practical economic equivalent of the foreign money awarded." 74 Recoveries of a plaintiff and a defendant on offsetting claims are netted at the exchange rate on the date of judgment "so that a person's exchange rate fluctuation risk continues only for the surplus in its money of the claim." 75

The conflict-of-laws rules of the state adopting the Uniform Act govern the right to and amount of pre-judgment interest. 76 That state's statutory rate determines the rate of interest on the judgment, even if the judgment is given in a foreign currency. 77 Although the drafters considered the fact that different currencies draw different interest rates, it was concluded that possible overcompensation or undercompensation resulting from the

69. Id. § 6 cmt. 2.
70. Id. § 7(a).
71. Id. § 7(b).
72. Id. §§ 1(3), 7(b).
73. Id. § 7(f).
74. Id. § 7 cmt. 2.
75. Id. § 7 cmt. 3.
76. Id. § 9(a).
77. Id. § 9(c).
statutory rate is preferable to a more complicated approach which would adjust for such differences.78

The Uniform Act respects the contracting parties’ autonomy by providing that the terms of the agreement may designate the currency to be used in a transaction.79 In order to avoid unwarranted inferences from contract terms, however, “[s]tating the price in a foreign money for one aspect of a transaction does not alone require the use of that money for other aspects of the transaction.”80 Thus, “a price stated in a particular money does not indicate, without more evidence, an intent that all damages from breach are to be in the same money.”81

While earlier drafts of the Uniform Act were more simply-stated,82 the final version opts for specificity in the rules applicable to differing types of claims. Unfortunately, the possibility of different currency payments for different aspects of a transactional breach creates confusion in the Act’s application. To understand these problems, it is useful to review basic concepts of damages law, beginning with Hadley v. Baxendale, and to consider how the recent English case of The Lips and the Isaac Naylor case in New Zealand affect the similar payment-date rule the drafters of the Uniform Act assume was adopted by the House of Lords in Miliangos.

IV. Exchange Loss Damages in Contract Law as the Test of a New Rule

Although foreign currency liabilities may arise in either contract or tort law—both of which are covered by the Uniform Foreign-Money Claims Act—the contract setting provides a particularly useful framework for evaluation of any new rule. Parties to a contract enter the transaction with specific expectations regarding one another’s conduct. Those expectations are defined, at least partially, in the contract terms, thus requiring less speculation about the parties’ intentions. In an international transaction, the currency-of-payment term allocates the risk of exchange rate fluctuation, at least for the expected duration of the contract.

It was noted earlier that the drafters of the Uniform Act considered the possibility of different exchange rates on the breach date, judgment date, and payment date.83 That consideration was limited in its failure to ac-

78. Id. § 9 cmt. 3.
79. Id. § 3.
80. Id. § 3(b).
81. Id. § 3 cmt. 2.
82. See, e.g., UNF. FOREIGN-MONEY CLAIMS ACT (Draft for Discussion Only, Jan. 10, 1989).
83. See supra note 18 and accompanying text.
EXCHANGE LOSS DAMAGES

count for all the possibilities a new rule should address. By assuming a strong home currency over the course of the transaction, the example does not provide an appropriate test of events when the foreign currency is the stronger of the two. A plaintiff will benefit from the application of a breach-date exchange rate (providing the most U.S. dollars) when the dollar is the stronger of the two currencies. On the contrary, when the foreign currency is stronger, the plaintiff will prefer the payment-date exchange rate, which is the rule suggested by Miliangos and required by the Uniform Act under such circumstances. Neither the breach-date nor the payment-date rule, however, provides proper results under both situations. While the Act allows the plaintiff to assert the claim in either dollars or the foreign currency, thus suggesting that the plaintiff (creditor) may select the rule most beneficial to him, this may not be the case where the court would find a foreign currency to be a more appropriate "money of the claim." And even if it were the case, it would be inappropriate to enrich a plaintiff that kept its accounts in the other currency and suffered no exchange loss between the breach and payment dates.

A second problem with the example in the Prefatory Note is that it begins with the breach date, which is probably the day on which the contract should have been performed by the breaching party. This starting point obscures the probability that the exchange rate the parties considered was that existing on the contract date. Thus, the relative nature of the risks assumed under the contract is clouded. By omitting the contract-date exchange rate, the example implies that the only important dates are those after the contract was to have been performed. In fact, a currency-of-payment clause in the contract would allocate fluctuation risk during the term of the contract. It would not necessarily allocate that risk after a contract's termination by non-performance. Demonstrable losses during the term of the contract are considered normal damages and can be determined by looking to the allocation of risk in the contract terms. Losses from exchange rate fluctuations after breach are considered consequential damages that flow from, and in addition to, the normal damages incurred as a result of the breach.

V. CURRENCY EXCHANGE LOSSES IN THE UNITED KINGDOM: FROM HADLEY V. BAXENDALE TO THE LIPS

A. The History of Hadley v. Baxendale and Damages for Non-Payment of Debt

The rule of Hadley v. Baxendale was stated by Baron Alderson as follows:

Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract.84

Thus, it is the foreseeability of losses, both general and special, that governs recovery in the law of contract damages. In many ways, an award of post-breach damages for exchange rate loss is comparable to an award of post-breach interest in contract cases not dealing with foreign currencies. Exchange rate loss and post-breach interest are both concerned with the value over time of the currency in which damages are measured and are both generally foreseeable risks. The issue of post-breach interest received special attention in The Lips, a case in which the courts should have paid greater attention to exchange rate loss.85 It is thus instructive to

85. See infra notes 129–69 and accompanying text.
EXCHANGE LOSS DAMAGES

review the manner in which courts have applied the foreseeability concepts of *Hadley v. Baxendale* to interest awards.

The distinction between general and special damages is not always clear as applied to damage awards for the late payment of money—whether the damages are for interest or exchange rate losses. English courts have uniformly expressed their dissatisfaction with this distinction and their belief that the law should be changed. As early as 1771, interest was awarded on a claim on a debt owed to a bankrupt, with the court stating that "when a note is due, it carries interest from that time, so likewise, when money lent becomes due, it carries interest from the day it becomes payable; but for money owing for goods sold and delivered, no interest shall be allowed." In the 1826 case of *Arnott v. Redfern*, the Court of Common Pleas considered a Scottish judgment that had awarded interest on a claim for commissions due on an agency contract. The English rule on interest and the rule's rationale were stated as follows:

By our law, interest forms no part of the original debt; it is created only by the express terms of a contract, or by implying an engagement to pay interest from the nature of the security, or the usage of the trade to which the contract relates.

This rule wisely prevents acts of kindness from being converted into mercenary bargains, and makes it the interest of tradesmen to press their customers for payment of their debts; and thereby checks the extension of credit, which is often ruinous both to tradesmen and customers.  

The *Arnott* court ultimately ordered enforcement of the Scottish judgment, including the award of interest, finding that "although it be not due *ex contractu*, a party may be entitled to damages to the amount of interest for any unreasonable delay in the payment of what is due under the contract."  

Shortly thereafter, in an action brought to recover a sum due on a promissory note, Lord Tenterden rejected the analysis provided in *Arnott v. Redfern*. In *Page v. Newman*, a claim for interest was denied because

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88. *Id.* at 552 ("Our law would not do what it professed to do, namely, provide a remedy for every act of injustice, if it did not allow damages to be given for interest where a creditor has been kept out of his debt (he using all proper means to recover it) by his debtor.").
"[i]t is a rule sanctioned by the practice of more than half a century, that money lent does not carry interest." 90

Four years later, Parliament adopted "Lord Tenterden's Act," authorizing juries to award interest for late payment of a debt. 91 The presence of a statute did not seem to make the matter any clearer. Cases continued to offer divergent opinions on the allowance of interest. 92 In Merchant Shipping Co. v. Armitage, 93 the Exchequer Chamber refused to award interest on a sum of money payable under a charterparty, determining that money payable two months after the date of the ship's report inward at the custom house, was not payable at a "time certain." 94 In Duncombe v. Brighton Club and Norfolk Hotel Co., 95 the plaintiff had delivered furniture to the defendants on the terms "one third in cash, and bills at six and twelve

90. Id. at 141. Referring to Arnott, Lord Tenterden stated:

If we were to adopt as a general rule that which some of the expressions attributed to the Lord Chief Justice of the Common Pleas in Arnott v. Redfern would seem to warrant, viz. that interest is due wherever the debt has been wrongfully withheld after the plaintiff has endeavoured to obtain payment of it, it might frequently be made a question at Nisi Prius whether proper means had been used to obtain payment of the debt, and such as the party ought to have used. That would be productive of great inconvenience. I think that we ought not to depart from the long-established rule, that interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments.

Id.

91. Civil Procedure Act, 1833, 3 & 4 Will. 4, ch. 42, § 28 (Eng.).

That upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law.

Id.

92. Lord Brandon of Oakbrook, in President of India v. La Pintada Compania, [1984] 3 W.L.R. 10 (Eng.), seems to take a position on these intervening years that would support his strict denial of interest, stating that "courts took very strict views about the various conditions which had to be fulfilled, and the requirements which had to be complied with, before a jury could, if they thought fit, award interest." Id. at 24.

93. 9 L.R.-Q.B. 99 (1873).
94. Id. at 114.
95. 10 L.R.-Q.B. 371 (1875).
EXCHANGE LOSS DAMAGES

months for the balance." \textsuperscript{96} A divided court found the case within Lord Tenterden's Act and awarded interest from the time the goods were delivered. The time of payment was found to have been "fixed by the instrument, although the exact date of payment must depend on the future event, the delivery of the goods." \textsuperscript{97}

In 1893, in \textit{London, Chatham & Dover Railway Co. v. South Eastern Railway Co.}, \textsuperscript{98} the House of Lords faced the question of whether interest could be recovered under an agreement calling for accountings and directing that "[a] payment of not less than 75 per cent shall be made on account of the balance appearing to be due on the face of the accounts so exchanged, and this payment shall be made as soon after the 1st of June as possible, and not later than the 15th of June." \textsuperscript{99} Lord Herschell ruled that interest could not be awarded because there was no debt or sum certain payable by virtue of a written instrument and further because no demand for payment had been made in writing as required by Lord Tenterden's Act. \textsuperscript{100} On the question of whether interest might be given by granting damages for the wrongful detention of the debt, Lord Herschell first expressed sympathy for the claim. \textsuperscript{101} He found it impossible to grant such an award, however, determining that from the time of Lord Tenterden's decision in \textit{Page v. Newman}, \textsuperscript{102} no attempt had been made to

\begin{itemize}
  \item \textsuperscript{96} \textit{Id.} at 371.
  \item \textsuperscript{97} \textit{Id.} at 373.
  \item \textsuperscript{98} 1893 App. Cas. 429 (appeal taken from C.A.).
  \item \textsuperscript{99} \textit{Id.} at 430.
  \item \textsuperscript{100} \textit{Id.} at 435–37.
  \item \textsuperscript{101} I think that when money is owing from one party to another and that other is driven to have recourse to legal proceedings in order to recover the amount due to him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use.
  \item \textsuperscript{102} \textit{Id.} at 437. Lord Watson also expressed a desire to reach a more equitable result, stating his "regret that I am unable to differ from your Lordships upon the question whether interest could be given in this case by way of damages." \textit{Id.} at 442. Lord Shand was even more troubled:

    I confess that I have looked with very great anxiety to the possibility under the law of England, as I have heard it argued, of giving interest in this case, for I cannot help thinking that a gross injustice is the result of withholding it. It appears to me that it is a defective state of the law that one party should be entitled to retain a large sum such as this . . . by simply creating delay in furnishing the requisite accounts and by refusing payment.

    \textit{Id.} at 443.
  
\end{itemize}
revert to the earlier, more liberal, view that interest could be awarded in such cases.¹⁰³

The statutory rule governing interest was amended in 1934 with section 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934, which provided:

In any proceedings tried in any court of record for the recovery of any debt or damages, the court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment: Provided that nothing in this section—(a) shall authorize the giving of interest upon interest; or (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or (c) shall affect the damages recoverable for the dishonour of a bill of exchange.¹⁰⁴

The uncertain history of awarding interest continued in Trans Trust S.P.R.L. v. Danubian Trading Co. Ltd.,¹⁰⁵ with an attempt to limit the rule that interest could not be awarded as damages on the late payment of a debt. When a claim for interest was made on the amount due resulting from the breach of a contract to provide a confirmed credit, Lord Justice Denning stated:

It was said that the breach here was a failure to pay money and that the law has never allowed any damages on that account. I do not think that the law has ever taken up such a rigid standpoint. It did undoubtedly refuse to award interest until the recent statute: see London, Chatham and Dover Railway Co. v. South Eastern Railway Co.; but the ground was that interest was "generally presumed not to be within the contemplation of "the parties": [sic]. . . . That is, I think, the only real ground on which damages can be refused for non-payment of money. It is because the consequences are as a rule too remote. But when the circumstances are such that there is a special loss foreseeable at the time of the contract as the consequence of non-payment, then I think such loss may well be recoverable. It is not necessary, however, to

¹⁰⁴ Law Reform (Miscellaneous Provisions) Act, 1934, 24 & 25 Geo. 5, ch. 41, § 3(1) (Eng.).
come to a firm conclusion on this point, because I regard the provision of a credit as different from the payment of money and not subject to the special rules, if any there are, relating thereto.\textsuperscript{108}

This effort to limit the implications of \textit{London, Chatham \& Dover Railway} continued in the Court of Appeal with the 1981 case of \textit{Wadsworth v. Lydall}.\textsuperscript{107} Upon the dissolution of a partnership, the defendant had promised to pay the plaintiff £10,000, and the plaintiff had promised to vacate the farm operated by the partnership. In reliance upon the promise to pay by May 15, 1976, the plaintiff had entered into an agreement to purchase property from a third party, intending the £10,000 as the required down payment. When the defendant failed to make the required payment, the plaintiff incurred an interest debt to the third party for late completion and other mortgage costs.\textsuperscript{108} It is here that the historical tale refers again to \textit{Hadley v. Baxendale}. Addressing the issue of consequential damages, Brightman L.J. stated:

In my view the court is not so constrained [to avoid awarding damages in respect of unpaid indebtedness] by the decision of the House of Lords. In \textit{London, Chatham and Dover Railway Co. v. South Eastern Railway Co.}, the House of Lords was not concerned with a claim for special damages. The action was an action for an account. The House was concerned only with a claim for interest by way of general damages. If a plaintiff pleads and can prove that he has suffered special damage as a result of the defendant’s failure to perform his obligation under a contract, and such damage is not too remote on the principle of \textit{Hadley v. Baxendale}, I can see no logical reason why such special damage should be irrecoverable merely because the obligation on which the defendant defaulted was an obligation to pay money and not some other type of obligation.\textsuperscript{108}

\textsuperscript{106} \textit{Id.} at 306 (citation omitted). Romer, L.J., expressed agreement, stating:

I am not, as at present advised, prepared to subscribe to the view that in no case can damages be recovered for non-payment of money; I agree with Denning L.J. that in certain circumstances such damages might well be recoverable provided that the loss occasioned to the plaintiff by the defendant’s default was reasonably within the contemplation of the parties when the bargain between them was made.

\textit{Id.} at 307.


\textsuperscript{108} \textit{Id.} at 599–601.

\textsuperscript{109} \textit{Id.} at 603 (citations omitted).
It is this distinction between special and general damages that became the focus of Lord Brandon's speeches in President of India v. La Pintada Compania,\(^{110}\) and in the later case of The Lips.\(^{111}\) In La Pintada, Lord Brandon agreed with Brighton L.J. that the London, Chatham & Dover Railway case “applied only to claims for interest by way of general damages, and did not extend to claims for special damages.”\(^{112}\)

Lord Brandon’s analysis, however, seems to rely ultimately upon a questionable interpretation of legislative intent in both section 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934\(^{113}\) and the Administration of Justice Act 1982.\(^{114}\) In applying those statutes, Lord Brandon determined there to be “three cases in which the absence of any common

110. [1984] 3 W.L.R. 10 (Eng.).
112. [1984] 3 W.L.R. at 27.
113. Law Reform (Miscellaneous Procedures) Act, 1934, 24 & 25 Geo. 5, ch. 41, § 3(1) (Eng.).
114. Administration of Justice Act, 1982, Eliz. II, ch. 53, § 15, sched. 1 (Eng.). Part III of the Administration of Justice Act 1982, which became effective in 1983, has the cross-heading “Powers of Courts to Award Interest.” Section 15, the first section under that heading, provides that section 3 of the Law Reform (Miscellaneous Provisions) Act 1934 shall cease to have effect and shall be replaced by Part I of Schedule 1 “to this Act,” which is inserted “after section 35 of the Supreme Court Act 1981.” Schedule 1 to the Act of 1982 states:

SCHEDULE 1
Interest on Debts and Damages
Part I
Section Inserted in Supreme Court Act 1981

35A. (1) Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given, or payment is made before judgment, for all or any part of the period between the date when the cause of action arose and—(a) in the case of any sum paid before judgment, the date of the payment; and (b) in the case of the sum for which judgment is given, the date of the judgment.

(3) Subject to rules of court, where—(a) there are proceedings (whenever instituted) before the High Court for the recovery of a debt; and (b) the defendant pays the whole debt to the plaintiff (otherwise than in pursuance of a judgment in the proceedings), the defendant shall be liable to pay the plaintiff simple interest at such rate as the court thinks fit or as rules of court may provide on all or any part of the debt for all or any part of the period between the date when the cause of action arose and the date of the payment. (4) Interest in respect of a debt shall not be awarded under this section for a period during which, for whatever reason, interest on the debt already runs. (6) Interest under this section may be calculated at different rates in respect of different periods.

(8) Nothing in this section affects the damages recoverable for the dishonour of a bill of exchange.
EXCHANGE LOSS DAMAGES

law remedy for damage or loss caused by the late payment of a debt may arise.\textsuperscript{118}

Case 1 is where a debt is paid late, before any proceedings for its recovery have been begun. Case 2 is where a debt is paid late, after proceedings for its recovery have been begun, but before they have been concluded. Case 3 is where a debt remains unpaid until, as a result of proceedings for its recovery being brought and prosecuted to a conclusion, a money judgment is given in which the original debt becomes merged.\textsuperscript{116}

Lord Brandon found both Lord Tenterden's Act and the Act of 1934 to deal only with case 3, and not to be applicable where the debtor had made payment at any time prior to judgment.\textsuperscript{117} He further found the 1982 Act to cover only cases 2 and 3, and did not deal with case 1\textsuperscript{118} (which was the nature of the \textit{La Pintada} case).

Lord Brandon's conclusions as to the application of the statutes are interesting in light of the language of the 1934 and 1982 Acts. The 1934 Act authorizes a court to grant an award of interest "for the whole or any part of the period between the date when the cause of action arose and the date of the judgment."\textsuperscript{119} Why this language cannot include the period from the date on which the cause of action arose until any date of payment prior to judgment (whether before or after commencing the action) is not explained by Lord Brandon. Neither does he explain why the 1982 Act language authorizing awards of interest when "payment is made before judgment"\textsuperscript{120} cannot include payment before the action is commenced. Certainly, payment before commencement of an action is payment "before judgment." There appears no good reason to apply Lord Brandon's exclusive interpretation of the language of either Act, particularly in light of the efforts made by Lords Brandon,\textsuperscript{121} Fraser,\textsuperscript{122}

\textit{Id.} The 1982 Act also provided for the insertion of similar provisions in the County Courts Act, 1959, 7 & 8 Eliz. 2, ch. 22 (Eng.) and the Arbitration Act, 1950, 14 Geo. 6, ch. 27 (Eng.). Administration of Justice Act § 15, sched. 1, pts. II, IV.

\textsuperscript{115} \textit{La Pintada}, [1984] 3 W.L.R. at 23.
\textsuperscript{116} \textit{Id.}
\textsuperscript{117} \textit{Id.} at 25.
\textsuperscript{118} \textit{Id.} at 29.
\textsuperscript{119} Law Reform (Miscellaneous Provisions) Act § 3(1) (emphasis added).
\textsuperscript{120} Administration of Justice Act, ch. 53, § 15, sched. 1.
\textsuperscript{121} "[A]n ideal system of justice would ensure that a creditor should be able to recover interest both on unpaid debts in case 1, and also in respect of debts paid late or remaining unpaid in cases 2 and 3." \textit{La Pintada}, [1984] 3 W.L.R. at 29.
Another interesting aspect of Lord Brandon's speech in the La Pintada case was his reference to the Practice Statement (Judicial Precedent) of 26 July 1966. The Practice Statement allows deviation from strict adherence to the rule of stare decisis by recognizing that "too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law." In responding to the proposition that the House of Lords should take advantage of the Practice Statement, Lord Brandon, after a masterful review of the law's historical development, stated:

If the legislature had not intervened twice in this field since the London, Chatham and Dover Railway case, first by the Act of 1934 and more recently by the Act of 1982, and if the Court of Appeal had not limited the scope of that case by its decision in Wadsworth v. Lydall, I should have thought that a strong, if not an overwhelming, case would have been made out for your Lordships' House, in order to do justice to creditors in all three cases 1, 2 and 3, to depart from the decision in the London, Chatham and Dover Railway case. But, . . . since the legislature has made the two interventions in this field to which I have referred, and since the scope of the London, Chatham and Dover Railway case has been qualified to a significant extent by Wadsworth v. Lydall, I

122. Lord Fraser's agreement with Lord Brandon's holding was expressly "with reluctance." Id. at 13.

123. "I also reach with regret and reluctance the conclusion that the appeal must be allowed. The sooner there is legislation . . . the better." Id.

124. If I may respectfully say so I find [Lord Brandon's] reasoning . . . compelling. But I freely confess that I have arrived at this conclusion though without doubt nevertheless with both regret and reluctance. . . . It has taken two pieces of legislation, one some 50 years after 1893 and the other almost another half-century later, to remedy the injustice in cases 2 and 3. I venture to hope that whatever solution be ultimately adopted in case 1, . . . that solution will be found promptly and the remaining injustices in this branch of the law finally removed.

Id. at 13-14.

125. In the 1893 case of London, Chatham & Dover Ry., Lords Herschell, Watson, and Shand expressed similar dissatisfaction with the accepted rule that interest could not be awarded as damages for late payment of a debt. See supra notes 98-103 and accompanying text.

126. [1966] 1 W.L.R. 1234 (Eng.).

127. Id. It is this Practice Statement that contributed to the Miliangos rule of judgments being available in a foreign currency. See supra notes 28-29, 41-42.
am of the opinion ... that the departure sought by the respondents would not now be justified.\textsuperscript{128}

It is against this backdrop of interest damages for delayed payment of sums owed that Lord Brandon brings us to the discussion of granting damages for currency exchange losses in \textit{The Lips}.

\section{B. \textit{The Lips}: Failure to Consider Miliangos in a Foreign-Money Claims Case}

1. Reaching the Courts through Arbitration

\textit{The Lips} raises concern for several reasons. It involved the application of English law to an obligation that was computed in U.S. dollars but was payable in British sterling. The conversion from one currency to the other was an indispensable element of the determination of the amount due on the claim. Thus, it would seem that the \textit{Miliangos}\textsuperscript{129} rule would apply in this case. To the contrary, though, the courts looked to damages rules generally, beginning with \textit{Hadley v. Baxendale}.\textsuperscript{130} The resulting decision denied damages for exchange rate losses actually suffered. The decisions in \textit{The Lips}—from the initial arbitration award through the Commercial Court (Queen’s Bench), Court of Appeal, and House of Lords—provide an example of just how confusing the issue can be if the logic of \textit{Miliangos} is disregarded.

On July 1, 1980, the President of India chartered \textit{The Lips} from its Greek owners (Lips Maritime Corporation) in order to carry a cargo of di-ammonium phosphate from Louisiana to India.\textsuperscript{131} Upon discharge of the cargo in Visakhapatnam and Calcutta, a dispute arose as to the amount due the owner from the charterer for demurrage. The contract provided that both freight and demurrage rates be computed in U.S. dollars. It also provided that the general average be settled in London; that any dispute be settled by arbitration in London; and that the amounts due for freight and demurrage be paid in London in British sterling.\textsuperscript{132} Clause

\begin{footnotes}
\item[128] \textsuperscript{128} [1984] 3 W.L.R. at 29-30 (citations omitted).
\item[129] \textsuperscript{129} See supra notes 24-52 and accompanying text.
\item[130] \textsuperscript{130} 156 Eng. Rep. 145 (Ex. 1854).
\item[132] \textsuperscript{132} \textit{The Lips}, [1988] 1 App. Cas. at 418.
\end{footnotes}
30 of the charter stated that freight and demurrage were to be paid in sterling at the exchange rate effective on the bill of lading date. A dispute arose over the length of demurrage, with the umpire in arbitration finding that the ship had been on demurrage for twenty-eight days, one hour and forty-seven minutes. The charterer had already paid demurrage (on three separate dates in 1981) for a period of twenty-four days and forty-seven minutes. Thus, it was left with a liability for four days and one hour of demurrage at the prescribed rate of $6,000 per day, or a total of $24,250. The charterer argued that the amount due in sterling was £10,232.07, based on the $2.37 = £1 exchange rate prevailing on the bill of lading date (July 1, 1980). The owner argued that the amount due was £15,746.75, based on the exchange rate of $1.54 = £1 prevailing on the date of the award (February 22, 1983). When the case went to arbitration, the umpire dealt with the issue of the proper measure of damages by stating,

[i]f, as Charterers contended, conversion of the amount awarded is made at the rate as at the Bill of Lading date, Owners will suffer a considerable loss. Charterers were in breach in not making payment at the proper time, and the damage for that breach is the difference between the respective rates of exchange, and I have awarded accordingly.134

2. The Two Decisions of the Commercial Court

The charterer appealed to the Commercial Court, where the case was considered to be governed by Hadley v. Baxendale and subsequent cases

133. The text of clause 30 read as follows:

(A) Freight . . . is payable in British external sterling . . . in London . . . at the mean exchange rate ruling on bill(s) of lading date. (B) The mean exchange rate ruling on bill of lading date will also apply to other related payments/settlements including demurrage/despatch settlements under this charterparty and will apply in all cases where payments/settlements are effected in currency other than the currency in which the rates of freight and demurrage/despatch are indicated in the charterparty. (C) In cases where there is more than one bill of lading in respect of a shipment the mean exchange rate as above will be applicable to the calculation of freight under each bill of lading. For the purpose of demurrage/despatch and other related payments, the exchange rate applicable will be the simple average of the mean exchange rates adopted for freight calculations. (D) Demurrage/despatch and any other payments under this charterparty shall also be made in British external sterling.

Id. at 418-19.

applying that opinion. Justice Lloyd found the 1893 case of *The London, Chatham & Dover Railway*\(^\text{135}\) and the 1984 case of *La Pintada*,\(^\text{136}\) to require a bifurcated application of *Hadley v. Baxendale* in dealing with damages for the late payment of a debt. Justice Lloyd found there to be "no better established rule of English common law than the rule that a creditor cannot, in the absence of some express or implied agreement, recover damages for late payment of a debt."\(^\text{137}\) He then noted, however, that this rule was subject to an exception, because although the recovery of general damages for late payment of a debt is forbidden, recovery for special damages is not.\(^\text{138}\) Justice Lloyd proceeded to summarize the important distinction involved:

The difference between general damages and special damages in this connection is the difference between damages recoverable under the first part of the rule in *Hadley v. Baxendale*, i.e., damages foreseeable as flowing naturally and probably from the breach of contract in the ordinary course of events; and damages recoverable under the second branch of that rule, i.e., damages foreseeable in the particular circumstances of the case because of special matters known to both parties at the time of making the contract.\(^\text{139}\)

Finding it unclear whether the umpire had found the exchange loss damages to fall under the first or second rule of *Hadley v. Baxendale*, Justice Lloyd remitted the award to the umpire for further consideration.\(^\text{140}\)

Contrary to what Justice Lloyd had expected,\(^\text{141}\) the umpire found the damages to be special rather than general, thereby falling under the sec-

\(^{135}\) See *supra* notes 98-103 and accompanying text.

\(^{136}\) President of India v. La Pintada Compania, [1984] 2 Lloyd's Rep. 9 (Eng.); see *supra* notes 110-18 and accompanying text.


\(^{138}\) *Id.*

\(^{139}\) *Id.*

\(^{140}\) *Id.*

\(^{141}\) *Id.*
ond rule of *Hadley v. Baxendale*. When the charterer appealed again to
the Commercial Court, Justice Staughton could not "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." Consequently,
he found the case to fall within the "first rule" of *Hadley v. Bax-
endale*. He also determined that clause 30 of the charterparty "specifi-
cally provides that demurrage shall be paid in sterling at a fixed rate of
exchange" and "governs payments under the contract, including late pay-
ments which give rise to a judgment or award." From this conclusion,
he varied the award by ordering that the sterling equivalent of $24,250 be
converted at the bill of lading date exchange rate of $2.37 = £1, rather
than at the exchange rate of $1.54 = £1, prevailing on the date of the
arbitration award.

3. The Court of Appeal

In the Court of Appeal, Lord Justice Neill, purporting to agree with
Justice Staughton of the Commercial Court, found that "clause 30 deter-
mines what the rate of exchange is to be if the contract is performed; it
does not apply, however, where the paying party is in breach." The

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142. *Id.* at 186. Justice Staughton went on to say:

[It] seems to me that the umpire should have held, in terms of the direction of Mr. Justice
Lloyd, that the damages were foreseeable as flowing naturally and probably from the
breach of contract in the ordinary course of events; they were not damages foreseeable in
the particular circumstances of the case because of special matters known to both parties at
the time of making of the contract. . . . [It] is not a case of special and extraordinary
circumstances beyond the reasonable provision of the parties.

*Id.*

143. *Id.* at 186.

144. *Id.* at 188.

145. *Id.* Interestingly, Justice Staughton had only one page earlier seemed to imply an opposite
result in his analysis of clause 30:

Clause 30 is concerned with apportionment of the risk of currency fluctuation: between the
date of the charter and the date of the bill of lading that risk depends on the rise or fall of
the U.S. dollar; from the date of the bill of lading to the date when payment is due it
depends on the rise or fall of the pound sterling. But there is in my judgment nothing in cl.
30 to displace the ordinary rules of law in respect of loss arising between the due date for
payment and the date of a judgment or award so far as concerns a claim for damages for
late payment.

*Id.* at 187.

146. *The Lips*, [1987] 2 W.L.R. at 914. In expressing agreement with Justice Staughton, Lord
Justice Neill quoted from the dictum of the lower court which appeared to find clause 30 to govern
party relationships only through the date for performance of the covered obligation.
EXCHANGE LOSS DAMAGES

contract clause, then, did not bar damages for late payment so long as such damages were otherwise recoverable.

Addressing the issue of Hadley v. Baxendale, Lord Justice Neill then found it "difficult to see why in an appropriate case damages should not be recoverable for a late payment of money in the same way as damages are recoverable for the late delivery of a chattel." He found the owner's loss from the late demurrage payment to be recoverable as damages falling within the "second rule" in Hadley v. Baxendale. However, rather than restore the award of the umpire at the more favorable bill of lading date exchange rate, he found that once the liability for demurrage was determined, additional exchange loss damages should be assessed on the basis of the difference between the exchange rate at the date when the demurrage should have been paid (found by the umpire to be December 11, 1980, when the rate was $2.32 = £1) and the date of the award ($1.54 = £1).

4. The House of Lords

In the House of Lords, Lord Brandon of Oakbrook accused the umpire and all the lower courts of "confusion of thought." Ignoring the long

147. Id. at 915.
148. Id. at 921. After reviewing the English common law history on damages for the late payment of money, Lord Justice Neill summarized the rules governing such claims as follows:

(1) A payee cannot recover damages by way of interest merely because the money has been paid late. . . . [T]he court will decline to impute to the parties the knowledge that in the ordinary course of things the late payment of money will result in loss. . . .

(2) In order to recover damages for late payment it is therefore necessary for the payee to establish facts which bring the case within the second part of the rule in Hadley v. Baxendale.

(3) . . . [T]he question in each case is to determine what loss was reasonably within the contemplation of the parties at the time when the contract was made. . . . [A] plaintiff will be able to recover damages in respect of a special loss if it is proved that the parties had knowledge of facts or circumstances from which it was reasonable to infer that delay in payment would lead to that loss.

. . . . [T]he question in each case is to determine what loss was reasonably within the contemplation of the parties at the time when the contract was made. In dealing with this question the court will not impute to the parties the knowledge that damages flow "naturally" from a delay in payment. But where there is evidence of what the parties knew or ought to have known the court is in a position to determine what was in their reasonable contemplation.

Id. at 919-21.
discussions of *Hadley v. Baxendale* and its progeny that had appeared in the opinions of the lower courts, he focused entirely on clause 30 of the charterparty. Finding that the legal effect of a demurrage clause “is to liquidate the damages payable,” he went on to determine that “[t]here is no such thing as a cause of action in damages for late payment of damages.” The House of Lords restored the order of Justice Staughton but employed a different rationale, holding that clause 30’s call for “settlement” of demurrage at the bill of lading date exchange rate required use of that rate of exchange “whenever demurrage is settled or paid for.”

If the language of *The Lips* in the House of Lords is considered carefully, it appears to leave little opportunity to apply the specific result to future cases. Consider the following:

1. Lord Brandon himself interpreted the *London, Chatham & Dover Railway* and *La Pintada* rules regarding claims for late payment interest damages as inapplicable to claims for exchange rate loss damages resulting from late payment. He specifically found there to be no previously established law and no statutory provisions “relating to the recovery of such losses which could conflict with any right of recovery at common law.”

    (2) Lord Brandon further found that “were it not for the inclusion of clause 30 in the charter, the owners would have been entitled to an award in respect of their claim for demurrage expressed in dollars.” Consequently, in a contract that either omits a currency of payment clause or contains a clause that is interpreted to be applicable only to conditions through the date of intended performance, the logic of *The Lips* will not hold.

    Lord Mackay of Clashfern was even more explicit in expounding the narrow nature of this aspect of the holding in *The Lips*. After stating that clause 30 “applies whenever payment is made and accordingly applies to a late payment just as much as to a timeous payment,” he continues:

    If instead of paying on the due date the charterer deferred payment to a later date and if on that later date the same amount in British sterling converted into U.S. dollars would yield a smaller

151. *Id.* at 422.
152. *Id.* at 425. “The only remedy which the law affords for delay in paying damages is the discretionary award of interest pursuant to statute.” *Id.*
153. *Id.* at 426.
154. *Id.* at 424.
155. *Id.*
156. *Id.* at 426 (citing *The Despina R*, [1979] 1 App. Cas. at 685).
157. *Id.* at 427.
EXCHANGE LOSS DAMAGES

amount than if converted at the due date the difference in U.S. dollars would be a loss to the owners for which they were entitled, in my opinion, to compensation. I see nothing in the words of clause 30 to preclude such a claim. . . . [T]he payment was later than it should have been with resulting loss to the payee in consequence of breach of contract on the part of the payer.158

In other words, it appears that Lord Mackay's concurrence in the result reached by Lord Brandon hinged entirely on the House of Lords' rejection of the umpire's finding that the "demurrage should have been . . . paid within two months of the completion of discharge, i.e. by 11 December 1980."159 This seems a uniquely weak foundation for an opinion, particularly considering that this finding of the umpire was arguably one of fact and apparently had not been questioned by the parties or the courts until the matter reached decision in the House of Lords.

(3) Lord Mackay, although agreeing with Lord Brandon's conclusion,160 reached his own opinion by a different route. In so doing, he specifically stated that "the owner had a claim for damages for breach of contract by reason of late payment of an amount equal to the exchange losses sustained by him in consequence of that breach," and that "damages other than interest may be recovered for breach of contract by late payment."161 He noted that because most contracts do not furnish a due date for the payment of damages upon breach, the result reached by Lord Brandon would not be obtained in the majority of cases.162

158. Id. at 427-28.
159. The Lips, [1985] 2 Lloyd's Rep. at 181. Lord Mackay specifically rejected Lord Brandon's position that the word "settlement" as used in the charterparty required that it be read in clause 30 to apply to payments of demurrage charges at any time. The Lips, [1988] 1 App. Cas. at 428-29.
161. Id. at 429.
162. Id. at 429. Lord Brandon's position hinges on clause 30 not setting a due date for payment of the liquidated damages represented by the demurrage computation. This requires the rejection of the umpire's finding that demurrage payments were due on 11 December 1980. The problems with this reasoning are:

(1) it requires a specific recognition that the finding of the umpire was one of law rather than one of fact, so that the court could pick it up on appeal even though not raised by the parties (the House of Lords was comfortable with this), and

(2) it requires the rejection of the assumption that the law requires payment of damages either on the date on which they are incurred or, at least, within a reasonable time thereafter. If the law does require payment within a reasonable time, then the determination of what amounts to a reasonable time is an appropriate subject of a finding of fact by the arbitration umpire.

1991-1992]
At least three of the five Lords of Appeal indicated some degree of discomfort with the outcome of the case. Both Lord Fraser and Lord Mackay found some "difficulty in departing from the umpire's holding to the effect that the charterer was contractually bound to pay the demurrage by 11 December 1980." As noted above, Lord Mackay also stated that if he had not read clause 30 as requiring reference to the bill of lading exchange rate in all circumstances, he would have found the law to require compensation of the owner for exchange loss damages. Lord Griffiths was somewhat more visceral in his admission that "I should for myself have preferred to reach a result which did not enable the charterer by delaying payment to take advantage of the decline of the pound against the dollar."

Despite these apparent limitations on future application of *The Lips*, the outcome has proved to create problems in subsequent cases. In *Mosvolds Rederi AS v. Food Corp. of India* (The "Arras"), the Commercial Court was faced with a claim very similar to that in *The Lips*. The question addressed was clearly stated as whether "the Owners are entitled..."

Perhaps the most troubling aspect of the opinion is how Lord Brandon, after determining that demurrage charges represented damages in legal terms, then finds that the exchange rate loss would be "damages for late payment of damages," and is therefore noncompensable under the law. This illogic is aptly met by Dr. Mann's rebuttal:

There was, it is submitted, a single breach of contract, i.e., the wrongful detention of the ship beyond the stipulated lay days, which was the ultimate cause of the prejudice, but produced two heads or, in the language of Lord Sumner in *The Volturno* [1921] 2 A.C. 544, 553, two "items" of damage, viz. demurrage and the exchange loss. These were different consequences flowing from the same event. That in respect of one of them the damages were liquidated does not affect the overall character of the claim.


163. *The Lips*, [1988] 1 App. Cas. at 418 (Lord Fraser of Tullybelton); id. at 427-29 (Lord Mackay of Clashfern).

164. *Id.* at 429.

165. *Id.* at 426. Lord Justice Nicholls in the Court of Appeal was perhaps even more visceral in concurring in an award favoring the owner when he stated:

The charterers' submissions on this lead to the bizarre result that where it was obvious to the contracting parties that a currency exchange loss was not unlikely in the event of late payment, the more the defaulting party can show that this was not because of some unusual or "special" circumstance of the particular contract but because of the well-known way in which the relevant trade or business is normally carried on, the less likely will it be that the plaintiff can cover his loss.

*Id.* at 412-13.

to recover damages for the period of delay in the payment of demurrage which resulted in an exchange loss.\textsuperscript{167} Rather than address the question directly or look at the loss suffered by the owner in terms of the foreseeability of that loss, Justice Evans focused on Lord Brandon's statement that "there can be 'no damages for late payment of damages.'"\textsuperscript{168} Determining that no contractual provision served to "create a new obligation to pay the amount due as demurrage," the owner's claim in \textit{The Arras} was found to be merely "one for liquidated damages for the underlying breach which occurred when the vessel was detained beyond the laytime."\textsuperscript{169} Relying solely on \textit{The Lips}, Justice Evans denied the claim for exchange rate losses. Thus, the House of Lords' decision in \textit{The Lips} appears destined to mire courts in arcane legal nuances without a sound rationale, nor a reasonable relationship to basic principles of contract damages.

For courts to give such extended effect to the holding in \textit{The Lips} is unfortunate. The likely expectation of the parties at the time of the contract was that the charterparty would be performed. Clauses establishing the currency of account and currency of payment must therefore be based upon that assumption, and their application should reflect that expectation. Breach on the proper demurrage payment did not result only in the loss of the sum due: the breach also resulted in exchange rate losses from the date chosen for the computation of the exchange rate until the date of actual payment, plus appropriate interest. The House of Lords considered clause 30 to apply not only to the time contemplated for contract performance, but also to the post-breach and post-arbitration award periods. They did not question whether the parties had reasonably allocated this risk in the contract, but simply assumed that they had. Where clauses are applicable to conditions that will occur assuming performance of the contract (or, in the case of a charterparty, conditions applicable to normal demurrage conditions), it seems inappropriate to automatically extend their application to conditions outside the proper performance of the contract.

In denying recovery for consequential damages resulting from exchange rate fluctuations after the date of the arbitral award, the House of Lords focused on \textit{Hadley v. Baxendale} and its progeny. The holding in \textit{The Lips} thus impedes further development of the \textit{Miliangos} rationale favoring consideration of transnational commercial concerns when a foreign currency obligation is involved. The failure to relate the issue in \textit{The Lips} to \textit{Miliangos} leaves uncertain the future development of the \textit{Miliangos}

\begin{footnotes}
\textsuperscript{167} Id. at 138.
\textsuperscript{168} Id. at 136 (citing \textit{The Lips}, [1988] 1 App. Cas. at 425).
\end{footnotes}
rule. The abrupt differences in *The Lips* decisions at each level of the appeal process demonstrate the problems likely to result if *Miliangos* is not adequately considered and foreign currency issues are governed only by reference to *Hadley v. Baxendale* and its now protracted lineage.

VI. **Hadley v. Baxendale and Currency Exchange Losses in the United States**

American contract law has placed its emphasis on economic considerations, resulting in rules of law generally unfamiliar to other legal systems. This distinct emphasis is demonstrated in the Introductory Note to Chapter 16 of the *Restatement (Second) of Contracts*:

>The traditional goal of the law of contract remedies has not been compulsion of the promisor to perform his promise but compensation of the promisee for the loss resulting from breach. "Willful" breaches have not been distinguished from other breaches, punitive damages have not been awarded for breach of contract, and specific performance has not been granted where compensation in damages is an adequate substitute for the injured party. In general, therefore, a party may find it advantageous to refuse to perform a contract if he will still have a net gain after he has fully compensated the injured party for the resulting loss.\(^{170}\)

The accompanying Reporter’s Note elaborates upon the economic benefit theory:

>[A] breach of contract will result in a gain in "economic efficiency" if the party contemplating breach evaluates his gains at a higher figure than the value that the other party puts on his losses, and this will be so if the party contemplating breach will gain enough from the breach to have a net benefit even though he

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170. *Restatement (Second) of Contracts* ch. 16, at 100 (1981). The Introductory Note indicates the problems with a "focus on pecuniary aspects of breach":

This traditional response is not without its shortcomings. Its focus on the pecuniary aspects of breach fails to take account of notions of the sanctity of contract and the resulting moral obligation to honor one’s promises. The analysis of breach of contract in purely economic terms assumes an ability to measure value with a certainty that is not often possible in the judicial process. The analysis also ignores the "transaction costs" inherent in the bargaining process and the resolution of disputes, a defect that is especially significant where the amount in controversy is small.

*Id.*
EXCHANGE LOSS DAMAGES

compensates the other party for his resulting loss, calculated according to the subjective preferences of that party. If this requirement is met, breach with such compensation will be advantageous to one party and not disadvantageous to the other. To prevent it by compelling performance, it is argued, would result in a less efficient distribution of wealth since the party in breach would lose more than the injured party would gain.

This conclusion accords well with the assumption of contract law that the principal purpose of the rules relating to breach is to place the injured party in as good a position as he would have been in had the contract been performed. Awarding damages on this basis to protect the injured party's "expectation interest" gives the other party an incentive to break the contract if, but only if, he gains enough from the breach that he can compensate the injured party for his losses and still retain some of the benefits from the breach.171

Such an economic measure of damages requires resort to a personal measure of expectation interests of the parties. A party will obtain economic benefit from its breach only if the damages due are less than the cost of performance. Assuming an objective measure of damages based on the value of performance, the cost of paying damages would equal the cost of performance. Under an expectation theory, however, the damages to the non-breaching party are based on a personal measure of that party's loss and then compared to a personal measure of the value to the breaching party of avoiding the performance obligation. Section 347 of the Restatement of Contracts states this rule as follows:

§ 347. Measure of Damages in General
Subject to the limitations stated in §§ 350-53, the injured party has a right to damages based on his expectation interest as measured by

(a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
(b) any other loss, including incidental or consequential loss, caused by the breach, less
(c) any cost or other loss that he has avoided by not having to perform.

171. Id. at 101-02.
Section 351 brings in the standard concepts of foreseeability arising from Hadley v. Baxendale:

§ 351. Unforeseeability and Related Limitations on Damages.
(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
(2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
   (a) in the ordinary course of events, or
   (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach has reason to know.\(^\text{172}\)

While the expectation concept set out in section 347 appears to encompass the recovery of exchange rate losses, the distinction between general and special damages found in section 351(2) mirrors that which created such difficult problems for the English courts in The Lips. The Restatement comments elaborate on the “general” versus “special” damages distinction by stating clearly that “damages recoverable for . . . loss that results in the ordinary course of events are sometimes called ‘general’ damages.”\(^\text{173}\) As to “special” damages, “[i]f loss results other than in the ordinary course of events, there can be no recovery for it unless it was foreseeable by the party in breach because of special circumstances that he had reason to know when he made the contract.”\(^\text{174}\) The Restatement comment makes specific reference to the possibility of a contract clause dealing with the matter, stating that “in the case of a written agreement, foreseeability is sometimes established by the use of recitals in the agreement itself.”\(^\text{175}\) Thus, the allocation of exchange rate risk in the contract for the period of the contract term would result in a demonstration of foreseeability for purposes of proving the right to recover damages for the resulting losses. The question of whether a Lips-style clause would indi-

\(^{172}\) Restatement (Second) of Contracts § 351. Paragraph (3) of this section tempers the effect of a singular expectation measure of damages:

(3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

\(^{173}\) Id. § 351 cmt. b.
\(^{174}\) Id.
\(^{175}\) Id.
cate foreseeability for losses suffered beyond the contract term is more problematic.

Further examination of U.S. case law is helpful in order to determine how to resolve this apparent inconsistency. In the 1881 Supreme Court case of *Loudon v. Taxing District*, the City of Memphis failed to make timely payment to a contractor, forcing the contractor to borrow at extremely high rates in order to continue work. In refusing to award the contractor damages for the extraordinary interest and for discounts on securities sold to raise the necessary money to continue work, Chief Justice Waite set down the rather blunt rule that "all damages for delay in the payment of money owing upon contract are provided for in the allowance of interest, which is in the nature of damages for withholding money that is due. The law assumes that interest is the measure of all such damages." Williston recognizes the firmness of this rule where only a single currency is involved:

Where the defendant is under a unilateral or independent obligation to pay a liquidated sum of money, the ordinary measure of damages for non-performance is the sum of money itself with interest at the legal rate from the time when it was due. In an action by a creditor against his debtor for the non-payment of the debt, no other damages are ever allowed.

This rule of damages, if carried over to a foreign currency liability, would appear to prevent a court from granting judgment for the amount due, plus interest, plus an adjustment for exchange rate fluctuation. However, courts have indirectly reached such a result through the selection of either the breach-date or judgment-date rate of exchange. Even Williston, despite his strident support for the principle of nominalism when only the forum currency is involved, recognizes the unique circumstances existing when the subject is a foreign currency claim. In making this distinction, Williston quotes heavily from the Third Circuit decision of *Krauss v. Greenberg*, which, although not a foreign currency liability case, allowed consequential damages based upon the rule that "knowledge of facts which makes special damages foreseeable imposes liability there-

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176. Portions of the following discussion are taken from Brand, *supra* note 1, at 186–87.
177. 104 U.S. 771 (1881).
178. *Id.* at 774.
180. See *id.* § 1410A.
181. 137 F.2d 569 (3d Cir. 1943).
Thus, Williston has at least indirectly recognized a claim for consequential damages in the form of compensation for losses due to currency exchange rate fluctuation.183

VII. THE INAPPLICABILITY OF NOMINALISM TO A NEW RULE

The issue of nominalism was faced squarely by the British Law Commission when it recognized the "long-established principle that (apart from any question of interest) in general only nominal damages are recoverable for failure to pay money."184 After noting judicial and academic criticism of the rule, and judicial exceptions that had been carved out, the Law Commission went on to note the suggestion that "the rule does not apply where substantial damages are within the contemplation of the parties."185 For this proposition, the Law Commission referred to Wadsworth v. Lydall.186 In Wadsworth, the Court of Appeal held a party to a contract entitled to special damages of interest and costs of obtaining a substitute mortgage where the other party to the contract had failed to pay money for the delivery of title to land when due. Although Wadsworth did not involve a foreign currency liability, the case of Ozalid Group (Export) Ltd. v. African Continental Bank Ltd.187 did address the question of compensation for late payment in the foreign currency context. When the debtor failed to make timely payment of money due under a contract, the

182. Id. at 571.
183. This conclusion is open to dispute as not having been explicitly stated by Williston. Section 1410A, rather than discussing the application of the foreseeability concept to foreign currency claims, follows the discussion of Krauss with a review of the U.S. cases adopting the breach-date and judgment-date exchange rules. See Williston, supra note 13, § 1410A. However, the consequential damages position is further supported in a closely-related section of Williston in which the firm rule of § 1410 is tempered by the recognition that, "special consequential damages arising after the breach are recoverable." Id. § 1413.
185. Id. The European Convention on Foreign Money Liabilities extends this principle even further by recognizing:

the principle that the debtor who fails to pay at the proper time is liable to make good the prejudice which the creditor may suffer as a result of depreciation, however slight, of the money of account in relation to the money of the place of payment, which occurs after the proper date for payment.

COUNCIL OF EUROPE, EXPLANATORY REPORT ON THE EUROPEAN CONVENTION ON FOREIGN MONEY LIABILITIES 10 (1968). The European Convention takes an approach similar to that suggested here. See Brand, supra note 1, at 186 n.251.
EXCHANGE LOSS DAMAGES

creditors suffered from a decline in the value of the dollar against the pound between the due date and the date of actual payment. While the court found the loss to be foreseeable, it made no distinction as to whether the damages fell within rule one or rule two of Hadley v. Baxendale. It merely found the foreseeability of such loss sufficient to justify compensation.

Both the foreign currency liability exception to the Loudon rule in the United States and the Ozalid Group gloss on judicial commentary in England represent a maturation of the application of Anglo-American legal principles rooted in Hadley v. Baxendale. In Hadley, it was stated that damages recoverable for breach of contract must be:

such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself; or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.

Although the principle of nominalism remains well-entrenched in Anglo-American law when a forum currency transaction is involved, the complexities of multiple-currency transactions make its application inappropriate. Allowing damages for losses arising from post-breach exchange rate fluctuation is consistent with the development of the Loudon rule in the United States and the similar rule in England. Today it is difficult,
if not impossible, to assume that a post-breach or post-tort exchange rate loss is not foreseeable. Even if this argument could have been made in the past, since the end of fixed exchange rates in 1971\textsuperscript{193} the fluctuation of rates has become a fact of life in international commerce. Particularly in the contract setting, where the parties have already dealt with explicit allocation of exchange rate risk for the duration of the contract by selecting a currency of payment, it would be absurd to argue that the parties did not foresee that the risk of exchange rate fluctuation would continue upon breach. At the same time, however, it would be unfair to assume that, had the matter been negotiated, the risk of post-breach fluctuation would have been allocated the same as it was prior to the negotiated performance date.

While it has appeared difficult for U.S. and U.K. courts to emerge from the shackles of the nominalism principle in foreign currency cases, commentators and other courts have had no such problem. The principle is limited to a proper understanding of the allocation of risks and is, by its very nature, applicable only to single-currency transactions. As to the first of these limitations, Professor Goode states:

It is important to bear in mind that the principle of nominalism is relevant only to the measurement of the debtor’s primary contractual obligation. That is to say, the principle features in quantifying the payment obligation \textit{as at the due date of payment}. The award of damages to a creditor for exchange losses suffered because of the debtor’s delay in payment is in no way inconsistent with the principle of nominalism. A creditor who makes no provision for exchange losses when specifying sterling as the money of account has no cause for complaint if his debtor tenders payment at the due date in devaluated sterling, for that is the bargain the parties have made. But the creditor does not bargain for default in payment, and upon such default he is entitled to recover not only the debt but such damages, including loss in exchange, as the proper law may entitle him to obtain.\textsuperscript{194}

\textsuperscript{193} See supra note 19.
\textsuperscript{194} Goode, supra note 52, at 129.
EXCHANGE LOSS DAMAGES

For single currency transactions, a dollar is a dollar no matter when considered, and a pound sterling is a pound sterling for all purposes. Any loss in value of money through inflation or otherwise is not for the consideration of the courts. A dollar is not a fixed percentage of a pound sterling, however, and multiple currency transactions present much different considerations. While parties may allocate the risk of exchange rate fluctuations by contract for the period of the contract, it is wholly improper to presume that such allocation applies to a time after which the conduct of the parties is no longer governed by the contract.

The international transaction limitation on the principle of nominalism is well stated in the New Zealand Court of Appeal case of Isaac Naylor & Sons Ltd. v. New Zealand Co-operative Wool Marketing Ass’n Ltd. A co-operative of New Zealand wool farmers contracted to sell wool for delivery in England. The price was set in sterling and the contract provided for payment in sterling in England. The buyer ordered the seller to postpone shipments during a time in which sterling was consistently depreciating against the New Zealand dollar. As a result, when the seller converted the sterling receipts into New Zealand currency, it was left with approximately 18,000 dollars less than it would have had if shipments and payments had been in accordance with the contract and sterling converted to dollars immediately upon receipt. Acknowledging that both parties knew it to be the practice of the buyer to have the monies immediately converted to New Zealand dollars and remitted to New Zealand, all three judges concurred in awarding exchange fluctuation damages to the seller.

When the buyer in Isaac Naylor raised the principle of nominalism as a defense to the award of exchange fluctuation damages, Judge Cooke acknowledged that “if there were no international element in the contracts I think that the principle of nominalism would probably apply.” Citing Miliangos and The Despina R as rejecting “the former judicial reluctance to allow changes in the value of money to complicate the common law,” however, he ultimately found that “when there is an international element in a contract the court will take note of losses from exchange fluctuations, and unless the claim fails on ordinary remoteness principles will give the plaintiff the judgment most nearly reflecting his loss.”

Judge Richardson also rejected nominalism in international transactions. He found The Despina R to emphasize

196. Id. at 364 (Cooke, J.).
197. Id.
198. Id. at 366 (relying on George Veflings Rederi A/S v. President of India (The “Bellami”), [1979] 1 All E.R. 380 (Eng. C.A.)).
that the ordinary rules as to damages for breach of contract are of
general application. Except where the contract itself determines
the matter and subject to the ordinary rules as to remoteness,
damages are recoverable in the currency which most truly ex-
presses the plaintiff's loss. That accords with the principle of res-
stitution and allows recovery in the ordinary way for the kind of
loss which the parties must be taken reasonably to have had in
contemplation.  

Judge Richardson ultimately concluded that the amount received in ster-
ling by the co-operative "was not of the same value to the respondent as it
would have been had the contract been performed without breach by the
appellant."  

Free of the intellectual confines of the principle of nominalism, the
Isaac Naylor decision provides a surprisingly simple analysis of the issues
that seemed so complex in The Lips. While acknowledging the importance
of the legal changes wrought by Miliangos, the decision provides a clear
discussion of the concerns of Hadley v. Baxendale, which were so trouble-
some to the House of Lords. The next section of this article addresses this
portion of the analysis.

VIII. NECESSARY DISTINCTIONS IN FORMING A NEW U.S. RULE

If a party may breach a contract and delay indefinitely in paying dam-
ages for breach, taking advantage of fluctuating exchange rates, then the
non-breaching party is clearly denied compensation for a loss resulting
from that delay. No justice or lord in The Lips denied that such a loss was
suffered. The question was whether such a loss was legally compensable.
In a world of rapidly fluctuating exchange rates, such a loss should be
compensable under any fair legal system.

The issue of damages resulting from fluctuating currency exchange
rates remains one of the most difficult in judgments involving multiple
currency transactions. For years the assumption in both English and U.S.
courts—that judgment could be given only in the home cur-
rency—effectively prevented direct reference to damages resulting from
currency fluctuation after a tort or contract breach.  

A focus on the date
for conversion of the foreign currency into the forum currency led to the
development of inflexible rules generally based on the result favoring the
plaintiff in periods of a strong forum currency.

199. Id. at 376 (Richardson, J.).
200. Id.
201. See Brand, supra note 1, at 139.
EXCHANGE LOSS DAMAGES

Only when the Bretton Woods system of fixed exchange rates faltered and the British pound and U.S. dollar showed more consistent weakness were the basic rules developed in times of strong forum currencies called into question. Even then, the residue of the existing approach to foreign currency claims clouded the matter. Because courts for so long had assumed that judgment must be given in the home currency, they had always focused on the date selected to determine the applicable exchange rate. In times of a strong forum currency, the favorite had been a breach-date (or in tort injury-date) rule. As the forum currency weakened, greater attention was given to a judgment-date approach.

With the Miliangos case in England, it looked as if the common law would finally deal directly with the problem of fluctuating currency exchange rates and their effect on failed transactions. Miliangos represented an admission that: (1) rules created during years of relatively stable exchange rates and strong forum currency did not provide just results in times of sharp fluctuations in currency markets, particularly in times of a weak forum currency; and (2) the logic requiring that the home-currency-judgment rule be discarded also required that the secondary fixed-date-of-exchange-rate rule be abandoned. In The Lips, the House of Lords failed to recognize the applicability of the Miliangos principles to a case in which, even though damages were to be stated in the forum currency, they were measured in a foreign currency. Second, and perhaps more fundamental, they failed to acknowledge that damages flowing from the breach of contract include the losses suffered by the non-breaching party as a result of both pre- and post-breach exchange rate fluctuation.

The emphasis in The Lips on whether clause 30 of the charterparty fixed the exchange rate date for both pre- and post-breach computation of damages was unfortunate. Business contracts are negotiated and carried out with the assumption that both parties will perform their obligations as defined in the contract. Contract clauses generally deal with the rights and obligations of the parties during the term of the contract. Delivery of the goods or services and payment of the purchase price should occur within the time specified in the contract. If a contract does not explicitly set a time for performance, the legal system provides a method for determining what that time is, generally by reference to some concept of "reasonableness." Parties do not enter into a contract expecting nonperformance. Consequently, contract terms are, and should be interpreted as being, generally consistent with both parties’ expectations of performance.

202. See supra notes 24-52 and accompanying text.
This is not to suggest that parties to a contract ignore the risks of non-performance. Careful negotiation and drafting should deal with the possibility that the other party will not perform. However, this should not lead courts automatically to conclude that contract provisions necessarily assuming performance apply in addition to conditions of nonperformance.

The House of Lords may have correctly interpreted the law to provide that demurrage clauses are simply a contractual statement of liquidated damages for the breach represented by late discharge of cargo and return of the vessel.\(^{204}\) It is questionable, however, whether Lord Brandon's characterization of the amount due as damages rather than debt requires denial of compensation for the loss because "[t]here is no such thing as a cause of action in damages for late payment of damages."\(^{205}\) Lord Brandon himself raises questions about this analysis in the manner in which he applies it. His analysis reaches the legal conclusions that:

1. delay in discharging a cargo is a breach of contract, and demurrage sums are liquidated sums accruing "throughout the period of time for which the breach continues";\(^{206}\)
2. nothing in prior law "conflict[es] with any right of recovery at common law" of currency exchange losses as damages for late payment of a debt;\(^{207}\)
3. because demurrage sums are damages rather than debt, the rules of the London, Chatham & Dover Railway. and La Pintada cases, and these cases' discussion of the two rules of Hadley v. Baxendale,\(^{208}\) do not apply.

This is enticing logic in its structure—as far as it goes. However, Lord Brandon's opinion begs the question of why it is that damages may be allowed for late payment of a debt but not for late payment of damages; what is it that makes the distinction between damages and debt so important? He does state (without citation) that "[t]he only remedy which the law affords for delay in paying damages is the discretionary award of interest pursuant to statute."\(^{209}\) This line of logic is incomplete and leads to results not nearly so enticing as the logic suggests. In fact, the result is

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\(^{205}\) Id. at 425 (Lord Brandon).

\(^{206}\) Id. at 423 (quoting Dias Compania Naviera S.A. v. Louis Dreyfus Corp., [1978] 1 W.L.R. 261, 263-64 (Eng. C.A)).

\(^{207}\) The Lips, [1988] 1 App. Cas. at 424.

\(^{208}\) See supra notes 98-103, 110-18 and accompanying text.

EXCHANGE LOSS DAMAGES

entirely inconsistent with the principles that led the House of Lords to depart from hundreds of years of precedent requiring home currency judgments in the Miliangos’ case.

Equally appealing in structure, and more appealing in result, is the logic of Dr. Mann, who analyzed The Lips by stating:

There was, it is submitted, a single breach of contract, i.e., the wrongful detention of the ship beyond the stipulated lay days, which was the ultimate cause of the prejudice, but produced two heads or, in the language of Lord Sumner in The Volturno [1921] 2 A.C. 544, 553, two “items” of damage, viz. demurrage and the exchange loss. These were different consequences flowing from the same event. That in respect of one of them the damages were liquidated does not affect the overall character of the claim.210

One source of confusion here is the relationship between damages and interest, both in determining damages for late payment of debt and damages for late payment of damages. Where currency exchange losses are concerned, it has been persuasively argued that exchange rate fluctuation and interest rates are correlated.211 Allowing compensation in the form of interest on debt or damages recognizes the value of money over time. When more than one currency is involved, there must be similar recognition of the relative values of the currencies over time. The logic that allows interest on debt should similarly allow compensation of exchange rate losses on that debt. Further, the distinction between debt and damages in this regard is meaningless. In the particular circumstances of The Lips, what is the difference between liquidated damages and debt? Is not the purpose of the liquidated damages clause to predetermine the amount of a debt owed by one party to another by reason of conditions arising during contract performance? For purposes of determining the loss to the

210. Mann, supra note 162, at 5.
211. See Bowles & Phillips, supra note 23, at 197-98:

It can be seen that ... when sterling has been depreciating against both the Deutschmark and the Swiss franc, United Kingdom Minimum Lending Rate has been approximately double the German and Swiss interest rates. This is to be expected since the central banks of countries with depreciating currencies generally use increases in interest rates to attract foreign investment by offsetting, to some extent, the expected devaluation on the capital. If devaluation were fully offset by the change in interest rates, the application of the old rules would amount to full compensation, since the effect of sterling’s depreciation on the value of the debt in a foreign creditor’s own currency would then be associated with a (higher) rate of interest payable on it; but in practice the relationship between exchange rates and interest rates is not so straightforward.
creditor (or non-breaching party to a contract), what is the difference if the amount due is payment for the goods or services (recognized in other cases as "debt") or an amount due which is otherwise determined specifically by the contract terms? It is submitted that there is no logical difference, and that the legal rules applied should be the same.\textsuperscript{1}

Lord Brandon, in terms of general applicability of the rule he selected, had two basic choices. The first was to interpret clause 30 in a mechanical manner, finding it applicable to \textit{all} exchange rate computations in regard to demurrage. The second was to determine the effect of interpreting clause 30 as providing for exchange rate computations in post-breach matters and then consider whether such an application would (1) be consistent with the likely intent of the parties at the time the charter was entered and (2) provide results consistent with general principles of justice in determining contract damages. Lord Brandon chose the first option. In doing so, he created a rule that failed to take into account the effect on the parties. This is exactly the type of rule the House of Lords rejected in \textit{Miliangos} when it determined that a fixed home-currency-judgment-breach-date rule would not always serve the interests of justice. The lesson of \textit{Miliangos} appeared to be that when inflexible rules in currency exchange loss cases produce unfair results by allowing a defendant to benefit from delay to the detriment of the plaintiff, such rules will be considered inappropriate. This lesson was lost in \textit{The Lips}.

One of the difficulties in discussing the application of another legal system's law to \textit{The Lips} arises from the determination of Lord Brandon that clause 30 simply and decisively controlled the outcome. If one assumes that clause 30 was intended by both the owner and the charterer to mean that \textit{all} exchanges of currency from U.S. dollars to British sterling were to be made at the bill of lading exchange rate, then there is not much else that can be said about the case. However, the issues obscured by this analysis are worth consideration for several reasons. First, not everyone accepts the contention that clause 30 was applicable to post-breach exchange rate calculations.\textsuperscript{2} Further, even if clause 30 does provide the definitive answer in \textit{The Lips}, other contracts will not provide such a simple construction. Contract terms generally do not deal specifically with the sub-

\textsuperscript{1} See Mann, \textit{supra} note 162, at 6:

But to make the payment of damages for exchange losses dependent upon whether the obligation to pay a specific sum of money is to be classified as debt or liquidated damages would not have occurred even to the strictest scholastic of past centuries.

\textsuperscript{2} See \textit{supra} note 162.
EXCHANGE LOSS DAMAGES

ject of exchange rate computations for pre- or post-breach losses.\textsuperscript{214} By so interpreting clause 30 of the charterparty, Lord Brandon avoided the issues that will face future courts in determining whether currency exchange losses are compensable for both pre- and post-breach periods.

The New Zealand Court of Appeal provides appropriate guidance in the \textit{Isaac Naylor}\textsuperscript{218} case. While the House of Lords in \textit{The Lips} became mired in its determination that a currency of payment clause effectively allocated risk for post-breach exchange rate fluctuations, the New Zealand Court of Appeal specifically rejected this conclusion. Without challenging the rule that general damages cannot be awarded for non-payment of money, the \textit{Isaac Naylor} court held that the principles of \textit{Hadley v. Baxendale} allow recovery for currency exchange losses resulting from delay in contract performance.\textsuperscript{216} Thus, while \textit{Miliangos} established in the English courts that judgment could be had in a foreign currency, it did not resolve the question of whether compensation would be available for ex-

\textsuperscript{214} It is possible that Lord Brandon's analysis creates a catch-22 for the party concerned about this problem at the contract negotiation stage. Assuming that both parties consider it reasonable to allocate exchange rate risks \textit{during} the term of the contract, it is much less likely that either will be willing to accept that risk for post-breach periods. First of all, the underlying assumption necessary to any contract is that both parties will perform their obligations. To assume otherwise is contrary to the purpose of the contract itself. If post-breach exchange rate risks are to be allocated in the contract itself, it is only logical to assume that the parties would allocate that risk to the breaching party. After all, at the time of entering the contract does not each party consider the possibility of breach as antithetical to the purposes of the exercise in which they are engaged?

Thus, a party concerned about risk planning in contract negotiation must take Lord Brandon's analysis as requiring that any clause dealing with allocation of exchange rate risks either be clearly limited to those risks occurring \textit{during} the term of the contract (a problem that most parties to such a contract have probably not considered to exist prior to \textit{The Lips}), or provide specifically for the method of post-breach allocation of such risk if it is meant to allocate that risk in a different manner than the pre-breach risk is allocated. Otherwise, that party runs the risk Lord Brandon assumed the owner had accepted in \textit{The Lips}: the court will assume that it agreed that the breaching party could obtain the benefit of delay.

Lord Brandon's statement that there is no cause of action in damages for the late payment of damages raises the question of whether such a cause of action can be explicitly created by the parties to a contract. If not, then Lord Brandon's analysis leaves the party in the position of the owner in \textit{The Lips} with little legal recourse.


\textsuperscript{216} See \textit{Goode, supra} note 52, at 143:

Though it remains the case that general damages cannot be awarded for non-payment of money, special damages are now considered recoverable for loss which the plaintiff can prove was suffered as the result of the defendant's non-payment to the extent to which the type of loss suffered should have been within the defendant's contemplation within the rule in \textit{Hadley v. Baxendale}.

(footnote omitted).
change losses resulting from delay in the payment of money. This question is a matter of substantive law and is governed by general contract principles concerning the remoteness of damages. This is the focus overlooked in The Lips but properly acknowledged in Isaac Naylor.

Noting that Miliangos provides a realistic solution to the question of whether judgment may be granted in a foreign currency, Isaac Naylor finds the related “realistic solution” to the exchange problems in the restitution principle placing “the injured party in the same position he would have been in had the breach not occurred.” The Miliangos abandonment of the sterling-breach-date rule thus represented a return to the ordinary principles of assessing damages for breach of contract.

The Isaac Naylor discussion avoids the multiple court disagreements in The Lips as to whether the first or second rule of Hadley v. Baxendale is applicable to the issue of currency exchange losses. Judges Cooke and McMullin find that recovery of consequential damages for post-breach exchange losses fit clearly within Hadley without any need to consider which rule applies. Judge Richardson assumes the loss could fit within the first rule of Hadley v. Baxendale, and then goes on to find it clearly within the second rule. He concludes:

217. See id. at 138.
220. One commentator has interpreted the decisions in Isaac Naylor to be void of “any clear and positive discussion about whether the common law should allow recovery of damages for exchange losses.” Id. at 570.
221. Judge Cooke writes that “such losses will be recoverable if the criteria ordinarily applied in damages cases in contract are satisfied. As is well known the most important of these is usually foreseeable.” Isaac Naylor, [1981] 1 N.Z.L.R. at 365 (Cooke, J.). He then adds:

It seems to me that if the evidence is that a plaintiff's loss has been caused by a defendant's breach of contract and that there was obviously a serious risk of such loss unless the plaintiff took certain steps, the defendant should not escape liability on the ground of remoteness by showing merely that he expected the plaintiff to take those steps. The question is rather whether it was so likely that a reasonable man in the plaintiff's position would take those steps that the plaintiff should be treated as having accepted the risk... [E]xchange losses were sufficiently within contemplation to be not too remote.

Id. at 367. Judge McMullin reviewed cases following Hadley v. Baxendale, concluding that “a loss arising from a variation in exchange rates can be said to have been fairly and reasonably in the contemplation of the parties.” Id. at 382 (McMullin, J.).

222. “In a commercial contract made between experienced traders, financial loss to one party arising from non-performance or delay in performance of contractual obligations by the other may well fall within the first branch of the rule.” Id. at 371 (Richardson, J.).
223. Id. at 372.
EXCHANGE LOSS DAMAGES

In the face of the parties' recognition of the respondent's need to remit sterling into New Zealand dollars and of the associated risk of exchange fluctuations in the period up to the due date of payment, it cannot be said that in providing for timely payment in sterling they intended that no compensable loss other than interest would occur as a result of a belated payment in sterling. It was within the reasonable contemplation of the parties that, in the event of breach by the buyer of its contractual obligations resulting in a delay for payment of the wool, the respondent would be liable to suffer an exchange loss. The true measure of the seller's loss in that respect is the sum required to put it in the position it would have achieved in New Zealand dollars if the contract had been properly performed.224

Thus, Isaac Naylor concludes that post-breach currency exchange losses fall clearly within the realm of compensable damages governed by Hadley v. Baxendale. Further, despite evidence that both parties to the case had specific knowledge of the practice of the seller immediately converting sterling to New Zealand dollars, the decision implies that such knowledge generally will be presumed on the part of international traders.225 There was no dispute that the clause calling for payment in sterling allocated the risk of exchange fluctuation during the contract period to the New Zealand seller. The court acknowledged, however, that "[i]t does not follow that it carried that same responsibility for exchange variations in the post-breack period."226 Thus, the court reasonably refused to imply that contract terms governing the period of performance contemplated by the parties also apply to events outside of performance. A new rule in the United States must do no less.

224. Id. at 377.

225. Judge Richardson writes that "[t]he parties were conscious, as well they would be as international traders, that variations in the exchange rate of sterling to the New Zealand dollar could well occur . . . ." Id. at 370. " . . . I think it must be said that international wool traders, with vivid experience of the instability of exchange rates, should reasonably have realised that a delay in giving shipping instructions resulting in a delay in arrival of the wool and so in payment for the wool might well affect the yield to the seller in his local currency." Id. at 372.

226. Id. at 371.
IX. The Uniform Foreign-Money Claims Act: A Vehicle for Change in the United States

A. The Restatement as a Catalyst for Change

U.S. courts have continued to resist abandonment of the home-currency-judgment rule and its related problem of determining the appropriate exchange date. While section 20 of the Currency Act of 1792 might have implied a requirement that judgments be in U.S. dollars, this provision was amended and restated "without substantive change" in 1982. At that time, any language was eliminated from which one could reasonably have inferred a requirement that judgments be in U.S. currency. The change to a new set of rules has begun. In 1987, the New York legislature enacted a provision allowing judgments in foreign currency.

227. For a recent case in which the court felt bound by the home-currency-breach-date rule, see Sainz Gonzalez v. Banco de Santander-Puerto Rico, 932 F.2d 999, 1003-04 (1st Cir. 1991). For a more general discussion, see Brand, supra note 1, at 155-63.


230. 31 U.S.C. § 371 (1982). Until the 1982 amendment of the provision, section 20 of the Currency Act of 1792 read as follows:

The money of account of the United States shall be expressed in dollars or units, dimes or tenths, cents or hundredths, and mills or thousandths, a dime being the tenth part of a dollar, a cent the hundredth part of a dollar, a mill the thousandth part of a dollar; and all accounts in the public offices and all proceedings in the courts shall be kept and had in conformity to this regulation.

31 U.S.C. § 371 (1976). After the 1982 amendment, the language is: "United States money is expressed in dollars, dimes or tenths, cents or hundredths, and mills or thousandths. A dime is a tenth of a dollar, a cent is a hundredth of a dollar, and a mill is a thousandth of a dollar." 31 U.S.C. § 5101 (1982). The change in the language of this provision is consistent with the original purposes of the Currency Act of 1792, which were to establish the coin of the United States, to choose the decimal system for determining fractions of that coin, and to create a national mint. See Brand, supra note 1, at 157-59.

231. N.Y. Jud. Law § 27 (McKinney Supp. 1991). Paragraph (b) of this provision reads:

In any case in which the cause of action is based upon an obligation denominated in a currency other than currency of the United States, a court shall render or enter a judgment or decree in the foreign currency of the underlying obligation. Such judgment or decree shall be converted into currency of the United States at the rate of exchange prevailing on the date of entry of the judgment or decree.

Id. Professor Fairfax Leary, Reporter for the Uniform Foreign-Money Claims Act, says of this provision: "the first sentence is admirable, the last is incomprehensible. Why enter a judgment in the foreign currency and then instantly convert it into domestic currency when no payment has been made?" Fairfax Leary, Jr. & Michael Casey, Fluctuating Currencies: Obligations Payable in Foreign Moneys, N.Y. St. B. J., at 16, 20 (Jan. 1988).
Since promulgation of the Uniform Foreign-Money Claims Act in late 1989, at least eleven states have adopted its provisions, each apparently without modification. The Restatement (Third) of Foreign Relations Law highlights the potential change in U.S. law by acknowledging that no clear prohibition on foreign currency judgments exists for most U.S. courts. While this is true in most states, in other states judicial change allowing judgments in foreign currency may be statutorily prohibited.


234. At least fifteen states have statutes that may be interpreted to require that judgments be rendered in U.S. dollars.

Statutes in seven states are explicit in this requirement. Cal. Civ. Proc. Code § 577.5 (West 1976) ("In any judgment, or execution upon such judgment, the amount shall be computed and stated in dollars and cents, rejecting fractions."). This statute is now arguably inconsistent with the Uniform Foreign Money Claims Act enacted by California in 1991.; Iowa Code Ann. § 535.1 (West 1987) ("Demands expressed in money of another denomination [other than U.S. dollars] shall not be affected by the provisions of this section, but in any action or proceeding based thereon it shall be reduced to and computed by the denominations given."); Md. Cts. & Jud. Proc. Code Ann. § 11-101 (1989) ("Except as otherwise provided by Law, a money judgment rendered or imposed by any court of the State shall be expressed in dollars and cents."). Despite the apparently clear language of the Maryland statute, an early Maryland Court of Appeals case upheld a judgment rendered in British sterling. See Purviance v. Neave, 4 H. & McH. 199 (Md. 1798). However, a later case, after having the Purviance case cited before it, ruled that "the court was not at liberty to disregard [the statute] and enter the judgment for money in other denominations than those prescribed." Marburg v. Marburg, 26 Md. 8, 21 (1866).; Mont. Code Ann. § 25-9-203 (1991) ("In judgments, the amounts thereof must be computed and stated as near as may be in dollars and cents, rejecting fractions of a cent."); S.C. Code Ann. § 34-31-10 (Law. Co-op. 1976) ("The verdicts of all juries on all contracts . . . shall be expressed in dollars or units thereof . . . "); Tenn. Code Ann. § 47-14-101 (1988) ("All verdicts and judgments shall be rendered in dollars and cents . . . "); Vt. Stat. Ann. tit. 9, § 1 (1984) (" . . . this section shall not affect an account, charge or entry originally made or a contract expressed in other money of account, but the same shall be reduced to dollars and parts of a dollar in an action thereon").


At least one court has rendered judgment in foreign currency. To the extent change can come through the common law, the Restatement encourages that change.

The problem in the application of the Restatement rule to a set of facts such as that in The Lips comes first in applying the phrase "the currency in which the obligation is denominated or the loss was incurred." The charterparty "denominated" the obligation in both U.S. dollars (the currency of account) and British sterling (the currency of payment). However, even Lord Brandon recognized that the owners "incurred" the loss in U.S. dollars. The Restatement rule appears to lead to judgment in U.S. dollars in a U.S. court. In Lord Brandon's words, this would mean that "the owner would not have suffered the currency exchange loss which led the umpire to add the damages element to the demurrage element." On the other hand, even if the judgment is rendered in the home currency, the second paragraph of Restatement section 823 provides that conversion must be made at "such rate as to make the creditor whole and avoid rewarding a debtor who has delayed in carrying out the obligation." This arguably places the focus on the impact of the remedy on the creditor rather than on construction of an ambiguous contract provision that may or may not apply to matters beyond reasonable contract of account," but then requires that "the same must be reduced to dollars and cents in any action." Mont. Code Ann. § 30-12-602 (1991).

235. See In re Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978 (Part 2 of 2), MDL Docket No. 376, 1988 U.S. Dist. LEXIS 16832, at *309-11 (N.D. Ill. Jan. 11, 1988). The award was to French plaintiffs who suffered loss as a result of the oil spilled when the Amoco Cadiz tanker broke up on the coast of France.

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.

Id. at *310, quoted in Fairfax Leary, Jr. & Howard T. Rosen, The Uniform Foreign-Money Claims Act, 12 U. Pa. J. Int'l Bus. L. 51, 81 (1991). For further discussion of examples implying judgment in a foreign currency, particularly with regard to enforcement of foreign arbitral awards, enforcement of foreign judgments, and consent judgments, see Brand, supra note 1, at 165-69.

236. Restatement (Third) of Foreign Relations Law § 823 cmt. b. See supra notes 53-59 and accompanying text.

237. Restatement (Third) of Foreign Relations Law § 823(1).


239. Id. at 426 ("the currency in which the owners carried on their business was U.S. dollars").

240. Restatement (Third) of Foreign Relations Law § 823(1).


EXCHANGE LOSS DAMAGES

performance dates. Thus, it would have allowed the result Lord Griffiths
alluded to when he noted that he would "have preferred to reach a result
which did not enable the charterer by delaying payment to take advantage
of the decline of the pound against the dollar."\(^{243}\)

The Restatement does a good job of noting the current law’s shortcom-
ings. It does not, however, provide sufficient clarification or guidance as to
what the law should be. Even if it did provide such guidance, however, it
could not change the established law, particularly in those states in which
a statute prevents such a change. The presence of such statutes, as well as
the deeply entrenched judicial rule that judgments be rendered in U.S.
dollars, dictates that change must come through legislation rather than
piecemeal common law development.\(^{244}\)

B. The Uniform Foreign-Money Claims Act as the Vehicle for Change

The Uniform Foreign-Money Claims Act is intended to remedy the
"tendency of the common law approach to foreign-money claims either to
overcompensate or undercompensate an aggrieved party."\(^{246}\) In so doing,
the drafters elected to follow the approach taken by the English House of

\(^{243}\) The Lips, [1987] 1 App. Cas. at 426. Unfortunately, the comments to the Restatement
 provision indicate that, although the claimant appears to be given the benefit of the most favorable
rate of exchange, the choice is limited to the breach-date, judgment-date, and payment-date rates:

If the foreign currency has depreciated since the injury or breach, judgment should be
given at the rate of exchange applicable on the date of injury or breach; if the foreign
currency has appreciated since the injury or breach, judgment should be given at the rate of
exchange applicable on the date of judgment or the date of payment.

**Restatement (Third) of Foreign Relations Law § 823 cmt. c.** This position would not in all
cases be consistent with the earlier statement in the same comment that, "[n]either party should re-
ceive a windfall nor be penalized as a result of currency conversion." \(\text{Id.}\)

\(^{244}\) See Leary & Rosen, supra note 235, at 59:

Lord Simon’s suggestion [in Miliangos] 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. 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. 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.

\(\text{Id.}\) (citations omitted).

\(^{245}\) \(\text{Id.}\) at 52.
Lords in *Miliangos* by endorsing the payment-date rule. Rather than allow the ad hoc development of this rule in its common law application, as has been done in England, the Act sets forth the method for determining the “money of the claim,” and then provides for judgment in that money. A review of the important provisions of the Uniform Act and how it might apply to the facts of *The Lips* provides insight into the logic of its framers.

The Act focuses on the determination of the “money of the claim.” Section 4 sets forth the rules for making this determination, stating that, “the money in which the parties to a transaction have agreed that payment is to be made is the proper money of the claim for payment.”

Consequently, the issue in *The Lips* would again hinge on whether clause 30 of the charterparty is construed to apply to post-breach matters and require that conversion from U.S. dollars to British sterling be at the rate prevailing on the bill of lading date. Although section 3 of the Act defers to an explicit expression by the parties of the currency to be used, it is uncertain whether clause 30 would be considered such a provision.

If clause 30 of the charterparty were not construed to apply to post-breach matters, then the application of substantive provisions of the Act is important. Section 9 of an earlier draft appeared to settle the discussion of the principles of *Hadley v. Baxendale* which were so important in the lower court decisions in *The Lips* and the New Zealand court’s decision in

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247. Id. § 4.
248. Id. §§ 1(8), 2(a), 4.
249. Id. § 4(a).
250. Id. § 3.
251. Significant in the context of *The Lips* case is comment 2 to section 3, that the second sentence of paragraph (b) “recognizes that a price stated in a particular money does not indicate, without more evidence, an intent that all damages from breach are to be in the same money.” *Id.*

Section 5 creates some confusion on the interpretation of currency of payment clauses in a contract. Section 5(b) implies that a currency of payment clause will not govern where payment is delayed beyond a reasonable time, not to exceed 30 days. This comports with general party intent to construct contract provisions governing performance, not breach. On the other hand, section 5(a) states that “if an amount contracted to be paid in a foreign money is measured by a specified amount of a different money, the amount to be paid is determined on the conversion date.” *Id.* § 5(a). Why a currency of payment clause would govern post-breach allocation of risk in one case and not in another is nowhere explained. Such a distinction will not always be consistent with general application of foreseeability principles governed by *Hadley v. Baxendale* and for which the Act otherwise leaves the substantive law matters governed by conflict of laws rules outside the Act. *See infra* notes 253–63 and accompanying text.
EXCHANGE LOSS DAMAGES

Isaac Naylor. Section 9(b) specifically provided for the recovery of consequential exchange loss damages:

(b) If the party asserting a foreign-money claim shows that it suffered a loss from depreciation in the money of the claim with regard to another money and that, in the circumstances of the case, the other party should have known of the need for the other money, the party asserting the claim may recover, as consequential damages, in lieu of an award of interest for the period involved, an additional amount equivalent to the difference between the amount of the needed currency obtainable at the rate of exchange at the date payment was due and the amount obtainable at the payment date.252

This provision, a restatement of the rule of Hadley v. Baxendale in foreign currency claim situations, was revised several times and ultimately omitted from the final Uniform Foreign-Money Claims Act.253 Thus, the reasonable application of basic contract principles so logically developed in the Isaac Naylor case must be found elsewhere. Only a careful reading of the Act, its comments, and the writings of the Reporter and the Chairman of the Drafting Committee makes the source and substance of the applicable rules clear.

Section 9(a) of the Act now deals with what the drafters had earlier called “incidental damages” in the form of post-default, pre-judgment interest.254 It states:

(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

252. UNIF. FOREIGN-MONEY CLAIMS ACT § 9(b) (Discussion Draft 1988). It was possible to interpret this section as being inapplicable to a case such as The Lips. The term “foreign-money claim” was defined in the same draft in section 1(c) as “a claim, expressed or measured by foreign money.” Id. § 1(c). Since the owners in The Lips did not assert a claim in U.S. dollars, in the English courts theirs was not a claim “expressed in” foreign money. However, it was at least arguably a claim “measured by” foreign money. Further, the commentary to section 9 made specific reference to The Lips in a manner indicating a preference for Dr. Mann’s position criticizing that case. Id. § 9 cmt. 3 (quoting Mann, supra note 162, at 6).

253. According to the Reporter and the Chairman of the Drafting Committee, this omission reflected a determination that attempts to provide rules for “incidental” and “consequential” damages in prior drafts were “unsatisfactory.” Leary & Rosen, supra note 235, at 66.

254. Id. at 66-67.

in subsection (b), are matters of the substantive law governing the right to recovery under the conflict-of-laws rules of this State.\textsuperscript{255}

Other issues normally falling under the rubric of consequential damages are never referred to in the final Act. While section 13 retains "the principles of law and equity" of the state that are not "displaced by particular provisions of this [Act],"\textsuperscript{256} nowhere does the Act itself provide guidance on the issue of consequential damages. Thus, its specific provisions leave us without a clue as to where the Act comes down in regard to the differences between \textit{The Lips} and \textit{Isaac Naylor}.

The danger is that legislatures, parties to litigation, and the courts will interpret the Act as providing a comprehensive and exclusive set of rules applicable to damages in cases involving foreign money claims. Such an interpretation would place the law in a state adopting the Act more in line with \textit{The Lips} than with \textit{Isaac Naylor}.\textsuperscript{257} This would be both unfortunate and contrary to the intent of the drafters of the Act.

The comments to section 9 of the Act provide some guidance, but only in a vague manner. It is stated that, "[a]lthough pre-judgment interest is one form of damages, provision for pre-judgment interest is not to be taken as indicating that no other damages for delay in payment can be awarded under the substantive law applicable to the determination of damages."\textsuperscript{258} A \textit{cf.} citation to the \textit{Isaac Naylor} case follows this language.\textsuperscript{259} Thus, it would appear that the Act endorses the New Zealand Court of Appeal's \textit{Isaac Naylor} interpretation and application of the rules of \textit{Hadley v. Baxendale} over that of the House of Lords in \textit{The Lips}. This conclusion is confirmed in the writings of the Reporter and the Drafting Committee Chairman, which criticize the result in \textit{The Lips} while commending that in \textit{Isaac Naylor}.\textsuperscript{260}

The absence of any specific reference in the Uniform Act or its comments could be interpreted as implying the opposite conclusion. The Act appears to provide a comprehensive system for dealing with foreign-money claims. It is easy to infer from section 2 of the Act that reference to other rules on damages are precluded. Section 2(b) states, "[t]his [Act] applies to foreign-money issues even if other law under the conflict of laws rules of this State applies to other issues in the action or distribution

\textsuperscript{255} \textit{Unif. Foreign-Money Claims Act} § 9(a).
\textsuperscript{256} \textit{Id.} § 13.
\textsuperscript{257} This Article concludes that the Act \textit{must} provide a comprehensive set of rules on damages, but that those rules should reflect the decision in \textit{Isaac Naylor} rather than in \textit{The Lips}.
\textsuperscript{258} \textit{Unif. Foreign-Money Claims Act} § 9 cmt. 1.
\textsuperscript{259} \textit{Id.}
\textsuperscript{260} Leary & Rosen, \textit{supra} note 235, at 67–74.
EXCHANGE LOSS DAMAGES

proceeding.” The comment to this section then states only that, “under the rules of the conflict of laws, the determination of when a foreign money is converted to United States dollars is generally considered a procedural matter for the law of the forum. Subsection (b) removes any doubt.” If all “foreign-money issues” are governed by the Act, then the remedies provided in the payment-date, money of account formula it establishes would be exclusive. It does not seem unreasonable to read section 2(b) to require such a result. On the other hand, the Reporter and the Chairman of the Drafting Committee indicate that the Committee intended otherwise. Addressing the important issue of exchange losses due to delay in payment, they state that the Committee intentionally omitted the issue from coverage under the Act:

[T]he 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 [to §2(b)], since the issue is to be covered by the rules of the conflict of laws of the forum court.

Given that cases such as The Lips and Isaac Naylor demonstrate that the issue of damages for exchange losses resulting from delay in payment is often the important issue in a case involving a foreign-money claim, this is a rather dramatic omission and will strip the Act of its importance in many cases. At the same time, the failure to make this omission clear is a serious oversight.

The only reference in the Act to the reservation of damages issues to general conflict of laws rules is the section 9(a) provision dealing with pre-judgment interest. Thus, it is easy to assume that the issue of consequential damages is subsumed by the general provisions of the Act and that a judgment in a foreign currency, which can be satisfied by payment in U.S. dollars at a payment-date rate of exchange, is intended to compensate fully the aggrieved party for all losses suffered.

“The principle of the Act is to restore the aggrieved party to the economic position it would have been in had the wrong not occurred.” In determining how this principle is to be carried out,

262. Id. cmt.
263. Leary & Rosen, supra note 235, at 72. “All matters of damages are eliminated from specific mention in the Act and therefore are left to be determine by the conflict of laws rules of the forum, or, if applicable, by the forum’s own general rules of damages.” Id. at 73.
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)? 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.”

This language is remarkably similar to that of the House of Lords in The Lips, where it was determined that a contract provision establishing the currency of payment for demurrage fees was also applicable to post-demurrage delays in the payment of those fees. However, it would be unfortunate if this similarity were to lead to interpretations of the contract autonomy provisions of the Uniform Act, assuming that currency of payment clauses govern foreign-money claims beyond the date of expected performance. This is nevertheless exactly what the Act seems to do by stating in section 4(a) that “[t]he money in which the parties to a transaction have agreed that payment is to be made is the proper money of the claim for payment.” If this is the rule, the logical conclusion is either that the resulting foreign currency judgment includes any consequential damages resulting from exchange fluctuations or that the Act intends that no such damages be available.

This logic is the result of several factors. First, the Act’s language appears to be comprehensive in providing the method for computing and stating the judgment. Nowhere in the Act are consequential damages specifically mentioned. The only comments that imply the availability of other damages for exchange fluctuations are buried in provisions dealing with pre-judgment interest rates. Second, if, as the Prefatory Note and later commentary by the Reporter and the Chairman of the Drafting Committee indicate, the Act specifically deals with the issue of allocation of loss, and is designed “to restore the aggrieved party to the economic position it would have been in had the wrong not occurred,” then it must cover damages for exchange fluctuations. There exists nothing else to allocate in terms of currency differences.

Finally, and perhaps most telling, the method chosen in the Act to deal with the problem of foreign-money claims would be meaningless if it did not cover damages from exchange fluctuations. Out of the three possibili-

265. Leary & Rosen, supra note 235, at 81.
266. UNIF. FOREIGN-MONEY CLAIMS ACT § 4(a).
268. UNIF. FOREIGN-MONEY CLAIMS ACT, Prefatory Note.
ties available for dealing with currency conversion (breach date, judgment date, and payment date), the Act rejects the two previously used by U.S. courts and opts for the third. It does this through its "money of the claim" and "conversion date" provisions. While breach-date and judgment-date exchange rates are associated with a home-currency judgment requirement, a payment-date rule does nothing more than allow judgment to be stated in a foreign currency, but paid in the home currency. Thus, all three remain definable in terms of payment in the currency of the forum. The choice of one over the others is meant to prevent the "mischief of the common law" that tended "either to overcompensate or undercompensate an aggrieved party." While a payment-date rule may lessen, or at times even eliminate, the possibility for overcompensation of an aggrieved party, it does not, without more, prevent undercompensation. Thus, an Act that fails to deal adequately with the issue of damages does little to improve on existing law. This can be demonstrated by considering the application of each of the breach-date, judgment-date, and pay-

269. See supra notes 60–82 and accompanying text. The problems of a simple transition from a breach-date to a payment-date rule were foreseen by Justice Donaldson in Ozalid Group (Export) Ltd. v. African Continental Bank Ltd., [1979] 2 Lloyd's Rep. 231, 233–34 (Eng.), when he rejected the argument that an obligation stated in U.S. dollars required a judgment in U.S. dollars:

I have said that under the new rule the plaintiff is entitled to make his claim in foreign currency. I use the word advisedly, because I can find no trace in the speeches of any intention to make a claim in this form obligatory. The overriding reason for changing the law was to provide a procedure which would enable the Courts to compensate the claimant in full for the wrong which he had suffered. A change which required the plaintiff to claim in foreign currency and to accept sterling at the rate prevailing at the date of judgment could in some circumstances work as great an injustice as the old procedure requiring him to claim in sterling and to adopt the date of breach rate of exchange.

Id. See infra note 295.

270. Once a rule is stated in terms of the date of conversion of the foreign currency into U.S. dollars, the focus is taken off the principle of consequential damages as governed by Hadley v. Baxendale and placed instead upon a rule of procedure that is simply assumed to produce the desired substantive result.

271. Leary & Rosen, supra note 235, at 52.

272. It has been stated that the Act governs procedure only and that substantive issues regarding damages remain governed by the conflict of laws rules of the adopting state. Id. at 72. If this were the case, then the Act has no purpose. No U.S. case, regardless of the exchange date applied, appears to have awarded consequential damages for exchange fluctuation losses. Thus, a conflict of laws analysis leading to the substantive law of any U.S. jurisdiction would never provide authority for an award of consequential damages even if the plaintiff could prove that exchange rate losses were suffered beyond the date of breach, judgment, or otherwise. All preliminary drafts of the Act included specific provisions allowing consequential damages. The absence of such a provision in the final Act appears a little like the White King's discussion with Alice about two Messengers:
ment-date rules to the spectrum of possible cases as is done in the next section.

C. Reasoning From a False Premise: Denial of the Foreseeability Factor as the Undoing of the Uniform Foreign-Money Claims Act

So far in this Article, examples offered to demonstrate concerns involved in a foreign currency case have consisted of facts of specific cases, or of the example set forth in the Prefatory Note to the Uniform Act. The weakness of such an analysis is that it assumes only the facts of a single case and not whether the rule under consideration leads to appropriate results if the facts are changed. Just as the home-currency-judgment-fixed-exchange-date rule generated appropriate results in some cases but failed to do so in others, it is important to determine whether any replacement rule is appropriate in all possible circumstances. Miliangos and the Uniform Act both reject a rule that provides simplicity at the expense of equitable results. The question is whether they replace the disfavored rule with a better alternative.

In order to test the Uniform Act in multiple variations of a given transaction, assume a seller and a buyer enter a transaction in which the contract price of the goods is 100,000 deutsche marks. One party does all its business and keeps all its accounts in U.S. dollars and the other in deutsche marks. The buyer breaches by nonpayment and the following exchange rates occur (based on two possible scenarios depending on which currency remains stronger):

<table>
<thead>
<tr>
<th></th>
<th>Strong $</th>
<th>Strong DM</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>$/DM</td>
<td>$/DM</td>
</tr>
<tr>
<td>Contract date</td>
<td>1/4 ($25,000)</td>
<td>1/4 ($25,000)</td>
</tr>
<tr>
<td>Breach date</td>
<td>1/5 ($20,000)</td>
<td>1/3 ($33,333)</td>
</tr>
<tr>
<td>Judgment date</td>
<td>1/6 ($16,667)</td>
<td>1/2 ($50,000)</td>
</tr>
<tr>
<td>Payment date (actual)</td>
<td>1/8 ($12,500)</td>
<td>1/1 ($100,000)</td>
</tr>
</tbody>
</table>

"... And I haven't sent the two Messengers, either. They're both gone to the town. Just look along the road and tell me if you see either of them."

"I see nobody on the road," said Alice.

"I only wish I had such eyes," the King remarked in a fretful tone. "To be able to see Nobody! And at that distance too! Why, it's as much as I can do to see real people, by this light!"

LEWIS CARROLL, THROUGH THE LOOKING GLASS 139-40 (The Macmillan Company 1941).

273. UNIF. FOREIGN-MONEY CLAIMS ACT, Prefatory Note.
EXCHANGE LOSS DAMAGES

The amounts in parentheses represent the dollar value of the original contract price of DM 100,000, based on each of the exchange rates. The example allows consideration of both pre- and post-breach allocation of exchange rate losses. It also facilitates consideration of the results of a rule applied in times of both strong and weak home currency.

The results in any case will depend upon (1) the exchange-date rule applied, (2) the direction of the fluctuation of currencies involved, and (3) the currency in which the non-breaching party keeps its accounts and would feel the loss. This can be demonstrated by considering the following possibilities:

(1A) Plaintiff keeping accounts in U.S. dollars under a home-currency-breach-date rule

Under the old home-currency-breach-date rule, the plaintiff would receive a judgment in a U.S. court for $20,000 in times of a strong dollar and $33,333 in times of a weak dollar. If the plaintiff keeps its accounts in U.S. dollars, it would have anticipated receipt of $25,000 at the date on which it entered into the contract. The contract terms, however, provide that both the currency of account (the currency in which the contract price is measured) and the currency of payment (the currency in which payment is to be made under the contract) are Deutsche marks. Thus, the plaintiff-seller has accepted the risk of a decline in the value of the mark against the dollar during the term of the contract. Assuming a strong U.S. dollar relative to the mark, a judgment for $20,000 (plus interest from the date of breach) places the plaintiff just where it would have been had the contract been properly performed.

On the other hand, the currency of payment clause allocates the risk of a declining dollar against the mark to the defendant-buyer. Thus, if, in the same transaction, the mark had been the stronger of the two currencies, a home-currency-breach-date rule results in judgment for $33,333, plus interest. The plaintiff receives the benefit of fluctuations during the term of the contract and again is placed in the position it would have been in had the contract been performed.

(1B) Plaintiff keeping accounts in deutsche marks under a home-currency-breach-date rule

The traditional home-currency-breach-date rule makes no distinction based upon the currency in which the plaintiff keeps its accounts. Thus, for a plaintiff that keeps its accounts in deutsche marks, the $20,000 judgment would convert on the date of actual payment to DM 160,000 assuming the strong dollar facts. Assuming the weak dollar facts, the $33,333
judgment would convert to DM 33,333 on the date of actual payment. The first result would grant a windfall to a plaintiff who had expected to receive DM 100,000 when the contract was entered. The second undercompensates the plaintiff, effectively (and inappropriately) presuming that the currency of payment clause in the contract (which does allocate risk up to the date on which payment was due—here, the breach date), applies also to allocation of risk beyond the contract events.

Thus, the home-currency-breach-date rule provides appropriate results when the creditor suffers the loss in the currency of the forum, regardless of the direction of the fluctuation of exchange rates. At the same time, a creditor who suffers the loss in a foreign currency is granted a windfall in times of a weak foreign currency and is not fully compensated in times of a weak forum currency.

(2A) Plaintiff keeping accounts in U.S. dollars under a home-currency-judgment-date rule

Under a home-currency-judgment-date rule, the plaintiff-seller would receive a judgment in a U.S. court for $16,667 in times of a strong dollar and $50,000 in times of a weak dollar. Assuming the plaintiff kept its accounts in U.S. dollars, it would have anticipated receipt of $25,000 at the date on which it entered into the contract. A judgment-date exchange rate rule would assume the application of the currency of payment term to post-breach, pre-judgment events. Thus, the plaintiff-seller, who would have contemplated receipt of $25,000 on the day the contract was entered, and who would have received either $20,000 or $33,333 had proper performance been accompanied by immediate conversion from marks to dollars, would receive $16,667 in times of a strong dollar and $50,000 in times of a weak dollar relative to the mark. While the former results in clear undercompensation, the latter results in a windfall overcompensation. In either event, the rule offers the court only the simplicity of allowing it to convert on the final date on which the case is before it.

(2B) Plaintiff keeping accounts in deutsche marks under a home-currency-judgment-date rule

If the same plaintiff kept its accounts in deutsche marks, it would have assumed the receipt of DM 100,000 upon proper performance of the contract. Instead, it would receive an amount that would convert on the payment date to DM 133,336 assuming the strong dollar facts (a $16,667 judgment), or to DM 50,000 assuming the weak dollar facts (a $50,000 judgment). The results are reversed from those in situation 2A, above,
EXCHANGE LOSS DAMAGES

with the first result producing a windfall and the second undercompensating the plaintiff.

Thus, the home-currency-judgment-date rule never provides suitable results unless overcompensation of the plaintiff can be seen as appropriate on the theory that the defendant-buyer should be penalized for causing the breach. According to its Prefatory Note, the Uniform Foreign-Money Claims Act endorses the payment-date rule considered by its drafters to have been the result of Miliangos.\(^{274}\) If this means a strict payment-date rule, then we may consider its implications in addition to the breach-date and judgment-date examples set forth previously.

(3A) Plaintiff keeping accounts in U.S. dollars under a payment-date rule

A payment-date rule requires that judgment be rendered in the foreign currency as both the actual date of payment and the exchange rate on that future date are unknown to the court. Under a payment-date rule, the plaintiff-seller in our example would receive a judgment in a U.S. court for \(\text{DM 100,000, payable in deutsche marks or in U.S. dollars at the exchange rate existing on the payment date. For the plaintiff keeping its accounts in U.S. dollars, this would result in the receipt of $12,500 in times of a strong dollar and $100,000 in times of a weak dollar. The first result undercompensates the non-breaching plaintiff, and the second gives the plaintiff three times the amount it would have received had the contract been properly performed with immediate conversion of marks to dollars.} \)

(3B) Plaintiff keeping accounts in deutsche marks under a payment-date rule

The plaintiff-seller in our hypothetical who keeps its accounts in deutsche marks will receive exactly the amount of the foreign currency for which it bargained. Thus, a plaintiff who had anticipated receiving \(\text{DM 100,000, will receive either that amount or its dollar equivalent on the date of payment. The plaintiff will receive the currency bargained for in the amount bargained for.} \)

The above examples demonstrate that the home-currency-breach-date rule properly protects the plaintiff's expectation interests when the forum currency is strong and is the currency in which the plaintiff keeps its accounts. On the other hand, the payment-date rule generates expectation

\(^{274}\) Unif. Foreign-Money Claims Act, Prefatory Note.
results whenever the plaintiff keeps its accounts in the foreign currency.

These results are summarized in the following chart:

<table>
<thead>
<tr>
<th>Plaintiff's Currency and Dollar direction:</th>
<th>$</th>
<th>$</th>
<th>DM</th>
<th>DM</th>
</tr>
</thead>
<tbody>
<tr>
<td>Breach-date</td>
<td>$20,000</td>
<td>$33,000</td>
<td>160,000 DM</td>
<td>33,333 DM</td>
</tr>
<tr>
<td>Judgment-date</td>
<td>$16,667</td>
<td>$50,000</td>
<td>133,336 DM</td>
<td>50,000 DM</td>
</tr>
<tr>
<td>Payment-date</td>
<td>$12,500</td>
<td>$100,000</td>
<td>100,000 DM</td>
<td>100,000 DM</td>
</tr>
</tbody>
</table>

*These results provide proper damages based upon the plaintiff’s expectation interests.

The *Miliangos* conclusion that an exclusive home-currency-breath-date rule is inappropriate in a modern world is confirmed in this analysis. That rule results in proper protection of the plaintiff’s expectation interest in only two out of four possible situations. On the other hand, the payment-date rule proffered as an alternative in both *Miliangos* and the Uniform Act, if applied strictly, also generates expectation damages in only two of four possible situations.

It is easy to draw the conclusion that the home-currency-breath-date rule properly compensates the plaintiff for its expectation losses when the plaintiff keeps its accounts in the home currency and the payment-date rule properly compensates the plaintiff when it keeps its accounts in the foreign currency. Thus, the decisive issue is whether the plaintiff keeps its accounts (suffers its loss) in the home or foreign currency.

Some insight into the thoughts of the drafters of the Uniform Act are provided on this issue, not in the Act or its comments, but in the article written by its Reporter and the Chairman of its Drafting Committee. The issue of which currency was the currency of the loss must, by its nature, be capable of objective determination. Thus, both parties must be aware (or capable of being aware) of the currency of the loss (i.e., they must be able to foresee the currency of the loss). In discussing the *Isaac Naylor* case, the Act’s Reporter and Chairman saw “trouble with a foreseeability
test,” because “some things are more foreseeable than others.” Noting that Isaac Naylor presented a simple determination of foreseeability, they state:

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.

Leary and Rosen go on to note that an earlier draft of the Act had focused on a foreseeability test, but that this test was dropped from the final Act:

[T]he 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. 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.

While this may have been an easy way to avoid the difficulty of dealing with the issue of foreseeability, it also strips the Act of its central purpose. There can be no reason for determining whether a breach-date, judgment-date, or payment-date rule is appropriate unless it is to compensate properly the aggrieved party for its loss. The Prefatory Note to the Act itself clearly states that “[t]he principle of the Act is to restore the aggrieved party to the economic position it would have been in had the wrong not occurred.” With no discussion of specific performance, this principle can only be accomplished by awarding damages. Thus, “the principle of the Act” requires that it address the issue of damages. Denying that it does so, denies its very purpose. Further, refusing to deal with the issue of

275. Leary & Rosen, supra note 235, at 68.
276. Id.
277. Id. at 72-73.
278. UNIF. FOREIGN-MONEY CLAIMS ACT, Prefatory Note.
279. This is in accord with the comments to RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 823, supra note 57 and accompanying text.
foreseeability in determining damages separates the Act from the very foundation of the law dating back at least to Hadley v. Baxendale.

The "trouble" seen in a foreseeability test is precisely why we have courts, juries, and judges: to ascertain the facts and apply the rules of law to those facts in order to administer justice in a particular case in a manner that provides a reasonable level of certainty and predictability. This is the success of the common law, not something to be avoided.

It may be possible that a Uniform Act adopting a payment-date rule could still produce proper results and thus achieve redemption as to its ends, even if no such redemption is available for the means applied in reaching those ends. Unfortunately, this is not the case with the Uniform Foreign-Money Claims Act. As noted above, a payment-date rule produces proper expectation damages only where the plaintiff's accounts are kept (and the loss suffered) in the foreign currency. Similarly, a home-currency-breach-date rule compensates expectation losses only where the accounts are kept (and the loss suffered) in the currency of the forum. A legitimate argument could be made for a system that resorted to a payment-date rule where appropriate, and to a home-currency-breach-date rule in other circumstances.

Unfortunately, section 4 of the Uniform Act leads to the foreign currency being the all-important "money of the claim" far too often in contract cases. Paragraph (a) states that "[t]he money in which the parties to a transaction have agreed that payment is to be made is the proper money of the claim for payment." This provision improperly presumes that whenever parties allocate risk of exchange rate fluctuation during the term of the contract through the selection of the currency in which payment is to be made if made on time, they have also agreed to allocate the risk of exchange rate fluctuation after contract performance was to have occurred. Not only is this presumption inappropriate, as demonstrated by the examples set forth in this Article, but it is wholly inconsistent with the second sentence of section 3(b) of the Act, which provides that, "[s]tating the price in a foreign money for one aspect of a transaction does not alone require the use of that money for other aspects of the transaction."

Parties must be able to enter contracts expecting performance. A clause that allocates a risk for a time certain cannot automatically be assumed to

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280. See supra example 3B.
281. See supra example 1A.
282. UNIF. FOREIGN-MONEY CLAIMS ACT § 4(a).
283. Id. § 3(b). "The second sentence recognizes that a price stated in a particular money does not indicate, without more evidence, an intent that all damages from breach are to be in the same money." Id. § 3(b) cmt. 2.
EXCHANGE LOSS DAMAGES

allocate a separate and distinct risk. Section 4(a) of the Act improperly makes such an assumption. As a result, the Act fails to compensate the plaintiff for expectation losses in two of the four possible events considered above.

D. Salvaging the Act: Some Suggested Amendments

The Uniform Act’s “endorsement” of the payment-date rule,\textsuperscript{284} is carried out through a focus on judgments in foreign currencies. This focus obscures the need to retain the power to grant judgment in U.S. dollars as the appropriate “money of the claim” when events so require. Section 4(a) too often requires judgment in the foreign currency. Any adoption of the Act must negate the impact of this provision in order to provide proper results in foreign-money cases.

Unlike the common law status of \textit{Miliangos}, which must wait for further cases to define the nuances of its rule, the statutory nature of the Uniform Act allows its payment-date rule to anticipate future cases. If the Act provided exceptions to a strict payment-date result in the cases in which expectation interests would not otherwise be protected properly, then it might be adopted as an appropriate solution to the exchange rate problem.

While the Prefatory Note to the Uniform Act indicates “endorsement” of a payment-date rule,\textsuperscript{285} the statutory language purports to set limits on a strict application of the rule. Rather than deal in differences among the currency of account, currency of loss, or currency of payment, as have some English cases and commentaries,\textsuperscript{286} the Act uses only the term, “money of the claim.” So long as the “money of the claim” is the appropriate currency based upon the foreseeability issue, the Act could provide proper results. It cannot do so, however, without recognizing that only by addressing directly the issue of exchange loss damages can the Act be applied “to restore the aggrieved party to the economic position it would have been in had the wrong not occurred.”\textsuperscript{287}

\textsuperscript{284} \textit{Id.} Prefatory Note.

\textsuperscript{285} \textit{Id.} ("The payment day rule is endorsed by this Act.").


\textsuperscript{287} \textit{UNIF. FOREIGN-MONEY CLAIMS ACT, Prefatory Note. See D.F. Libling, Questions \& Answers; Miliangos v. Frank (Textiles) Limited, 93 L.Q. REV. 212, 215 (1977):}
There are two ways in which an act could serve the purpose attributed to the Uniform Act. The first is through a simple rule such as that applied in Isaac Naylor in New Zealand. By recognizing that the issue is one of foreseeability and then determining the damages occasioned by the breach, including the post-breach exchange rate loss, a court would compensate the plaintiff for its expectation losses. This method focuses on the ends rather than the means. Thus, the goal of compensating the aggrieved party for the loss suffered, including exchange rate fluctuation losses, guides the court in selecting the means it determines best suited to achieving that goal. Without more, such a rule may leave courts ill-suited to construct the proper means of achieving the stated end. Further, the end of proper compensation cannot be reached without removal of the current impediments in U.S. courts to judgments in foreign currency. Thus, any act must at a minimum remove the well-established assumption that judgments be in U.S. dollars.

The ideal Uniform Foreign-Money Claims Act should state the goal and elaborate the means of achieving that end. The Act’s stated goal of restoring the aggrieved party “to the economic position it would have been in had the wrong not occurred” requires that the expectation interest of the aggrieved party be protected. This goal can be reached only upon recognition that proper compensation to the aggrieved party requires that damages be paid for the losses suffered as a consequence of the wrong. In the contract setting, this requires a proper application of the foreseeability test of Hadley v. Baxendale. Thus, the means employed to achieve the desired end must include damages for any exchange rate loss from the time of breach until the time of payment.

How the Act is applied to determine the amount of those damages depends upon the means selected for achieving compensation of the aggrieved party’s expectation interest. When the aggrieved party keeps its accounts in the foreign currency involved, the Act properly recognizes that

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288. See supra notes 215-26 and accompanying text.
289. UNIF. FOREIGN-MONEY CLAIMS ACT, Prefatory Note.
290. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 344 cmt. a (1979):

Ordinarily, when a court concludes that there has been a breach of contract, it enforces the broken promise by protecting the expectation that the injured party had when he made the contract. It does this by attempting to put him in as good a position as he would have been in had the contract been performed, that is, had there been no breach. The interest protected in this way is called the “expectation interest.”
the court can and should be able to provide this compensation by granting judgment in the foreign currency. This changes current law and is an appropriate step in achieving proper compensation. However, it is not the only step, because it does not provide the desired ends in all circumstances. The Act also must directly address the issue of exchange loss damages. Going part way is not enough. Going in the wrong direction, as section 4 currently does, is even more problematic.

The Act could simply state the goal and require courts to apply whatever methods they deem appropriate in reaching that goal. This would place U.S. law on equal footing with that in England and New Zealand. Once the choice is made to develop new rules through statute rather than common law, however, it is inappropriate to leave all possible variations to be determined by courts in future cases.291 Thus, it is appropriate to set out the means to the desired end.

The examples set forth above indicate that it is possible to develop rather simple rules determined by the currency in which the aggrieved party keeps its accounts or, if there are more than one, the currency in which it was foreseeable that the plaintiff would incur the loss.292 Thus, when the aggrieved party keeps its accounts related to the transaction in the foreign currency, judgment in the foreign currency and a payment-date rule will be appropriate. When those accounts are kept in U.S. dollars, then the judgment should be in U.S. dollars with a presumption in favor of a breach-date exchange rate. These simple rules provide an appropriate recognition of both the efforts of courts to develop a simply applied rule and the concern of courts and commentators that the rule achieve just results. In order to insure that the goal of the Act not be masked by the rules developed for achieving that goal, the Act should contain a provision (as did prior drafts of the Act) acknowledging that a court may award damages for exchange rate fluctuation losses where to do so would place the aggrieved party in the economic position it would have been in had the contract been performed or had the tort not occurred.

The rules suggested above should not require radical changes in the existing language of the Act. Replacing section 4 with appropriate rules for selecting the money of the claim, and adding a new section mirroring prior draft recognition of the need for a rule on consequential damages

291. See Leary & Rosen, supra note 235, at 59.

292. While this determination of foreseeability admittedly may be difficult, particularly in transactions involving multinational corporations with accounts in numerous countries, it is a determination that is necessary under basic contract doctrine and cannot be ignored. The Act should acknowledge that courts are constantly involved in such fact determinations and directly address the issue by covering damages in its provisions.
should suffice. In the process, it is important that the Act be construed not to provide the claimant undue control over the choice of the money of the claim. While the claimant “may assert a claim in a specified foreign money,” \(^{293}\) the ultimate determination of the appropriate money of the claim is a question of law for the court. \(^{294}\) The plaintiff must not be given an unbridled option to determine the currency in which judgment will be rendered. \(^{295}\)

293. Unif. Foreign-Money Claims Act § 6(a).

294. Id. § 6(d).

295. The Restatement rule appears to provide such an option for the plaintiff. See Brand, supra note 1, at 182. In England, Miliangos has not generated a clear position on whether the adoption of a payment-date rule gives the plaintiff an exclusive option in requesting judgment. The Report of the Law Commission speaks of a “completely new principle governing the treatment by the courts of foreign-currency obligations,” and notes that the foreign currency will be the currency of judgment in appropriate cases, “for good or ill.” Law Comm. Rep. No. 124, supra note 55, ¶ 2.5. It later states that “to allow the plaintiff to seek judgment in sterling in the case of a foreign-currency claim would be contrary to the principle in Miliangos,” and concludes that “[a] plaintiff should not be able to obtain judgment in sterling in the case of enforcement of a claim which ought properly to be expressed in a foreign currency.” Id. ¶¶ 3.9, 3.11.

The courts and commentators have not made this position so clear. The Practice Direction adopted immediately after Miliangos left the issue unresolved. Practice Direction, [1976] 1 All E.R. 669. In The Maratha Envoy, Lord Denning indicated that the plaintiff has no option when he stated, “[o]nce it is recognised that judgment can be given in a foreign currency, justice requires that it should be given in every case where the currency of the contract is a foreign currency.” [1977] 2 All E.R. at 51. In Barclays Bank Ltd. v. Levin Bros. Ltd., Judge Mocatta seemed to take a more flexible approach, rejecting the argument that “where the obligation in the contract is expressed in terms entitling the creditor to a sum expressed in a foreign currency, judgment must . . . be given in that currency.” [1976] 3 All E.R. 900, 909 (Q.B. (Com. Ct.)).

A position somewhere between The Maratha Envoy and Barclays Bank was taken by Judge Donaldson in Ozalid Group, when he stated that “under the new rule the plaintiff is entitled to make his claim in foreign currency,” but not “required” to do so. [1979] 2 Lloyd's Rep. 231, 233–34. Justice Donaldson would not give the plaintiff a free choice, but rather leave it to the plaintiff, “to select the currency in which to make his claim and . . . to prove that an award or judgment in that currency will most truly express his loss and accordingly most fully and exactly compensate him for that loss.” Id. at 234; see also Law Comm. Rep. No. 124, supra note 55, ¶ 3.9.

A leading commentator has accepted the mandatory nature of foreign currency judgments after Miliangos, but tempered the effect of such a rule by calling for the adoption of “a sound rule permitting the recovery of damages for the loss caused by the depreciation of foreign money.” Mann, supra note 192, at 348. Other commentators would apply a more flexible interpretation of the Miliangos rule, allowing the plaintiff to receive judgment in sterling when it was the stronger currency, apparently offering an option similar to that contemplated by the Restatement. Roger A. Bowles & Christopher J. Whelan, Law Commission Working Paper No. 80: Private International Law Foreign Money Liabilities, 45 Mod. L. Rev. 434, 440–41 (1982).

See also Ozalid Group, where payment in U.S. dollars was due on a letter of credit no later than Oct. 5, 1977, but was not in fact made until Dec. 12, 1977. During this period the appreciation of the pound sterling against the dollar resulted in a difference of £2,987.17 in the sterling value of the dollars paid. Ozalid Group, [1979] 2 Lloyd's Rep. at 231. The Commercial Court (Queen's Bench
A proper application of the Uniform Act's rules regarding the selection of the money of the claim should lead courts to select a payment-date rule only when the plaintiff foreseeably keeps its accounts (or suffers the loss) in the foreign currency selected as the money of the claim. Selecting U.S. dollars as the money of the claim in most other cases should provide proper expectation damages when the dollar is the stronger of the two currencies and a breach-date rule is applied. It is important that the Act not assume courts can provide an adequate solution by looking to state conflict of laws rules and the resulting rules on consequential damages. Such an approach is not likely to lead to uniform results and thus defeats the very purpose of having a uniform act.

The changes to the *Uniform Foreign-Money Claims Act* set forth below are suggested in order to remedy the problems of the Act discussed above. These provisions involve a complete replacement of section 4 and its comments, a minor amendment to section 5(a) and its comments, the creation of a new section 9, and the renumbering of current sections 9 through 19 as sections 10 through 20.

**The Suggested Amendments**


(a) If the parties to a transaction have agreed that a specific money shall be used to govern all events concerning a transaction among them, that money shall be the money of the claim.

(b) If the parties to a transaction have not otherwise agreed, the money of the claim shall be the money in which the party claimant suffered the loss, provided the parties could reasonably have foreseen that the loss would be suffered in such money.

(c) In the event the money of the claim is not subject to determination by the application of paragraphs (a) and (b), then the money of the claim shall be the money in which the parties should reasonably have foreseen that the party claimant would suffer such a loss, taking into account,

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Division) found that the plaintiff's loss was incurred in sterling even though the contract price and the letter of credit terms were stated in U.S. dollars. *Id.* at 234. The court rationalized this result by declaring that the plaintiff, who did business in England, did through the contract and letter of credit undertake the risk of currency fluctuation only for the period of the contract, "but for no longer." *Id.* Although the Law Commission has been highly critical of this result, the case has been defended by others as a proper application of the *Miliangos* rule. *Working Paper No. 80, supra* note 286, ¶¶ 2.29-.30, 3.65-.68; Bowles & Whelan, *supra* at 440-41.
LAW & POLICY IN INTERNATIONAL BUSINESS

(1) the money in which the party claimant customarily kept its accounts at the time the transaction was entered or the loss was suffered;

(2) the money regularly used between the parties as a matter of usage or course of dealing;

(3) the money used at the time of the transaction in international trade, by trade usage or common practice, for valuing or settling transactions in the particular commodity or service involved.

Comment

1. The selection in a contract of a money in which payment is to be made upon proper performance, will not, without more specific language in a contract, be considered to govern post-breach allocation of exchange rate fluctuation losses. In order for a contractual provision to govern the money of the claim for purposes of this Act, the intent of the parties must be clear that the provision applies to post-breach exchange losses.

2. Parties will seldom agree ahead of time upon the money to govern events beyond the normal duration of a transaction. Subsection (b) therefore states the principal rule governing the determination of the money of the claim. This rule has been followed in English cases. See The Despina R, [1979] 1 App. Cas. 685. An example is the use of an operating account in U.S. dollars by a French company to buy Japanese yen for ship repairs; the loss is felt in the depletion of the dollar bank account. Thus, the money in which the loss is suffered will generally be the money in which the claimant keeps its accounts relating to the transaction.

3. The party asserting a money of the claim must prove that it was foreseeable that the loss was or would be incurred in the money asserted. See Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854). The appropriate time for application of the foreseeability test will generally be the time the parties entered into the transaction, or the time the event causing the loss occurred if no prior transactional relationship existed among the parties. The judge is to determine the appropriate money of the claim from the facts of the case. See Section 6(d).

4. Subsection (c) states rules to fill gaps when there is no agreement among the parties and no clear money in which the loss was incurred. The three rules will normally apply in the order stated. The ultimate test is one of foreseeability as the selection of the money of the claim serves the purpose of determining the claimant's recovery of damages for the loss suffered. The purpose of the Act to restore the aggrieved party to the economic position it would have been in had the wrong not occurred requires that the selection of the money of the claim further the protection
of the claimant’s expectation interests in contract cases. See Restatement (Second) of Contracts §§ 344, 347, 351 (1981).

5. When the money of the claim is determined to be U.S. dollars there will be no need for conversion from a foreign currency beyond the breach date in a contract case and the injury date in a tort case. The loss is suffered on that date in the money of the claim (U.S. dollars). Cases predating the adoption of this Act that attempted to compensate a claimant suffering a loss in a foreign currency by applying a judgment-date exchange rate (because judgment in a foreign currency was unavailable) are no longer applicable under the Act.

(a) If an amount contracted to be paid in a foreign money is measured by a specified amount of a different money, the amount to be paid is determined on the conversion date if, and only if, payment is made within a reasonable time after the date required by the contract, not exceeding 30 days.
(b) [no change]
(c) [no change]

Comment
1. Add at the end of the existing language: [The final clause of subsection (a) prevents a contract debtor from causing the creditor to suffer exchange rate loss because of undue delay in any payment.]
2. Add at the beginning of the existing language: [Inclusion of a fixed rate as specified in the contract, under subsection (a), or as of a date before default, under subsection (b), remains effective . . . ]

§ 9. Incidental and Consequential Damages. [new section]
If the selection of the money of the claim pursuant to section 4 of this Act results in less than full compensation of the loss suffered by the party-claimant as a result of delay in the payment of a foreign money obligation, additional damages may be awarded as are necessary to place the party-claimant in the economic position in which it would have been had the event leading to the claim not occurred.

Comment
1. The overriding purpose of this Act is to restore the aggrieved party to the economic position it would have been in had the wrong not occurred. Thus, in a contract case, the claimant should be awarded damages in an amount sufficient to compensate its expectation losses. See Restatement (Second) of Contracts §§ 344, 347, 351 (1981). In most cases, the selection of the money of the claim as required by section 4 will result in
proper compensation of the claimant's expectation interests. In the event this is not the case, section 9 provides that such damages as are necessary to provide expectation compensation may be awarded. In accordance with the general rules of contract damages, such losses must be foreseeable in order to be recovered. See Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854). Such damages for delay in payment are consistent with the provisions of section 10 regarding interest. See Isaac Naylor & Sons, Ltd. v. New Zealand Co-operative Wool Marketing Association, Ltd., [1981] 1 N.Z.L.R. 361 (exchange loss due to delay awarded as additional damages).

2. This section makes clear that damages for currency exchange losses suffered as the result of the delay on the part of another in making payment are compensable under the substantive law of this State. Cases predating the adoption of this Act in most U.S. jurisdictions deny recovery for such losses as a result of the application of the home-currency-judgment rule, which is rejected by the adoption of this Act. This rejection of a rule that judgments can be given only in U.S. money would be incomplete without accompanying rejection of the prior rule's failure to adequately compensate the claimant's expectation interests.

§ 10. Pre-Judgment and Judgment Interest. [renumbered from § 9]

[no change in text of provision]

Comment

1. Add at end of comment 1: [See section 9.]

[renumber all remaining sections]

These amendments bring the provisions of the Act in line with the stated purpose set forth in the Uniform Act's Prefatory Note, which is "to restore the aggrieved party to the economic position it would have been in had the wrong not occurred."296 Section 4 accomplishes this goal by recognizing that (a) a foreign money of the claim—with payment-date conversion if necessary—generally will provide the proper measure of the claimant's expectation interests when the loss is suffered in the foreign currency, and (b) a U.S. dollar money of the claim—with breach-date conversion in order to demonstrate the loss in U.S. dollars—generally will provide the proper measure of the claimant's expectation interests when the loss is suffered in U.S. dollars.

EXCHANGE LOSS DAMAGES

Section 4 further acknowledges that parties to a contract may determine the rules governing that transaction, including the determination of the money of the claim for purposes of the Act. It also recognizes that by selecting a money of payment in a contract the parties do allocate the risk of currency exchange rate fluctuations during the term of the contract. At the same time, however, it explicitly denies the assumption that such a clause also allocates the risk of further fluctuation beyond the normal term of the contract. This is consistent with ordinary business practice and prevents the contortions in contract drafting that would be necessary to avoid the potentially harsh consequences of section 4 of the Act as adopted by the National Conference of Commissioners on Uniform State Laws.

The new section 9 specifically recognizes that it is the Act's purpose to compensate a party for losses suffered because of exchange rate fluctuation when the other party has delayed the payment of any amount due. Finally, the amendments state the rules in a manner consistent with basic U.S. contract principles regarding the foreseeableability of damages. The amendments necessarily admit that the Act does address substantive rules of damages. Those rules are stated consistent with traditional concepts stemming from Hadley v. Baxendale.


> Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

See also McCollough & Co. v. Ministry of Post, 11 Iran-U.S. Cl. Trib. Rep. 3, 33 (1986) ("The Tribunal finds that it would be inequitable to oblige the Claimant now to suffer the full extent of such a depreciation [in the Iranian rial] when the payments it should have received were delayed as a consequence of breaches of contract by the Respondents."). Compare Serbian Loans (Fr. v. Serb-Croat-Slovene State), 1929 P.C.I.J. (Ser. A) No. 26, at 376 (July 12) (judgment in "gold clause" value of French francs rather than their depreciated value); Joined Cases 64 & 113/76, 167 & 239/78, and 27, 28 & 45/79, P. Dumortier Frères S.A. v. Council, 1982 E.C.R. 1733, 1760 (judgment date exchange rate ordered for payments on claims in currency of account (ECU) due from European Community Council of Ministers as damages for non-contractual liability for agricultural production refunds unlawfully abolished, thus favoring recipients over payor Council); Joined Cases 41, 43 & 44/73, Société anonyme générale Sucrerie v. Commission, 1977 E.C.R. 445, 461 (fine due European Community Commission stated in French francs and paid in Italian lire required application of payment-date exchange rate).
It is important also to note what these amendments do not do. They do not address either the availability or rate of pre-judgment and post-judgment interest. These will undoubtedly be important to a claimant in a foreign-money case. State statutes on pre-judgment and post-judgment interest vary widely, and commentators disagree as to whether the determination of the applicable rate is a question of substantive or procedural law. This area is simply too confused and complex on its own to be changed in a uniform law on foreign-money claims and must "remain for a later uniform law addressed only to" the issues of prejudgment and post-judgment interest.

Such confusion does not exist, however, in terms of basic rules of consequential damages in contract law and questions of foreseeability in tort law. Thus, not only is it appropriate for the Act to address the question of the substantive rule of damages, it is necessary to do so if the Act is to have any meaning and consistency in application.

While the amendments—and for that matter, the early drafts of the Act—place the focus on the proper measure of damages, they do not in contract cases take a position on whether the appropriate rule as to foreseeability fits within the first or the second "rule" of Hadley v. Baxendale. This is the issue that caused so much trouble in the English courts in The Lips. The Isaac Naylor case demonstrates that appropriate results may be reached by acknowledging, as did Judge Richardson, that between international businesspersons currency exchange rate losses resulting from delayed payment "may well fall within the first branch of the rule," but most certainly "are within the second limb of the rule of Hadley v. Baxendale." Thus, for experienced international traders, a loss due to exchange rate fluctuations will be a probable result of breach occurring in the ordinary course of events. Even for the occasional participant in an international transaction, the nature of the transaction, as compared to that party's normal course of business, will be such that a loss due to exchange rate fluctuations will be a probable result of breach,

298. The interest issue and the substantive law of damages are noted by the Reporter and the Drafting Committee Chairman to be the "[t]wo issues of great difficulty" in the Act. Leary & Rosen, supra note 235, at 66. The complexity of the interest issue is demonstrated in the British Law Commission Report, where 35 of the 79 pages of general discussion are devoted to the topic of interest on foreign-currency judgment debts and arbitral awards. LAW COMM. REP. NO. 124, supra note 55, at 45-79.

300. Id. at 79.
301. See supra notes 24-52 and accompanying text.
EXCHANGE LOSS DAMAGES

given the international nature of the transaction, of which the party in
breach had reason to know. Thus, currency exchange losses resulting
from delay in payment of a foreign-money claim fall within the foresee-
ability rule of Hadley v. Baxendale in any event, and it is unnecessary in
the Act to distinguish between the first branch or the second branch of
that rule.

Finally, the proposed amendment does not in all events prevent a delay-
ing party from benefitting from the effect of the delay upon exchange
rates. A proper rule in a foreign-money case should prevent awards that
either overcompensate or undercompensate the plaintiff. Some have ex-
pressed this goal in terms of preventing the plaintiff from suffering further

304. Id. § 351(2)(b).

305. This is consistent with presentation of the rule of Hadley v. Baxendale in § 351 of the
Restatement, where it is stated that, "it is not necessary to distinguish between 'general' and 'spe-
cial' damages for the purpose of the rule stated in this Section." Restatement (Second) of Con-
tracts § 351 cmt. b (1981). The rationale for dispensing with such a distinction in foreign-money
cases is summarized in one commentator's discussion of Isaac Naylor:

If the prima facie right to recover for exchange losses due to breach of contractual obliga-
tions is established, then provided the parties to the contract are involved in international
trade practices the loss sustained will probably ab initio not be too remote. There will be
no need for the potential plaintiff to establish that the defendant was actually aware that
the plaintiff would be transferring the funds received back to his own base. All that is
required is a reasonable awareness that the plaintiff might suffer loss through exchange
fluctuations if he decided to convert to his local currency. Pretty well everyone involved in
international trading today must be aware of this. Richardson, J.'s statements as to this
point are not even limited to a general awareness of those currencies most likely to fluctu-
ate; rather they extend broadly to the general possibility of exchange fluctuations. Some
may balk at the blanket situation resulting from such a view. The difficulty, however, is
one of consistency. If one appeals to realism and modern commercial practices as the justi-
fication for the abandonment of the sterling-breach-date rule and for the recognition of the
right to recover for exchange losses, how can one turn a blind eye to the same realism
when it comes to the issues of foreseeability and remoteness?

Rickett, supra note 219, at 573-74; see also C. Czarnikow Ltd. v. Koufos, [1969] 1 App. Cas. 350,
385 (appeal taken from C.A.):

The crucial question is whether, on the information available to the defendant when the
contract was made, he should, or as a reasonable man in his position would, have realised
that such loss was sufficiently likely to result from the breach of contract to make it proper
to hold that the loss flowed naturally from the breach or that loss of that kind should have
been within his contemplation.

See also U.N. Sales Convention, supra note 297, art. 74.

306. "[T]he mischief to be remedied is the tendency of the common law approach to foreign-
money claims either to overcompensate or undercompensate an aggrieved party." Leary & Rosen,
supra note 235, at 52.
loss or the defendant from benefitting from currency exchange losses resulting from delay. While the claimant should not suffer loss (i.e., should be compensated fully for the loss suffered), penalizing the debtor is not a purpose of our law. In contract law, remedies are guided by a focus on the economic effect of breach on the plaintiff. In tort law, the primary focus is on compensation to the injured party, rather than on penalizing the tortfeasor. The drafters of the Act properly concentrated on “how best to compensate the injured party, rather than focusing on windfalls to the wrongdoer.” Any other approach would be inconsistent with the development of law in the United States generally.

X. Conclusion

The Uniform Foreign-Money Claims Act fosters confusion by selecting a payment-date rule and then stating its provisions in terms of that rule. The Act addresses the problems of a past rigid formula by creating a new mechanical formula. It then limits that formula in order to deal with potential aberrations in result. Like the old rules, the Act builds on a simple model and then adjusts that model, attempting to address all the complex possibilities. This similarity to the old rules brings with it the risk that courts will apply the new process in a manner that will not produce better results.

The final Act eliminates the section on damages contained in prior drafts and requires that the foreign currency be the money of the claim in cases in which it is wholly inappropriate. This approach abandons the ends of the old system (simplicity) while retaining its means (rigidity). It

308. See supra notes 170–83 and accompanying text. For an example of a case with enlightened language but results that penalize the debtor, see El Universal v. Phoenician Imports, 802 S.W.2d 799 (Tex. Ct. App. 1990). A Texas company failed to pay peso accounts when due for publication of advertisements in a Mexican newspaper. The peso subsequently declined against the dollar such that the amount due converted to $27,155.01 on the date of breach and $5,114.03 on the date of judgment. Nothing indicates that the Mexican newspaper company kept its accounts in any currency other than pesos. The Court found the “only just result” to be “placing the injured party in the position in which he would be had the loss not occurred.” Id. at 804. Determining that Texas law required that judgment be given in U.S. dollars, id. at 802, the court held the Mexican company entitled to judgment in the amount of $27,155.01, together with pre-judgment and post-judgment interest at the rate prescribed by the Texas statutes. Id. at 804. The result clearly gave the Mexican plaintiff a windfall when converted back to pesos, thus exceeding an expectation measure of damages. It also encourages future forum shopping when the foreign plaintiff has a choice between bringing the action in the courts of its own country (where a nominalistic judgment in that country's currency for the original amount is likely) and a court in the United States.
309. Restatement (Second) of Torts § 901 (1977).
310. Leary & Rosen, supra note 235, at 56.
replaces old rules with new ones that appear strikingly similar in their application.

Miliangos represented an important departure from the rigid rules of the past in favor of equitable results in the future. Unfortunately, subsequent decisions in the United Kingdom have focused on the payment-date rule of Miliangos rather than the reason for the rule. The Lips provides a striking example of a court so engrossed in the need to apply fixed rules that it loses all sight of the appropriate result. The decision in the Isaac Naylor case in New Zealand, on the other hand, focuses on proper compensation for loss and basic concepts of foreseeability without getting hung up on detailed rules. If the ends are any indication of the value of the means for reaching those ends, consideration must be given to developing a methodology more similar to that applied in Isaac Naylor than that dealt with in the House of Lords in Miliangos and The Lips. At a minimum, the focus on basic principles of damages should not be obscured by the statement of the rule chosen.

Constant increases in international trade require that disputes in U.S. courts be subject to rules consistent with the needs of international traders. The need for a uniform act dealing with foreign-money claims is obvious. But that act must move our law toward the enlightenment demonstrated in the Isaac Naylor case in New Zealand and not toward the confusion engendered by The Lips in England. Unfortunately, the Uniform Foreign-Money Claims Act approved by the National Conference of Commissioners on Uniform State Laws in August of 1989 moves us closer to The Lips than to Isaac Naylor. It does this by requiring that a judgment be rendered in a foreign currency even when to do so will either overcompensate or undercompensate the claimant. The Act claims to leave the substantive law of damages to the conflict of laws rules of the adopting state even though (1) its payment date rules are based upon decisions in which the choice of the exchange date is specifically intended to provide proper damages and (2) the stated purpose of the Act, to restore the aggrieved party to the economic position it would have been in had the wrong not occurred, by its very nature requires a substantive rule of damages. With the amendments offered in this article, these defects can be corrected and a proper change in U.S. law effected.
Appendix

Uniform Foreign-Money Claims Act

Drafted by the

National Conference of Commissioners on Uniform State Laws†

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT IN ALL THE STATES

at its

Annual Conference Meeting in Its Ninety-Eighth Year in Kauai, Hawaii
July 28 - August 4, 1989

† This Act has been reprinted through the permission of the National Conference of Commissioners on Uniform State Laws, and copies of the Act may be ordered from them at a nominal cost at 676 North St. Clair Street, Suite 1700, Chicago, PA 60611, (312) 915-0195.
EXCHANGE LOSS DAMAGES

UNIFORM FOREIGN-MONEY CLAIMS ACT

Prefatory Note

This Act facilitates uniform judicial determination of claims expressed in the money of foreign countries. It requires judgments and arbitration awards in these cases to be entered in the foreign money rather than in United States dollars. The debtor may pay the judgment in dollars on the basis of the rate of exchange prevailing at the time of payment.

A Uniform Act governing foreign-money claims has become desirable because:

These claims have increased greatly as a result of the growth in international trade.

Values of foreign moneys as compared to the United States dollar fluctuate more over shorter periods of time than was formerly the case.

United States jurisdictions treat recoveries on foreign-money claims differently than most of our major trading partners.

A lack of uniformity among the states in resolving foreign-money claims stimulates forum shopping and creates a lack of certainty in the law.

American courts historically follow one of two different rules in selecting a time during litigation for converting foreign money into United States dollars. These are called the "breach day rule" — the date the money should have been paid — and the "judgment date rule" — when judgment is entered. Many other countries use the "payment day rule" — when the judgment is paid. See Miliangos v. George Frank (Textiles) Ltd., (1976) A.C. 1007. The merits of this approach have begun to be recognized in this country. The payment day rule is endorsed by this Act.

The three rules produce wildly disparate results in terms of making an injured person whole. This is illustrated by the following example:

An American citizen (A) owes 18,790 pounds sterling to a British corporation (BCo) suing in New York, and the pound is falling against the dollar. Due to the declining value of the pound, the three rules worked out as follows:
A judgment of $41,338 may be entered based on the breach day rule. However, the payment in dollars was worth 34,449 pounds ($41,338 divided by $1.20) when eventually received, an excess of £15,659 over the actual loss.

This example is adapted from an actual case. See Comptex v. LaBow, 783 F.2d 333 (2d Cir. 1986). The facts are simplified.

If conversion is delayed until the date of actual payment, the creditor is recompensed with its own money or the financial equivalent in United States dollars; the debtor bears the risk of a fall in the debtor's money or reaps the benefit of a rise therein. If conversion is made at breach or judgment date, the risk of fluctuation in value of a money not of its selection falls on the creditor.

The real issue is where the risk of exchange rate fluctuation should be placed. This Act recognizes the right of the parties to agree upon the money that governs their relationship. In the absence of an agreement, the Act adopts the rule of giving the aggrieved party the amount to which it is entitled in its own money or the money in which the loss was suffered.

The principle of the Act is to restore the aggrieved party to the economic position it would have been in had the wrong not occurred. Thus, for example, if oil is spilled on the coast of France by an American ship, the loss is felt by the French in francs and a judgment of an American court for damages should reflect this fact. Courts should enter judgments in the money customarily used by the injured person.

The payment day rule, on which the Act is based, meets the reasonable expectations of the parties involved. It places the aggrieved party in the position it would have been in financially but for the wrong that gave rise to the claim. States which adopt it will align themselves with most of the major civilized countries of the world.

The Act also covers other issues that may arise in connection with foreign-money claims. These include revalorization and interest. In order to determine aliquot shares for distributions from funds created in insolvency and estate proceedings, the Act specifies use of the date the distribution proceeding was initiated for conversion of foreign money into United States dollars.
EXCHANGE LOSS DAMAGES

UNIFORM FOREIGN-MONEY CLAIMS ACT

SECTION 1. DEFINITIONS.

In this [Act]:

(1) "Action" means a judicial proceeding or arbitration in which a payment in money may be awarded or enforced with respect to a foreign-money claim.

(2) "Bank-offered spot rate" means the spot rate of exchange at which a bank will sell foreign money at a spot rate.

(3) "Conversion date" means the banking day next preceding the date on which money, in accordance with this [Act], is:

   (i) paid to a claimant in an action or distribution proceeding;
   (ii) paid to the official designated by law to enforce a judgment or award on behalf of a claimant; or
   (iii) used to recoup, set-off, or counterclaim in different moneys in an action or distribution proceeding.

(4) "Distribution proceeding" means 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.

(5) "Foreign-money" means money other than money of the United States of America.

(6) "Foreign-money claim" means a claim upon an obligation to pay, or a claim for recovery of a loss, expressed in or measured by a foreign money.

(7) "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.

(8) "Money of the claim" means the money determined as proper pursuant to Section 4.

(9) "Person" means an individual, a corporation, government or governmental subdivision or agency, business trust, estate, trust, joint venture, partnership, association, two or more persons having a joint or common interest, or any other legal or commercial entity.

(10) "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 trans-
action giving rise to the foreign-money claim.

(11) “Spot rate” means the rate of exchange at which foreign money is
sold by a bank or other dealer in foreign exchange for immediate or next
day availability or for settlement by immediate payment in cash or
equivalent, by charge to an account, or by an agreed delayed settlement
not exceeding two days.

(12) “State” means a State of the United States, the District of Colum-
bia, the Commonwealth of Puerto Rico, or a territory or insular posses-
sion subject to the jurisdiction of the United States.

**COMMENT**

1. “Action.” A suit or arbitration may be legal or equitable in nature,
but it must be based on a pecuniary claim.

2. “Bank-offered spot rate” is the rate at which a bank will sell the
requisite amount of foreign money for immediate or nearly immediate use
by the buyer.

3. “Conversion date.” Exchange rates may fluctuate from day to day. A
date must be picked for calculating the value of foreign money in terms of
United States dollars. As used in the Act, “conversion date” means the
day before a foreign-money claim is paid or set-off. The day refers to the
time period of the place of the payor, not necessarily that of the recipient.
The exchange rate prevailing at or near the close of business on the bank-
ing day before the day payment is made will be well known at the time of
payment. See Comment 2 to Section 7.

4. “Distribution proceeding.” In keeping with the concept underlying
Section 2, the coverage of this statute is limited to judicial actions and
nonjudicial proceedings which involve the creation of a fund from which
pro-rata distributions are made to claimants. As provided in Section 8, a
different conversion date is required where either input to or outgo from a
fund involves two or more different moneys. Thus, the term includes a
mortgage foreclosure proceeding, judicial or under a trust deed, distribu-
tion of property in divorce and child support proceedings, distributions in
the administration of a trust or a decedent’s estate, an assignment for the
benefit of creditors, an equity receivership, a liquidation by a statutory
successor, a voluntary dissolution of a business or a nonprofit enterprise or
the like when in each case a fund must be shared among claimants and
where, usually, the fund will not satisfy all claimants of the same class.
An asset or a liability of the fund must also involve one or more foreign-
money claims, but not all of the claims can be in the same money.
5. “Foreign money.” Since only the federal government has the power to coin money and regulate the value thereof, the term “foreign” means a government other than that of the United States of America. Special Drawing Rights of the International Monetary Fund are foreign money even though the United States is a member of the Fund. Foreign governments included are all those whose moneys are, in the currency markets of the world, exchangeable for the money of other currencies even though the government is not recognized by the United States.

6. “Foreign-money claim.” The term “claim” is not limited to any one party to an action or a distribution proceeding and may be asserted by a plaintiff or a defendant or by a party to an arbitration or distribution proceeding. It may be based on a foreign judgment, or sound in contract, quasi-contract, or tort.

7. “Money.” The definition includes composite currencies such as European Currency Units created by agreement of the governments that are members of the European Monetary System or the Special Drawing Rights created under the auspices of the International Money Fund. These are “stores of value” used to determine the quantity of payment in some international transactions.

8. “Money of the claim.” See Section 4 and the Comment thereto.

9. “Party.” This combines the Uniform Commercial Code’s definitions of “person” and “organization,” but is limited to those who are parties to transactions or involved in events which could give rise to a foreign-money claim.

10. “Rate of Exchange.” A free market rate is to be used rather than an official rate if both exist. Some countries have transactional differences in exchange rates with slightly different rates; for example, in Belgium one rate prevails for commercial and another for financial transactions. Both rates are recognized in money market transactions. The last sentence of the definition indicates that the rate appropriate to the transaction is the rate to be used.

11. “Spot rate” is the term used in the financial markets of the United States for the rate of exchange for immediate or nearly immediate transfers from one money to another, as distinguished from the rates for future options or future deliveries.

In the foreign exchange markets, as in the stock markets, quotations are either “bid” or “ask,” and the spread between is where the dealer makes a profit. An “offered spot rate” is the rate at which the offeror will sell the particular money. It is, of course, higher than the rate at which that person will buy the same money. “Spot” refers to the time the trade is made, not the time for settlement, which in spot transactions is often two days after the date of the trade.
12. "State." The definition, as in other Uniform Laws, is extended to include areas given the same, or nearly the same, treatment in law as the states.

SECTION 2. SCOPE.
(a) This [Act] applies only to a foreign-money claim in an action or distribution proceeding.
(b) This [Act] applies to foreign-money issues even if other law under the conflict of laws rules of this State applies to other issues in the action or distribution proceeding.

COMMENT
Under the rules of the conflict of laws, the determination of when a foreign money is converted to United States dollars is generally considered a procedural matter for the law of the forum. Subsection (b) removes any doubt.

SECTION 3. VARIATION BY AGREEMENT.
(a) The effect 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.
(b) Parties to a transaction may agree upon the money to be used in a transaction giving rise to a foreign-money claim and may agree to use different moneys for different aspects of the transaction. Stating the price in a foreign money for one aspect of a transaction does not alone require the use of that money for other aspects of the transaction.

COMMENT
1. A basic policy of the Act is to preserve freedom of contract and to permit parties to resolve disputed matters by contract at any time, even as to choice of law problems. The parties may agree upon the date and time for conversion. After entry of judgment the parties may agree upon how the judgment is to be satisfied.
2. Subsection (b) covers cases where, for example, claims for petroleum may be settled in United States dollars but settlement for joint costs of exploration may be in pounds sterling. The parties also may agree on the money to be used for damages. The second sentence recognizes that a price stated in a particular money does not indicate, without more evidence, an intent that all damages from breach are to be in the same money. The principle of freedom of contract allows the parties to allocate the risks of currency fluctuations between foreign moneys as they desire.
Sections 4 and 5 provide rules in the absence of special agreements by the parties for determining the money to be used. Parties may by agreement select a particular market or foreign exchange dealer to be used for exchange purposes.

**SECTION 4. DETERMINING MONEY OF THE CLAIM.**

(a) The money in which the parties to a transaction have agreed that payment is to be made is the proper money of the claim for payment.

(b) If the parties to a transaction have not otherwise agreed, the proper money of the claim, as in each case may be appropriate, is the money:

1. regularly used between the parties as a matter of usage or course of dealing;
2. used at the time of a transaction in international trade, by trade usage or common practice, for valuing or settling transactions in the particular commodity or service involved; or
3. in which the loss was ultimately felt or will be incurred by the party claimant.

**COMMENT**

1. Subsection (a) uses “payment” in a broad sense not related to just the price, but to any obligation arising out of a contract to transfer money. See also Section 3(b).

2. Subsection (b) states rules to fill gaps in the agreement of the parties with rules as to the allocation of risks of fluctuations in exchange rates. The three rules will normally apply in the order stated. Prior dealings may indicate the desired money. If there are none, it is appropriate to use the money indicated by trade usage or custom for transactions of like kind. The final rule of subsection (a) is one established in English cases. See The Despina R and the Folias, (1979) A.C. 685. An example is the use of an operating account in United States dollars by a French company to buy Japanese yen for ship repairs; the loss is felt in the depletion of the dollar bank account. Appropriateness of a rule is to be determined by the judge from the facts of the case. See Section 6(d).

**SECTION 5. DETERMINING AMOUNT OF THE MONEY OF CERTAIN CONTRACT CLAIMS.**

(a) If an amount contracted to be paid in a foreign money is measured by a specified amount of a different money, the amount to be paid is determined on the conversion date.
(b) If an amount contracted to be paid in a foreign money is to be measured by a different money at the rate of exchange prevailing on a date before default, that rate of exchange applies only to payments made within a reasonable time after default, not exceeding 30 days. Thereafter, conversion is made at the bank-offered spot rate on the conversion date.

(c) A monetary claim is neither usurious nor unconscionable because the agreement on which it is based provides that the amount of the debtor's obligation to be paid in the debtor's money, when received by the creditor, must equal a specified amount of the foreign money of the country of the creditor. If, because of unexcused delay in payment of a judgment or award, the amount received by the creditor does not equal the amount of the foreign money specified in the agreement, the court or arbitrator shall amend the judgment or award accordingly.

**Comment**

1. Subsections (a) and (b) cover different interpretation problems. One arises where the amount of the money to be paid is measured by another money, one of which is foreign. An example is "pay 5,000 Swiss francs in pounds sterling." The issue is the time at which the rate of exchange into pounds sterling is to be applied. Subsection (a) says in a "measured by" situation with no rate specified, the rate of exchange that controls is the one prevailing at or near the close of business on the day before the day of payment. See Section 1(2), the definition of "conversion date."

2. Another problem arises when an exchange rate in effect before a default is used, as in "pay on November 30, 1989, 5,000 Swiss francs in pounds sterling at the exchange rate prevailing on June 30, 1989." In this case, the issue is how long does the specified exchange rate control in the absence of a clear expression of intent?

   Inclusion of a fixed rate as of a date before default, under subsection (b), remains effective only if payment is made within a reasonable time after default, not to exceed 30 days. The 30-day limitation accords usually with the expectation of the parties. Parties may agree to a longer time.

3. The most common application of subsection (c) will be found in international loan transactions. For example, a loan by a Japanese bank to an American company could be made with dollars purchased by yen for the purpose. The loan agreement could provide for repayment in dollars of an amount which, when received by the lender, would repurchase the amount of yen used to acquire the dollars advanced.

   An exemption is needed from the application of usury laws that may be interpreted to hold that the indexing of the principal amount creates additional interest. See Aztec Properties, Inc. v. Union Planters National
EXCHANGE LOSS DAMAGES

Bank, 530 S.W.2d 756 (Tenn. Sup. Ct. 1975). The subsection removes all doubts as to the legal enforceability of such agreements under theories such as usury, merger in a judgment, unconscionability, or the like.

SECTION 6. ASSERTING AND DEFENDING FOREIGN-MONEY CLAIM.

(a) A person may assert a claim in a specified foreign money. If a foreign-money claim is not asserted, the claimant makes the claim in United States dollars.

(b) An opposing party may allege and prove that a claim, in whole or in part, is in a different money than that asserted by the claimant.

(c) A person may assert a defense, set-off, recoupment, or counterclaim in any money without regard to the money of other claims.

(d) The determination of the proper money of the claim is a question of law.

COMMENT

1. Subsection (a) covers not only the claim of a plaintiff but also the assertion by a defendant of a defense, set-off, or counterclaim. Subsection (b) provides that the money asserted as the money of its defenses by the defendant need not be the same as that of the plaintiff.

2. The money to be used as the money of the claim is a threshold issue to be determined, if contested, by the court after any factual issues as to expenditures, custom, usage, or course of dealing are decided. See subsection (b). If a payment is made or a debt incurred in a money other than that in which the loss was felt, the party asserting the foreign-money claim should establish the amount of the money of the claim used to procure the money of expenditure and the applicable exchange rate used.

3. Judgments may be entered in more than one money when dealings impact on more than one area. An inn-keeper in Mexico, for example, in taking in customers from many countries, should be held to foresee that treatment for injuries at the inn would occur not only in Mexico, but also in the native land of the injured party or in a third country.

SECTION 7. JUDGMENTS AND AWARDS ON FOREIGN-MONEY CLAIMS; TIMES OF MONEY CONVERSION; FORM OF JUDGMENT.

(a) Except as provided in subsection (c), a judgment or award on a foreign-money claim must be stated in an amount of the money of the claim.

(b) A judgment or award on a foreign-money claim is payable in that foreign money or, at the option of the debtor, in the amount of United States dollars which will purchase that foreign money on the conversion date at a bank-offered spot rate.
(c) Assessed costs must be entered in United States dollars.

(d) Each payment in United States dollars must be accepted and credited on a judgment or award on a foreign-money claim in the amount of the foreign money that could be purchased by the dollars at a bank-offered spot rate of exchange at or near the close of business on the conversion date for that payment.

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

(f) A judgment substantially in the following form complies with subsection (a):

[IT IS ADJUDGED AND ORDERED, that Defendant (insert name) pay to the Plaintiff (insert name) the sum of (insert amount in the foreign money) plus interest on that sum at the rate of (insert rate - see Section 9) percent a year or, at the option of the judgment debtor, the number of United States dollars which will purchase the (insert name of foreign money) with interest due, at a bank-offered spot rate at or near the close of business on the banking day next before the day of payment, together with assessed costs of (insert amount) United States dollars.]

[Note: States should insert their customary forms of judgment with appropriate modifications.]

(g) If a contract claim is of the type covered by Section 5(a) or (b), the judgment or award must be entered for the amount of money stated to measure the obligation to be paid in the money specified for payment or, at the option of the debtor, the number of United States dollars which will purchase the computed amount of the money of payment on the conversion date at a bank-offered spot rate.

(h) A judgment must be [filed] [docketed] [recorded] and indexed in foreign money in the same manner, and has the same effect as a lien, as other judgments. It may be discharged by payment.

COMMENT

1. Subsection (a) changes a number of statutes in the states which can be construed to require all values in legal proceedings to be expressed in United States dollars. Professor Brand, in his article in the Yale Journal of International Law, Vol. 11:139 at page 169, identified 18 states having statutes which could require all judgments to be entered in dollars. They are Arkansas, California, Idaho, Iowa, Louisiana, Maryland, Michigan, Montana, Nevada, New Jersey, New Mexico, New
EXCHANGE LOSS DAMAGES

York, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin. Brand, ibid. fn. 166. Hence, direct statutory authority must be given the courts in those states, and will be helpful in other states. In some states other statutes may need amendments. See, e.g., Wisc. Stats. §§ 138.01, 138.02, 138.03, and 779.05.

2. Subsection (d) gives defendants the option of paying in dollars which are, at the payment date, practically the economic equivalent of the foreign money awarded. The judgment creditor should be indifferent to whether the debtor exercises the right to pay in dollars as the only difference is a small bank charge for exchanging the dollars for the foreign money. The concept of the rate of the banking day next before the payment day is taken from Section 131 of the Province of Ontario, Canada, Courts of Justice Act (Ch. 11 Ont. Stats. (1984) as recently amended). It gives the defendant and the sheriff conducting the sale the necessary conversion rate comfortably ahead of its use. Newspaper quotations are usually said to be “at or near the close of business” on the stated date, so that phrase is used in this Act.

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

4. The form of judgment in subsection (f) should be varied appropriately where the money to be paid is measured by a foreign money. See Section 5.

SECTION 8. CONVERSIONS OF FOREIGN MONEY IN DISTRIBUTION PROCEEDING.

The rate of exchange prevailing at or near the close of business on the day the distribution proceeding is initiated governs all exchanges of foreign money in a distribution proceeding. A foreign-money claimant in a distribution proceeding shall assert its claim in the named foreign money and show the amount of United States dollars resulting from a conversion as of the date the proceeding was initiated.

COMMENT

All claims must be in the same money when determining aliquot shares in a distribution proceeding. The Act requires use of the date the proceeding was initiated for applying the exchange rate to convert foreign-money
claims into United States dollars. See Re Lines Bros. Ltd., [1982] 2 All E.R. 99. A claim may be amended to show the proper conversion rate and the proper amount of United States dollars.

SECTION 9. PRE-JUDGMENT AND JUDGMENT INTEREST.

(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.

COMMENT

1. As to pre-judgment interest, the Act adopts the majority rule in the United States that pre-judgment interest follows the substantive law of the case under conflict of laws rules, both as to the right to recover and the rate. English courts use a different rule, i.e., the borrowing rate used by plaintiff or prevailing in the country issuing the money of the judgment. See Helmsing Schiffarts G.M.B.H. v. Malta Drydock Corp., [1977] 2 Lloyd's Rep. 44 (Maltese money but borrowed in West Germany; German rate); Miliangos v. George Frank (Textiles) Ltd., (No. 2) [1976] 1 Q.B. 487 at 489 (Swiss money, Swiss interest rate). Although pre-judgment interest is one form of damages, provision for pre-judgment interest is not to be taken as indicating that no other damages for delay in payment can be awarded under the substantive law applicable to the determination of damages. Cf. Isaac Naylor & Sons, Ltd. v. New Zealand Co-operative Wool Marketing Association, Ltd., [1981] 1 N.Z.L.R. 361 (exchange loss due to delay as additional damages).

2. Allowances of pre-judgment interest in some states depend upon a party's conduct with respect to settlement or delay of the proceeding. Subsection (b) treats these state laws as either procedural in nature or expressions of a significant policy, in either case to be governed by the law of the forum state.
EXCHANGE LOSS DAMAGES

3. Interest on a judgment is considered to be procedural and also goes by the law of the forum. There is a problem here in that there is great discrepancy among the states in the rates for judgment interest. When a judgment is in a foreign money, United States interest rates may result in some overcompensation or undercompensation as compared to what would be awarded in the jurisdiction issuing the foreign money. But in both the United States and in foreign countries, most jurisdictions have fixed statutory rates that do not readily respond to the inflation or deflation of the value of their money in the world market. Hence it was decided to apply the usual rules of the conflict of laws.

SECTION 10. ENFORCEMENT OF FOREIGN JUDGMENTS.

(a) If an action is brought to enforce a judgment of another jurisdiction expressed in a foreign money and the judgment is recognized in this State as enforceable, the enforcing judgment must be entered as provided in Section 7, whether or not the foreign judgment confers an option to pay in an equivalent amount of United States dollars.

(b) A foreign judgment may be [filed] [docketed] [recorded] in accordance with any rule or statute of this State providing a procedure for its recognition and enforcement.

(c) A satisfaction or partial payment made upon the foreign judgment, on proof thereof, must be credited against the amount of foreign money specified in the judgment, notwithstanding the entry of judgment in this State.

(d) A judgment entered on a foreign-money claim only in United States dollars in another state must be enforced in this State in United States dollars only.

COMMENT

1. Some states have special acts that simply cover the recognition, entry, and enforcement of foreign judgments. Common law enforcement is by action. Subsection (a) refers to the common law method; it is subject to subsection (b) which refers to statutory procedures. Subsection (c) applies to both procedures.

2. Subsection (d) avoids constitutional issues under the full faith and credit clause by requiring that judgments of sister states be enforced as entered in the sister state.
SECTION 11. DETERMINING UNITED STATES DOLLAR VALUE OF FOREIGN-MONEY CLAIMS FOR LIMITED PURPOSES.

(a) Computations under this section are for the limited purposes of the section and do not affect computation of the United States dollar equivalent of the money of the judgment for the purpose of payment.

(b) For the limited purpose of facilitating the enforcement of provisional remedies in an action, the value in United States dollars of assets to be seized or restrained pursuant to a writ of attachment, garnishment, execution, or other legal process, the amount of United States dollars at issue for assessing costs, or the amount of United States dollars involved for a surety bond or other court-required undertaking, must be ascertained as provided in subsections (c) and (d).

(c) A party seeking process, costs, bond, or other undertaking under subsection (b) shall compute in United States dollars the amount of the foreign money claimed from a bank-offered spot rate prevailing at or near the close of business on the banking day next preceding the filing of a request or application for the issuance of process or for the determination of costs, or an application for a bond or other court-required undertaking.

(d) A party seeking process, costs, bond, or other undertaking under subsection (b) shall file with each request or application an affidavit or certificate executed in good faith by its counsel or a bank officer, stating the market quotation used and how it was obtained, and setting forth the calculation. Affected court officials incur no liability, after a filing of the affidavit or certificate, for acting as if the judgment were in the amount of United States dollars stated in the affidavit or certificate.

COMMENT

This section protects those who must determine how much should be held subject to a levy or other collection process or what the dollar amount of a supersedeas or other surety bond should be. If the judgment debtor is damaged by a gross overstatement of the dollar amount in the affidavit or certificate of counsel for the judgment creditor or the bank officer, recovery should be against that person.

SECTION 12. EFFECT OF CURRENCY REVALORIZATION.

(a) If, after an obligation is expressed or a loss is incurred in a foreign money, the country issuing or adopting that money substitutes a new money in place of that money, the obligation or the loss is treated as if expressed or incurred in the new money at a rate of conversion the issuing country establishes for the payment of like obligations or losses denominated in the former money.
EXCHANGE LOSS DAMAGES

(b) If substitution under subsection (a) occurs after a judgment or award is entered on a foreign-money claim, the court or arbitrator shall amend the judgment or award by a like conversion of the former money.

COMMENT

1. Subsection (a) refers to situations in which a country authorizes the issue of a new money to take the place of the old money at a stated ratio. An example is Brazil's recent abolition of cruzieros for cruzados. The subsection mandates that foreign money claims should be subjected to the same ratio.

2. The Act takes no position on the effect of money repudiations or revalorizations so drastic as to be, in effect, confiscations. Remedy, if any, for these is usually found through diplomatic channels. Equally, the Act takes no position on the effect of exchange control laws. The effect, if any, on obligations to pay is left to other law.

SECTION 13. SUPPLEMENTARY GENERAL PRINCIPLES OF LAW.

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.

COMMENT

The section is taken from Section 1-103 of the Uniform Commercial Code.

SECTION 14. UNIFORMITY OF APPLICATION AND CONSTRUCTION.

This [Act] shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this [Act] among states enacting it.

SECTION 15. SHORT TITLE.

This [Act] may be cited as the UNIFORM FOREIGN-MONEY CLAIMS ACT.

SECTION 16. SEVERABILITY CLAUSE.

If any provision of this [Act] or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this [Act] which can be given effect without the invalid
provision or application, and to this end the provisions of this [Act] are severable.

SECTION 17. EFFECTIVE DATE.

This [Act] becomes effective on January 1st following its enactment.

SECTION 18. TRANSITIONAL PROVISION.

This [Act] applies to actions and distribution proceedings commenced after its effective date.

[SECTION 19. REPEALS.

The following acts and parts of acts are repealed:

(1) [Any statute requiring judgments to be entered in United States dollars.]  
(2)  
(3) ]