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# Judgments in Foreign Currency—A Little Known Change in New York Law

With little if any fanfare or public attention, the New York State Legislature recently amended New York law to provide expressly that for the first time judgments may be rendered in currencies other than United States dollars.[1] The amendment specifically provides that in a case where a cause of action is based on an obligation denominated in a currency other than U.S. dollars, a New York court must render its judgment in the foreign currency at a rate of exchange prevailing on the date of entry of judgment. The amendment takes an innovative step toward resolving complex and potentially inequitable results stemming from transnational, cross-currency transactions, which often involve disparate conversion choices and volatile exchange rates. Neither courts nor commentators, nor presumably even many practitioners, however, appear to be aware of the amendment.[2]

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1. New York State Chapter Law, July 20, 1987, ch. 326, *codified in* N.Y. JUD. LAW § 27 (b) (McKinney Supp. 1988):

> (b) 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.

2. *E.g.*, Teca-Print A.G. v. Amacoil Mach. Inc., 138 Misc. 2d 777, 525 N.Y.S.2d 535 (Sup. Ct. 1988) (apparently unaware of the foreign currency amendment—the briefs to the court were filed prior to the amendment and no supplemental materials were filed with the court pointing out the amendment's enactment); Leary & Casey, *Fluctuating Currencies: Obligations Payable in Foreign Moneys*, N.Y. ST. B.J., Jan. 1988, at 16 (noting that "the law of New York and, for that matter, the law of the rest of the United States is out of step with the law of many other highly civilized and sophisticated countries in the area of litigation over defaulted obligations to pay sums due in foreign currencies or damages actually suffered in foreign currencies," but failing to note the enactment of the foreign currency judgment amendment in New York six months prior to the article's publication date).

## I. Foreign Currency Judgment Law Before the Amendment

Until the recent New York amendment, it was generally assumed that New York and other American courts did not have the power, or at least the precedent, under which to render judgments in foreign currency. As the Restatement (Third) of the Foreign Relations Law of the United States (the Restatement) explained: "The traditional United States rule has been that courts in the United States are required to render money judgments payable in United States dollars only, regardless of the currency of obligation or loss."[3] No decision has been located, either before or after the foreign currency judgment amendment, in which a judgment was awarded by an American court in a foreign currency.[4] Nor has any other state statute been located authorizing foreign currency judgments.[5] Curiously, at least one decision and article dated after the amendment do not even mention the amendment.[6]

### A. Legal Rationales

The basis for this general rule against the rendering of judgments in foreign currencies has not been clearly or consistently articulated. Some courts have referred to a common law principle that a judgment in a foreign currency was not enforceable.[7] Although the common law notion was rejected in 1976 in Great Britain,[8] other courts have relied on principles of sovereignty and the impracticality of obtaining other currencies.[9]

Some federal courts have looked to the Coinage Act of 1792.[10] According to section 20 of that Act, which is no longer in effect: "The money of account of

3. *See generally* 2 Restatement (Third) of the Foreign Relations Law of the United States § 823 (1987) [hereinafter Restatement]; *Foreign Currency Judgments: 1985 Report of the Committee on Foreign and Comparative Law,* 18 N.Y.U. J. Int'l L. & Pol'y 791 (1986), *summary reprinted in N.Y.C. B.A. Rec.*(1986) [hereinafter *Foreign Currency Judgments*]; F. Mann, The Legal Aspect of Money 305-35 (1983); Becker, *The Currency of Judgment,* 25 Am. J. Comp. L. 152 (1977).

4. *But see* Waterside Ocean Navigation Co. v. International Navigation, Ltd., 737 F.2d 150 (2d Cir. 1984) (without discussing foreign currency judgments, foreign arbitral awards enforced partly in U.S. dollars and partly in pounds sterling).

5. This writer understands that the National Conference of Commissioners on Uniform State Laws is in the process of drafting a lengthy Foreign Claims Money Act that would affect U.S. judgments involving claims incurred in the money of other countries.

6. Teca-Print, A.G. v. Amacoil Mach., Inc., 138 Misc. 2d 777, 525 N.Y.S.2d 535 (Sup. Ct. 1988); Leary & Casey, *supra* note 2; *cf.* Air Canada v. Golowaty, 536 N.Y.S.2d 962 (Nassau Dist. Ct. 1989).

7. *E.g.*, Pennsylvania R.R. Co. v. Cameron, 280 Pa. 458, 124 A. 638 (1924); Manners v. Pearson & Son, [1898] 1 Ch. 581, 587 (C.A.).

8. Miliangos v. George Frank (Textiles) Ltd., [1976] App. Cas. 443.

9. *E.g.*, Guinness v. Miller, 291 F. 769, 770 (S.D.N.Y. 1923) ("an obligation must be discharged in the money of that sovereign, none other being available, the obligation so created can only be measured in that medium"), *aff'd,* 299 F. 538 (2d Cir. 1924), *aff'd sub nom.* Hicks v. Guiness, 269 U.S. 71 (1925); Liberty Nat'l Bank v. Burr, 270 F. 251 (E.D. Pa. 1921).

10. *See* International Silk Guild, Inc. v. Rogers, 262 F.2d 219 (D.C. Cir. 1958); Shaw, Savill, Albion & Co. v. The Fredericksburg, 189 F.2d 952, 954 n.5 (2d Cir. 1951); *see also* Bronson v. Rodes, 74 U.S. (7 Wall.) 229 (1868).

the United States shall be expressed in dollars or units, dimes or tenths, cents or hundredths . . . and all accounts in the public offices and all proceedings in the courts of the United States shall be kept and had in conformity to this regulation."[11] Courts and commentators, however, questioned whether other provisions of the Coinage Act did actually preclude the award of a foreign currency judgment.[12] In 1982, section 371 was replaced by section 5101: "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."[13] Section 5101 deleted the earlier reference to the keeping of "all proceedings in the courts" in conformity with the expression of money in United States currency. The House Committee on the Judiciary explained the omission "as surplus" and stated that "no substantive change in the law" was made.[14] At least one court has viewed the repeal of section 20 of the Coinage Act as suggestive that American courts are empowered to enter foreign currency judgments.[15] Other courts have assumed without discussion the lack of power to award foreign currency judgments.[16]

Before the amendment, New York law also appeared unclear as to the power of New York courts to issue judgments in foreign currencies. Section 27 of New York's Judiciary Law previously seemed to require the computation of all judgments in U.S. dollars:

> Judgments and accounts must be computed in dollars and cents. In all judgments or decrees rendered by any court for any debt, damages or costs, in all executions issued thereupon, and in all accounts arising from proceedings in courts the amount shall be computed, as near as may be, in dollars and cents, rejecting lesser fractions and no judgment, or other proceeding shall be considered erroneous for such omissions.[17]

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11. 31 U.S.C. § 371, *amended by* Pub. L. No. 97-258, 96 Stat. 877, 980 (codified as amended at 31 U.S.C. § 5101 (1982)).

12. *See* Baumlin & Ernst, Ltd. v. Gemini, Ltd., 637 F.2d 238 (4th Cir. 1980).

13. 31 U.S.C. § 5101 (1982).

14. H.R. REP. No. 97-651, 97th Cong., 2d Sess. 1, 147, at 3, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 1895, 2040-41.

15. *See* Compatex v. Labow, 783 F.2d 333, 337 (2d Cir. 1986) (the "assumption" that American judgments must be entered in dollars "probably deserves re-examination in light of the repeal of section 20 [of the Coinage Act of 1792].").

16. *E.g.*, Jamaica Nutrition Holdings, Ltd. v. United Shipping Co., 643 F.2d 376, 379 n.5 (5th Cir. 1981); Frontera Transp. Co. v. Abaunza, 271 F. 199, 202 (5th Cir. 1921); La Société De Diffusion Vinicole, S.A. v. Peartree Imports, Inc., No. 83 Civ. 6478 (S.D.N.Y. Apr. 5, 1984); Newmont Mines Ltd. v. Adriatic Ins. Co., 609 F. Supp. 295 (S.D.N.Y. 1985), *aff'd sub nom.* Newmont Mines Ltd. v. Hanover Ins. Co., 784 F.2d 127 (2d Cir. 1986); Island Territory of Curacao v. Solitron Devices, Inc., 356 F. Supp. 1, 14 (S.D.N.Y.), *aff'd*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974); Weston Banking Corp. v. Turkiye Garanti Bankasi, A.S., 86 A.D.2d 544, 446 N.Y.S.2d 67, 69 (1st Dep't), *aff'd*, 57 N.Y.2d 315, 442 N.E.2d 1195, 456 N.Y.S.2d 684 (1982); Perutz v. Bohemian Discount Bank in Liquidation, 279 A.D. 386, 390–91, 110 N.Y.S.2d 446, 451 (1st Dep't 1952), *rev'd on other grounds*, 304 N.Y. 533, 110 N.E.2d 6 (1953); Librairie Hachette, S.A. v. Paris Book Center Inc., 62 Misc. 2d 873, 309 N.Y.S.2d 701 (Sup. Ct. 1970).

17. N.Y. JUD. LAW, § 27 (McKinney 1983) (amended 1987).

This wording may be viewed as denying New York courts the ability to render foreign currency judgments. Alternatively, the purpose of section 27 may simply have been to ensure the computation of money awards or judgments only to the cent and to no smaller denomination.[18]

New York's change in its Uniform Commercial Code may have supported the notion that foreign currency judgments were not available in New York. Prior to 1962, the New York Commercial Code provided as follows, including the bracketed language:

> (2) A promise or order to pay a sum stated in a foreign currency is for a sum certain in money and [, unless a different medium of payment is specified in the instrument,] may be satisfied by payment of that number of dollars which the stated foreign currency will purchase at the buying sight rate for that currency on the day on which the instrument is payable, or, if payable on demand, on the day of demand. [If such an instrument specifies a foreign currency as the medium of payment the instrument is payable in that currency.][19]

Effective in 1964, New York deleted the part of the "Official Text" (the bracketed text above) that stated that an instrument that specified a foreign currency as the medium of payment was payable in that foreign currency.[20]

Two reasons were proffered to support New York's change in this provision. First, the New York Clearing House Association was concerned that its member banks might otherwise have had to maintain large amounts of foreign currencies. Second, it was assumed that the courts did not have the power to order payment in a foreign currency, so any provision to the contrary would be ineffectual.[21] Neither of these reasons appears to suggest, however, that it was the intent of the New York Legislature to deny the courts the power to authorize foreign currency judgments.

Moreover, New York's Civil Practice Law and Rules section 105(q) continued to define a money judgment without restriction to United States currency. Section 105(q) simply stated a judgment was "for a sum of money or directing the payment of a sum of money."[22] In addition, the content of a judgment is not restricted as to any particular currency,[23] and no official judgment form has been

18. *See* earlier version of § 27, the second paragraph of a statute dated Jan. 27, 1797, entitled "an Act Relative to the Money of Account of this State" providing, "it shall only be necessary to mention the said amount in dollars and cents" and denying any error "for or by reason of the omission of the fractional parts of a cent in any such computation."

19. N.Y. U.C.C. § 3-107 (McKinney 1964).

20. Act of Apr. 18, 1962, ch. 553, N.Y. Sess. Laws 1962 (codified as amended at N.Y. U.C.C. § 3-107 (McKinney 1964)).

21. NEW YORK COMMISSION, 1962 REPORT; *see* NEW YORK CLEARING HOUSE ASSOCIATION, REPORT ON THE UNIFORM COMMERCIAL CODE (Dec. 1, 1961); Penney, *New York Revisits the Code: Some Variations in the New York Enactment of the Uniform Commercial Code*, 62 COLUM. L. REV. 992, 997–98 (1962).

22. N.Y. CIV. PRAC. L. & R. § 105(q) (McKinney Supp. 1988).

23. *Id.* 5011 (McKinney 1963).

endorsed.[24] Thus, the rendering of a judgment in a foreign currency may not be inconsistent with the Uniform Commercial Code in New York.

### B. Conversion of Foreign Currency Claims to U.S. Dollars

To provide recovery to litigants in U.S. currency, courts have generally selected one of two dates on which to exchange foreign currency into U.S. dollars—the date of the judgment or the date of the breach.

The judgment day conversion rule has been used by federal courts in suits based on obligations existing under foreign law where the debt is payable in the foreign currency. As the Supreme Court has explained, the judgment day rule has been utilized on the theory that "[a]n obligation in terms of the currency of a [foreign] country takes the risk of currency fluctuations. . . ."[25] Thus, conversion as of the judgment day includes any appreciation or depreciation of the foreign currency as against the U.S. dollar up through the date of judgment. Such a rule, it is argued, avoids inconsistent results as between an action in the United States and an action in the foreign court; the foreign court generally would give judgment in its currency without regard to currency fluctuation, which would be equivalent to a U.S. dollar judgment converted as of the day of judgment.[26] It is also argued, however, that the judgment day rule may unduly reward a dilatory defendant during a time of depreciation of the foreign currency.[27]

As to New York and certain other state law claims, courts have generally converted the foreign currency to dollars as of the date of the breach or injury.[28]

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24. *See id.* 107 (McKinney Supp. 1988) (authorizing the state administrator to adopt an appendix of forms).

25. Deutsche Bank v. Humphrey, 272 U.S. 517 (1926); *see* Zimmerman v. Sutherland, 274 U.S. 253, 255–56 (1927); Vishipco Line v. Chase Manhattan Bank (*Vishipco I*), 660 F.2d 854, 865 (2d Cir. 1981) ("It is true that federal courts sitting in *non*-diversity cases have rather consistently adopted the judgment-day rule."), *cert. denied,* 459 U.S. 976 (1982); Vishipco Line v. Chase Manhattan Bank (*Vishipco II*), 754 F.2d 452, 454 (2d Cir. 1985) (noting the "currency-conversion rule employed by New York courts, pursuant to which recovery in United States currency is to be measured by the dollar value of the [foreign currency] on the date of breach."); Shaw, Savill, Albion & Co. v. The Fredericksburg, 189 F.2d 952 (2d Cir. 1951); 11 S. Williston, A Treatise on Contracts § 1410A (3d ed. 1968); Annotation, *Rate of Exchange to be Taken into Account in Assessing Damages for Breach of Contract,* 33 A.L.R. 1285 (1924).

26. *See Vishipco I,* 660 F.2d at 866 n.7.

27. *Id.; see also* Deutsche Bank v. Humphrey, 272 U.S. at 520, 525 (Sutherland, J., dissenting) (criticizing the majority's adoption of the judgment day rule: "The amount of the recovery will depend upon whether suit is promptly brought or promptly prosecuted; whether the defendant interposes dilatory measures; whether the call of the docket is largely in arrears or is up-to-date; and, perhaps, upon whether there is a successful appeal and a new trial with the consequent annulment of the old judgment and the rendition of a new one.").

28. Middle E. Banking Co. v. State Street Bank Int'l, 821 F.2d 897, 902 (2d Cir. 1987) ("Where damages are sustained in foreign currencies, New York courts apply the 'breach-day rule'."); *Vishipco I,* 660 F.2d at 866 ("with one or two rare exceptions not applicable here, . . . New York courts have long favored the breach-day rule. . . ."); United Shellac Corp. v. A.M. Jordan Ltd., 277 A.D. 147, 97 N.Y.S.2d 817 (1st Dep't 1950); Parker v. Hoppe, 257 N.Y. 333, 340–41, 178 N.E.

Courts generally characterize the choice of conversion dates as substantive rather than procedural, which invokes the *Erie* doctrine and subjects the issue to state law determination.[29] Use of the breach day rule has been justified on the theory that a plaintiff is best made whole by putting him back in the position he would have been in, but for the breach.[30]

The breach day conversion rule has also been subject to question. According to the Second Circuit: "[T]he breach-day rule is favorable to a plaintiff only when the foreign currency in which the obligation was originally measured has depreciated with respect to the defendant's currency . . . during the period since the breach. If it has appreciated, the judgment rule will be more favorable."[31] Recently, in *Teca-Print*,[32] a New York trial court carefully reviewed New York case law, concluding that there was no "strict rule" requiring the use of the breach day for currency conversion[33] and questioning the "continued viability" of the breach day rule.[34] In that case, a Swiss plaintiff sought recovery in New York for the sale of certain goods billed in Swiss francs. The sole issue before the court was the applicable conversion date, either the traditional breach day or the federal, "more modern," judgment day.[35] Apparently unaware of the foreign currency judgment amendment, the court assumed (incorrectly) that it lacked the authority to render a foreign currency judgment.[36] Instead, because of the continuing fluctuation of the U.S. dollar against the Swiss franc, the court chose

550, 551–52 (1931); Hoppe v. Russo-Asiatic Bank, 235 N.Y. 37, 39 (1923) ("In an action . . . to recover damages . . . for breach of contract or for a tort, where primarily the plaintiff is entitled to recover a sum expressed in foreign money, in determining the amount of the judgment expressed in our currency the rate of exchange prevailing at the date of the breach of contract or at the date of the commission of the tort is under ordinary circumstances to be applied."); Kantor v. Aristo Hosiery Co., 222 A.D. 502, 503, 226 N.Y.S. 582, 584 (1st Dep't) ("We think that, in the interest of uniformity, the breach-day rule should be followed, in the absence of clear proof of exceptional conditions."), *aff'd*, 248 N.Y. 630, 162 N.E. 553 (1928); Newmont Mines Ltd. v. Adriatic Ins. Co., 609 F. Supp. 295, 297 (S.D.N.Y. 1985). *But see* John S. Metcalf Co. v. Mayer, 213 A.D. 607, 211 N.Y.S. 53 (1st Dep't 1925); Sirie v. Godfrey, 196 A.D. 529, 188 N.Y.S. 52, 57 (1st Dep't 1921).

29. *Vishipco I*, 660 F.2d at 865–66.

30. *E.g.*, Parker v. Hoppe, 257 N.Y. 333, 339, 178 N.E. 550, 551 (1931) ("The dollar is taken as money and not as a commodity. We would not expect that an action brought in a foreign country upon such a contract would give a profit to the plaintiff by exchange fluctuations. The money value of the judgment obtained in the foreign country should and would equal the value here of the dollar as of the time the plaintiff was entitled to it."); *see also Vishipco I*, 660 F.2d at 866 n.7.

31. *Vishipco I*, 660 F.2d at 866 n.7. The difference in rates between breach and judgment day can be dramatic. For example, in Teca-Print, 138 Misc. 2d at 778, 525 F. Supp. at 536, between the date of breach and the date of judgment the Swiss franc vis-à-vis the U.S. dollar decreased in value by one third.

32. 138 Misc. 2d 777, 525 N.Y.S.2d 535 (Sup. Ct. 1988).

33. *Id.* at 784, 525 N.Y.S.2d at 540.

34. *Id.* at 777, 525 N.Y.S.2d at 536.

35. *Id.*

36. The court did note the *Miliangos* decision, the Restatement provisions (then in draft), and the City Bar Report. Apparently, neither party raised the foreign currency amendment with the court.

the date of conversion that provided a "fair and equitable result"—not the breach day, but the judgment day.[37]

Of course, there is a third alternative date of conversion—the date of payment—but American courts have generally not adopted such a rule.[38] Nonetheless, the Restatement has endorsed the use of the date of payment as the proper date of conversion whether it would "serve the ends of justice in the circumstances."[39] In addition, English courts at present generally award a prevailing party an amount expressed in foreign currency or its sterling equivalent at the time of payment.[40] This appears to change the prior British rule whereby courts required conversion of the foreign currency to sterling at the date of breach.[41]

### C. Impetus for Change

In recent years, American courts have faced complex questions and potentially inequitable results in awarding judgments solely in U.S. dollars even though the underlying cause of action arose out of matters regarding non-U.S. currency. Several factors seemed to suggest the need for re-examination of the foreign currency judgment assumptions. These factors included the move away from fixed exchange rates and the change in the law by the British courts. In addition, the Restatement and the Bar Association of the City of New York examined the applicable law and context of foreign currency judgments, and concluded that a change in the law was desirable.

#### 1. *Exchange Rate Volatility*

In the 1970s, the system of exchange rates was subject to serious disturbances and underwent basic revision. Previously, as established by the Bretton Woods agreement, fixed par values of Member State currencies were denominated in terms of gold or another currency pegged to gold, generally the U.S. dollar.[42] Over time, however, with mounting pressure on the dollar, and declining confidence in it, the United States suspended its commitment to convert dollars into gold.[43] A new system of floating exchange rates was adopted under which no major currency issuer any longer undertook to maintain a specific exchange

37. 138 Misc. 2d at 785, 525 N.Y.S.2d at 540.

38. *E.g.*, Parker v. Hoppe, 257 N.Y. 333, 340–41, 178 N.E. 550, 551–52 (1931) (rejecting the date of payment for the date of the breach).

39. Restatement, *supra* note 3, § 823.

40. *See* [1988] 2 The Supreme Court Practice ¶ 724.

41. S.S. Celia v. S.S. Volturno, [1921] 2 App. Cas. 544. In contract cases, the foreign currency was converted into sterling at the rate in effect on the day when the obligation was due and payable and, as to torts damages which had been denominated in a foreign currency, conversion was at the date of injury.

42. Bretton Woods Agreement, art. IV.

43. F. Block, The Origins of International Economic Disorder 203–04 (1977); *see also* Teca-Print, 138 Misc. 2d at 781–82, 525 N.Y.S.2d at 538.

rate in terms of other currencies or of gold.[44] Following this revision, exchange rates have been subject to considerable volatility.[45]

2. *Decisions by the British Courts*

Beginning in 1976, the British courts have changed their law as to the rendering of judgments in foreign currencies. In *Miliangos v. George Frank (Textiles) Ltd.*,[46] the Swiss seller of certain goods to an English buyer sought to recover the purchase price of the goods. The contract was governed by Swiss law, and the money of account (or currency in which the contract obligation was expressed) and payment were denominated in Swiss francs.

The trial judge was faced with a difficult choice between following an earlier decision of the House of Lords, the *Havana Railways* case,[47] which held that judgment could be given only in sterling on a foreign currency claim, or a recent decision of the Court of Appeal, *Schorsch Meier G.m.b.H. v. Hennin*,[48] in which the court declined to follow *Havana Railways* and issued a foreign currency judgment. The lower court followed the House of Lords case, holding that British courts could express their judgments only in sterling.[49] The Court of Appeal, however, saw its own *Schorsch* decision as binding, and reversed.[50] Payment was ordered in Swiss francs or the equivalent in sterling at the time of payment.[51]

The House of Lords affirmed the decision of the Court of Appeal. In a lengthy opinion, the high court ruled that British courts can in fact render judgments in foreign currency.[52] The court abandoned the "common law" rule, which had "nothing but precedent to commend it."[53] To provide the seller "neither more nor less than he bargained for," the seller was permitted to recover in Swiss francs.[54]

*Miliangos* has been extended beyond damages for breach of contract to claims in tort and restitution.[55]

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44. Amended Articles of Agreement of the International Monetary Fund art. IV (entered in force Apr. 1, 1978); *see* RESTATEMENT, *supra* note 3, Introductory Note at 313–14; *see also* Teca-Print, 138 Misc. 2d at 781–82, 525 N.Y.S.2d at 538–39.

45. *See* RESTATEMENT, *supra* note 3, Introductory Note at 313–14.

46. [1976] App. Cas. 443.

47. *In re* United Rys. of Havana & Regla Warehouses Ltd., [1961] App. Cas. 1007.

48. [1975] Q.B. 416.

49. Miliangos v. George Frank (Textile) Ltd., Feb. 10, 1974 (Bristow, J.).

50. [1975] Q.B. 487.

51. *Id.*

52. [1976] App. Cas. 443.

53. *Id.* at 464.

54. *Id.* at 466.

55. *See Private International Law Foreign Money Liabilities, Report on a Reference under Section 3(1) (e) of the Law Commissions Act 1965*, 124 LAW COMM'N 6–7 (1983); *see also* [1988] 2 THE SUPREME COURT PRACTICE ¶ 724; [1985] 2 THE SUPREME COURT PRACTICE ¶ 724; *Practice Direction (Judgment: Foreign Currency)*, [1976] 1 W.L.R. 83, *as amended, Practice Direction (Judgment: Foreign Currency) (No. 2)*, [1977] 1 W.L.R. 197; The Law Commission Private International Law: Foreign Money Liabilities (Working Paper No. 80, 1981). As to other countries, see F. MANN, *supra* note 3, at 310–14.

### 3. *Restatement (Third) of the Foreign Relations Law of the United States*

The Restatement (Third) of the Foreign Relations Law of the United States, first circulated in draft form beginning about 1984, examined the question of the availability of foreign currency judgments. For the first time, the Restatement asked whether U.S. law required the rendering of judgments on obligations in foreign currency in U.S. dollars.[56] The Restatement concluded that while American courts typically rendered judgments in U.S. dollars, they were not precluded from giving judgment in the currency in which the obligation is denominated or the loss incurred.[57]

Section 823 of the Restatement provided as its "black letter law":

> (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.[58]

The Restatement noted that such a judgment could be satisfied either in the foreign currency or by payment of an equivalent amount in dollars converted from the foreign currency as of the date that would best "serve the ends of justice in the circumstances."[59]

The Restatement went on to provide as its "black letter law" that, where a court converts the obligation to dollars, the rate must be one "to make the injured party whole":

> (2) If, in a case arising out of a foreign currency obligation, the court gives judgment in dollars the conversion from foreign currency to dollars 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.[60]

The Restatement reviewed the three possible conversion rules to be employed—breach date (when the obligation was payable), judgment date (when the judgment was rendered), and payment date (when the judgment was to be paid or execution on a judgment is levied). The choice of conversion should be one that would result in neither a penalty nor a windfall to the parties. Thus, if a foreign currency has depreciated since the breach, judgment should be given at the rate of exchange applicable on the date of breach; if the foreign currency has appreciated, judgment should be given at the rate on the date of judgment or payment. Regardless, a foreign currency judgment should be given only at the creditor's request and only when it would best accomplish making the creditor whole and avoiding reward to a delaying debtor.[61]

56. RESTATEMENT, *supra* note 3, § 823.
57. *Id.*
58. *Id.*
59. *Id.* at 333.
60. *Id.* at 331.
61. *Id.* at 332.

4. *The City Bar Report*

In 1985, the Foreign and Comparative Law Committee of the Bar Association of the City of New York (the Committee) prepared a report (the City Bar Report) regarding the "anachronistic" legal rules limiting judgments to awards expressed in U.S. dollars.[62] The Committee recommended that foreign currency judgments be available in both New York and federal courts in "appropriate cases." The Committee further recommended that American courts be able to award either an amount of foreign currency or its dollar equivalent at the time of payment. Amendments to both the New York State Judiciary Law and the Civil Practice Law and Rules were suggested. According to the City Bar Report, "The adoption of new rules on claims in foreign currency will contribute to the maintenance of the state's status as one of the world's financial and commercial centers."[63]

In 1987, the Committee, along with the Erie County Bar Association and the New York State Bar Association, recommended to the New York State Legislature the amendment of New York law to permit foreign currency judgments.[64]

## II. The Foreign Currency Judgment Bill in New York

On May 5, 1987, a bill adding a foreign currency judgment proviso to section 27 of the Judiciary Law was introduced to both the Senate and

62. *Foreign Currency Judgments, supra* note 3.

63. *Id.* at 36. Two out of the twenty members of the Committee who prepared the Report dissented in part. The dissenters substantially agreed with the Committee's conclusion that New York courts should be permitted to make foreign currency awards in appropriate cases, but they believed that such a remedy "should be viewed as exceptional," with the burden of showing entitlement to the foreign currency judgment placed on the litigant seeking the foreign currency judgment. They also stated that the Committee's proposal provided insufficient guidance as to the judicial criteria to be used in making that showing.

64. *See* Memorandum entitled "Foreign Currency Judgments" from the Committee recommending the amendment of New York law (undated). The Committee made two particular recommendations. First, new language would be added to N.Y. JUD. LAW § 27: "provided, that in an appropriate case a court may render a judgment or decree, and issue execution thereon, in a currency other than currency of the United States." Second, N.Y. CIV. PRAC. L. & R. § 5230(a) would be amended by adding the following:

> If the judgment was denominated in a currency other than that of the United States, the attorney for the judgment creditor shall compute the amount of United States dollars which would satisfy the judgment on the date of the issuance of the execution by applying the then current exchange rate. The computation of such amount (including a specification of the basis for the exchange rate) shall be submitted to the sheriff along with the execution in the form of an affirmation by the attorney for the judgment creditor; the computation contained in such affirmation shall remain in effect for the sixty days following the issuance of the execution, and may be extended or recomputed through the submission of additional affirmations if the attorney for the judgment creditor extends the period of the execution under subsection (c).

*See also* New York State Bar Association Committee on International Trade and Transactions, Memorandum entitled "Foreign Currency Judgments" (undated) (also recommending that New York law be changed and noting the same two specific amendments).

Assembly.[65] That early version of the bill proposed that the following language be added to section 27:

> [T]hat in an appropriate case a court may render a judgment or decree, and issue executions thereon, in a currency other than currency of the United States.[66]

Under this early version of the bill, a court in its discretion "may" render a foreign currency judgment. The bill applied only to "appropriate cases," not to all cases or to certain enumerated cases related to obligations denominated in foreign currencies. This bill also allowed the rendering of judgments in a foreign currency without mention of converting the foreign currency into U.S. dollars; presumably, a party could receive an actual judgment in the foreign currency, rather than a dollar equivalent of that currency. If the foreign currency was converted, no conversion date was specified, whether the date of breach, judgment, or payment.

The bill was amended to its present version on June 18, 1987.[67] On July 20, 1987, the Governor signed the bill into law as New York State Chapter Law 326, and the law became effective on that date.

The foreign currency judgment amendment adds a new paragraph to section 27 of the Judiciary Law. Thus, the earlier language of section 27 was retained as subsection (a):

> (a) Except as provided in subdivision (b) of this Section, judgments and accounts must be computed in dollars and cents. In all judgments or decrees rendered by any court for any debt, damages or costs, in all executions issued there upon, and in all accounts arising from proceedings in courts the amount shall be computed, as near as may be, in dollars and cents, rejecting lesser fractions and no judgment, or other proceeding shall be considered erroneous for such omissions.[68]

A new subsection (b) was added to provide for the rendering of foreign currency judgments.

> (b) 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.[69]

### A. Legislative Comments on the Bill

The bill evoked comment and debate. According to the Legislators' Memorandum in Support, provided by Senator Volker and Assemblyman Silver,

65. S. 5625, A. 7563 (May 5, 1987).
66. *Id.*
67. N.Y. Jud. Law § 27 (McKinney Supp. 1988).
68. *Id.*
69. *Id.*

the purpose of the amendment was "[t]o expressly authorize New York courts to render judgments in foreign currencies as well as dollars in appropriate cases."[70] The legislators noted New York's leadership in international trade and commerce and sought to implement the reasonable expectations of the contracting parties:

> Because of the varying nationalities of the parties . . . and because of the current volatility of international exchange rates, judgment in dollars, in such cases, may not give the parties the benefit of the bargain they originally entered into. When the parties expect to pay and receive payment in another currency than United States dollars and that agreement is based in this state, New York courts should have the power to enforce it.[71]

In explaining the amendment's fiscal impact, the legislators noted that, without the amendment, some transactions and litigation were structured to enable the rendering of judgments in other jurisdictions where judgments could be awarded in other currencies.[72]

The new version of the bill had considerable support. The New York State Department of Commerce recommended approval of the bill, noting that its enactment "should help secure New York's place as a center of international commerce."[73] The Bar Association of the City of New York urged approval of the bill.[74] According to the City Bar Memorandum: "The proposed legislation will provide parties entering into transactions involving foreign currencies with better assurance that they will receive the benefits of their agreements. The measure will also help insure that New York remains the pre-eminent international financial and legal center."[75] The New York State Bar Association also urged enactment of this "important legislation."[76] According to the State Bar Report:

> Failure to award foreign currency judgments not only adversely affects New York's status as a leading center of international finance and commerce, but it exposes the innocent, non-breaching party to foreign currency risks. The shifting rates of exchange may threaten an equitable reduction in the value of his award, or reward him with a windfall profit, especially since substantial time may pass between the date on which

70. Memorandum in Support of S. 5625-A and A. 7563-A [hereinafter Memorandum in Support].

71. *Id.*

72. *See id.;* Letter from Luaren D. Rachlin, Chairman of the Committee on International Trade and Transactions of the New York State Bar Association 1 (July 14, 1987) (enactment of the amendment "would have the effect of substantially conforming New York Law to the law of England, which at present is considered more advantageous as the choice of law in many international financial and commercial transactions.").

73. "Ten-Day Bill" Memorandum by Lesley Douglass Webster, Deputy Commissioner and Counsel, New York State Department of Commerce (July 30, 1987) [hereinafter "Ten-Day Bill" Memorandum].

74. City Bar Association Memorandum in Support of S. 5625-A and A. 7563-A (July 20, 1987) [hereinafter City Bar Memorandum].

75. *Id.*, at 1.

76. New York State Bar Association Report No. 190-A (June 27, 1987) [hereinafter Bar Association Report]; *see also* Letter, *supra* note 72.

damages are incurred in the course of a transaction involving foreign currency, and the date on which a judgment awarding damages is collected in dollars.[77]

While a number of other New York entities refrained from taking a position,[78] the Erie County Bar Association also supported the bill,[79] as did Senator Volker of the New York State Assembly.[80]

### B. Claims Subject to the Foreign Currency Amendment

The amendment differs from the earlier version of the bill in several respects, including a requirement that the cause of action is based on "any obligation denominated in" a foreign currency. Thus, the provision does not apply to all "appropriate cases" but, rather, is limited to "obligation[s] denominated in" foreign currencies. This would probably include contracts denominated in foreign currencies and judgments from other jurisdictions rendered in foreign currencies. For example, the amendment should apply to cases arising out of foreign currency foreign branch deposits,[81] and to claims arising out of loan agreements denominated in foreign currencies and subject to New York law. Without other facts tying into the denomination requirement, however, the amendment probably would not apply to other arguably "appropriate" cases such as tort claims.[82]

Unlike the earlier bill, as long as the amendment applies to the cause of action, the law is mandatory rather than permissive. At least one speaker, during the floor debate on the bill, argued for giving the plaintiff the option of obtaining a foreign currency judgment, rather than requiring it.[83] However, as enacted, as long as the cause of action is based on an obligation denominated in a foreign

77. Bar Association Report, *supra* note 76.

78. *See* Letter from Michael Colodner, Counsel to the New York Office of Unified Court System (July 9, 1987) ("This measure, which is substantive in nature, would not significantly affect court administration. Therefore, this Office is taking no position with respect to this measure."); Letter from David Merritt, Associate Counsel to the New York Office of the State Comptroller (July 7, 1987) ("We will not issue any formal opinion on the measure."); Memorandum No. B-203 of the New York Division of the Budget ("We find that the bill has no appreciable effect on State finances or programs, and this office does not have the technical responsibility to make a recommendation on the bill. . . . We, therefore, make no recommendation."); Memorandum from Robert Abrams, Attorney General (July 6, 1987) ("Inasmuch as this bill does not appear to relate to the functions of the Department of Law, I am not commenting thereon, at this time."); Letter from Edward C. Farrell, Executive Director, New York State Conference of Mayors and Other Municipal Officials (July 10, 1987 ("The Conference of Mayors . . . takes no position as to whether or not the Governor should sign the bill into Law.").

79. City Bar Memorandum, *supra* note 74, at 3.

80. Letter from Franklin K. Breselor, Counsel to Senator Volker, to Hon. Evan A. Davis (July 7, 1987).

81. *E.g.*, Tat Ba v. Chase Manhattan Bank, 616 F. Supp. 10 (S.D.N.Y. 1984), *aff'd mem.*, 762 F.2d 991 (2d Cir. 1985); Tran v. Citibank, 586 F. Supp. 203 (S.D.N.Y. 1983).

82. *Compare supra* notes 46–55 and accompanying text.

83. Debate on Bill No. 7563-A, Rules Report No. 782, at 319 (1987) [hereinafter Debate] (statement of Mr. Proskin).

currency and otherwise falls within the purview of the amendment, the rendering of a judgment in the foreign currency is required.

### C. Conversion to U.S. Dollars

Although the amendment provides that the court shall render judgments in foreign currency, it goes on to say that the judgments "shall be converted" into currency of the United States. Thus, contrary to British decisions and the suggestion of the Restatement, which appear to permit a judgment to be satisfied in the foreign currency, the amendment appears to require that a judgment rendered in a foreign currency must nonetheless still be converted into U.S. currency.[84] The amendment does not appear to provide the option of satisfying the judgment by simply providing the necessary amount of foreign currency. Thus, the amendment really does not go as far as it could have in actually enabling the award of a foreign currency. To illustrate, a court may initially provide for the rendering of a judgment in French francs, but the court must then convert those French francs into U.S. dollars; the prevailing litigant does not necessarily receive by judicial decree his recovery in French francs. Thus, while the bill has generally been described as conferring on New York courts the authority in an appropriate case to render a "judgment in foreign currencies,"[85] it does not appear in fact to ultimately do so; apparently such a judgment must ultimately still be converted back into U.S. dollars.

The amendment also provides that the judgment shall be converted into U.S. currency at the exchange rate prevailing on the date of entry of the judgment. This changes the prior breach day conversion rule in New York, conforming the New York rule to that used by many federal courts.[86]

Of course, conversion on the date of judgment may nonetheless be problematic.[87] A judgment day rule may result in potential delay or other unfairness due to a lapse of time between the date of entry of judgment, subsequent review, and the ultimate date of payment, during which time the value of the foreign currency may appreciate or depreciate substantially against the U.S. dollar.[88]

Moreover, the amendment provides no precise method for determining the "prevailing rate of exchange" under which to convert judgments in foreign currency into dollars.[89] Thus, which exchange rate must be used is not clear.

Rates of exchange may vary substantially depending on which source is quoted, particularly between "official" rates of exchange and "black market"

84. *Id.* at 308, 810.
85. *See* Memorandum in Support, *supra* note 70.
86. *See supra* notes 25–41 and accompanying text.
87. *See supra* notes 25–27 and accompanying text.
88. Restatement, *supra* note 3, § 823.
89. *See* "Ten-Day Bill" Memorandum, *supra* note 73; *see also* Debate, *supra* note 83, at 321 (1987) (statement of Mr. Wertz) (asking who would make the conversion to U.S. dollars).

rates.[90] The leading New York decision of *Hughes Tool Co. v. United Artists Corp.*[91] is illustrative. In that case the defendant contracted to distribute a motion picture for the plaintiff in several foreign countries. The agreement required the defendant to hold the plaintiff's share in box office receipts in the various foreign currencies or to deliver the foreign currencies to the plaintiff's nominees in those countries. The funds were blocked by foreign laws, such that they could not be freely converted into U.S. currency. The First Department rejected the use of the "official" rate of exchange, because otherwise the plaintiff would have received a greater recovery than if the defendant had not breached the contract. "These parties did not intend that defendant should solve plaintiff's foreign exchange difficulties."[92] Instead, the court directed the measure of damage to be "whatever value there may be in New York of blocked foreign currencies."[93]

More recently, in the *Vishipco* litigation, the Second Circuit addressed the valuation question. In *Vishipco,* the plaintiff sought to recover on his piastre, or local currency, account with Chase Manhattan Bank's former Saigon branch, which was closed and then confiscated when Saigon fell. After holding the bank liable in *Vishipco I,*[94] the court examined the calculation of damages in *Vishipco II.* The court held that conversion from the Vietnamese piastre to the U.S. dollar would be on the day of breach in the spring of 1975 when the Vietnamese piastre still had some significant value, rather than the day of judgment in 1981, when the piastre had depreciated substantially against the dollar. The court urged an examination of the market of the foreign currency to evaluate the "purchasing power" of the foreign currency at the time and place the plaintiff would have used the funds, but for the breach. This "purchasing power," "fair market," or "equivalent value" determination requires "an assessment of the actual costs of an opportunity for exchange at the time and place of the breach."[95]

As in *Hughes Tool,* the *Vishipco* court sought a realistic currency valuation and avoided the use of official exchange rates. "Where local currency restrictions would

90. *See* Trinh v. Citibank, 623 F. Supp. 1526 (E.D. Mich. 1985), *aff'd on other grounds,* 850 F.2d 1164 (6th Cir.), *petition for cert. filed,* No. 88-1031 (Dec. 20, 1988). For example, in Cinelli v. Commissioner, 502 F.2d 695 (6th Cir. 1974), the official rate was 19.1 lire to the dollar, while the commercial rate was 719 lire to the dollar, nearly forty times the official rate.

91. 279 A.D.2d 417, 110 N.Y.S.2d 383 (1st Dep't 1952), *aff'd mem.,* 304 N.Y. 942, 110 N.E.2d 884 (1953).

92. 279 A.D.2d at 419–20, 110 N.Y.S.2d at 385.

93. 279 A.D.2d at 422, 110 N.Y.S.2d at 387. Similarly, the British courts appear to require exchange into sterling at the "rate current in London" as of the relevant conversion date. [1988] 2 THE SUPREME COURT PRACTICE ¶ 724.

94. The *Vishipco I* decision has been seriously questioned. U.S. Amicus Curiae Brief on Petition for a Writ of Certiorari, at 7, 10, 17 (filed Oct. 6, 1982); Note, *The Act of State Doctrine: Resolving Debt Situs Confusion,* 86 COLUM. L. REV. 594, 616, 616 n.136 (1986); Warden, *Choice of Law and Act of State Questions in International Banking Transactions,* in PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS IN 1984, at 288–91 (1985); *Vishipco Line v. Chase Manhattan Bank: Bank Liability for Foreign Branch Seizures,* 2 ANN. REV. BANKING L. 393 (1983).

95. *Vishipco II,* 754 F.2d at 455.

prevent a party from converting its money into dollars, New York courts have been disinclined to employ 'official' exchange rates, seeking instead to appraise realistically the relative value of the currencies.''[96] The court encouraged an ''innovative approach to the ordinarily strict principles that govern ascertainment of damages and admissibility of evidence,''[97] and suggested a review of the underground market for dollars in Saigon. The task of such valuation during a time of civil unrest is not necessarily easy,[98] and the burden is on the plaintiff to establish the unofficial rate with ''reasonable certainty.''[99] Should insufficient evidence be available to determine the unofficial exchange rate in the Saigon market, the court suggested examination of other markets such as Singapore and Hong Kong.[100]

The Sixth Circuit in *Cinelli v. Commissioner*[101] has also analyzed foreign currency conversions in terms of ''actual purchasing power.''[102] In that tax case, the claim arose in Italian lire during World War II when the currency was blocked or otherwise could not be taken out of the country. Taxpayers sought to use the official exchange rate of the lire, which would have resulted in a higher valuation of his property and a higher loss for tax purposes. The court rejected the artificial ''official'' exchange rate, choosing instead a ''fair market value'' or the ''actual purchasing power'' of a currency.[103] The court noted the typical measure as the ''commercial'' rate established in New York's financial centers at the relevant time, which was also the rate applied for U.S. customs purposes under 31 U.S.C. section 372(c).[104] Because no New York commercial rate was presented, however, the court looked to the Italian black market rate, which was based on actual dollar-lire transactions.

Similarly, in *Trinh v. Citibank,*[105] where the plaintiff sought recovery on a local currency or piastre account with Citibank's former branch in Saigon, South Vietnam, which was closed and confiscated when Saigon fell, the Michigan district court rejected the plaintiff's proffer of the official rate. Instead, the court looked to ''commercial rates of exchange that reflect actual fair market value of foreign currency.''[106]

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96. *Id.*
97. *Id.* at 457.
98. *Id.*
99. *Id.*
100. *Id.* However, the *Vishipco* analysis appears to be internally inconsistent. In *Vishipco I,* the Second Circuit held that the situs of the plaintiff's bank account or debt ''sprang'' out of Saigon and into New York when Chase closed its Saigon branch. Nonetheless, in *Vishipco II,* the court rejected the district court's determination that the relevant measure of damages was that available in New York. Thus, the debt was supposedly located in New York, but damages could not be valued there.
101. 502 F.2d 695 (6th Cir. 1974).
102. *Id.* at 698.
103. *Id.* at 697, 698.
104. *Id.* at 688–89.
105. 623 F. Supp. 1526 (E.D. Mich. 1985), *aff'd on different grounds,* 850 F.2d 1164 (6th Cir.), *petition for cert. filed,* No. 88-1031 (Dec. 20, 1988).
106. 623 F. Supp. at 1538.

### D. Other Features of the Amendment

The law amends only the Judiciary Law and not the Civil Practice Law and Rules. Thus, unlike the earlier bill, which would have provided that the court "issue executions" on a foreign currency judgment,[107] and unlike the City Bar Committee's recommended approach,[108] the amendment does not expressly apply to executions on judgments in foreign currency.[109] According to the summary of the Legislators' Memorandum in Support of the amendment, however, the bill amended section 27 to provide not only that a court may render a judgment, but also "executions thereon in foreign currencies."[110]

## III. Conclusion

The foreign currency judgment amendment provides a welcome development in New York law. While it may not go as far as it could have, it is at least a respectable beginning.

107. *See supra* notes 65 & 66 and accompanying text.

108. *See supra* note 64.

109. N.Y. Jud. Law § 27 (McKinney 1987).

110. Memorandum in Support, *supra* note 70. Apart from the amendment, American courts have generally converted a foreign judgment expressed in a foreign currency to dollars as of the date of the second (American) judgment. *E.g.*, Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co., 484 F. Supp. 1063, 1070 (N.D. Ga. 1980) (enforcement of foreign arbitral award); Island Territory of Curacao v. Solitron Devices Inc., 356 F. Supp. 1 (S.D.N.Y.), *aff'd*, 489 F.2d 1313 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974).