FOREIGN CURRENCY JUDGMENTS: A NEW OPTION FOR UNITED STATES COURTS

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1. INTRODUCTION

The once well established precept that a U.S. court may only award judgments in dollars\(^1\) no longer holds force as doctrine. The recent federal court decisions in *In re Oil Spill by the Amoco Cadiz*\(^2\) and *Mitsui & Co. v. Oceantrawl Corp.*\(^3\), granting judgments in foreign currencies, indicate a willingness by courts to look beyond the doctrines of the past and formulate rules better suited to

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2 954 F.2d 1279 (7th Cir. 1992).

trans-national legal disputes. Numerous states have seen fit to reject the home-currency rule, which requires that all awards be denominated in dollars, by adopting statutes that require judgments to be awarded in foreign currency. Criticism of the home-currency rule, though dating back to the early twentieth century, has recently multiplied. These factors combined indicate that the old rule can no longer be depended upon and that alternative approaches should be given due weight by the courts.

Due to the fluctuating value of national currencies relative to each other, both the choice of currency and the choice of the date for determining the rate of currency conversion can significantly affect the value of an award in terms of a domestic currency. When a court cannot issue awards in a foreign currency, the court must specify a conversion rate to determine the domestic currency equivalent for the foreign money obligation. The three most commonly suggested dates for setting a conversion rate are: breach-day—the date money became due; judgment-day—the date judgment is entered; and payment-day—the date when the obligation is actually paid. Depending on currency fluctuations, use of different rules may produce "wildly disparate results in terms of making the injured person whole."8

The ability to grant an award in foreign currency appears to resolve much of the complexity surrounding conversion of a foreign currency claim into dollars for enforcement by a U.S. court.

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4 See UNIF. FOREIGN-MONEY CLAIMS ACT, §§1-19 tbl., 13 U.L.A. 60 (West Supp. 1997) [hereinafter UFMCA]. As of 1995, California, Colorado, Connecticut, Hawaii, Illinois, Minnesota, Montana, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Utah, the Virgin Islands, Virginia, Washington, and Wisconsin have all enacted significant parts of the UFMCA. Id. at 60.


6 See UFMCA prefatory note at 61; Brand, supra note 5, at 142; Lion, supra note 1, at 871-72.

7 See UFMCA prefatory note at 61.

8 Id.
However, from the perspective of an injured party the economic consequence of a foreign currency award is indistinguishable from the use of a payment-day rule. This necessarily follows because on the day of payment the foreign currency amount will be equivalent to an amount in domestic currency using the conversion rate for that day. Theoretically, the injured party could exchange the foreign currency on the day of payment for the equivalent dollar amount. Though the amount of the foreign currency award remains constant, the actual economic value of the award in terms of domestic currency fluctuates with exchange rates. Because the actual value received by the injured party varies over time, it is necessary to look beneath the apparent simplicity of a foreign currency rule.

The availability of foreign currency judgments broadens the field of potential remedies. A foreign currency judgment produces the same economic result as if a payment-day conversion rate were used. It does not solve the problem of choosing a conversion rule, but adds another factor to consider in determining what amount most fully compensates a plaintiff without providing a windfall.

The scope of international business and litigation, combined with fluctuations in relative value of currencies indicative of a floating currency market, make the availability of satisfactory awards for foreign obligations crucial. England and numerous European countries have responded to the pressure of floating currency markets by adopting rules equivalent to a foreign currency rule or payment-day rule. The reaction of courts in the United States has been significantly more hesitant, though a shift may be imminent.

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9 See Competex, S.A. v. LaBow, 783 F.2d 333, 338 (2d Cir. 1986) ("The payment-day rule is economically equivalent to the foreign-currency-judgment rule.").

10 See Brand, supra note 5, at 180 ("A pure foreign currency judgment rule is no more than a rigid home currency judgment rule combined with a mandatory payment date conversion rate.").

11 See UFMCA prefatory at 61.

12 See Brand, supra note 5, at 180.

13 See Miliangos v. George Frank, Ltd., 1976 Law Reports 443 (App. Cas. 1975) (appeal taken from Eng. C.A.) (departing from 350 years of home currency rule in English courts by awarding damages in Swiss francs); see generally Dach, supra note 5, at 160 (discussing the changing foreign currency rules of European countries following World War I).
Most commentators agree that the traditional home currency rule enforced by U.S. courts can not adequately meet the needs of international litigation. Within the last fifteen years, a few courts and state legislatures have responded to this crisis by formulating rules requiring foreign currency awards in certain situations. The demands of commerce and the adoption of a foreign-currency rule by English courts have significantly influenced U.S. law in this area. Regrettably, the traditional objective of Anglo-American civil justice, fair compensation of the victim, has received less attention. To protect this ideal, U.S. courts and legislatures must fashion a currency choice rule which looks beyond economic trends and focuses, instead, on the individual economic realities of the effected parties, particularly the plaintiff, and select the method of currency conversion which best achieves equity.

Section two of this comment will examine the historical background and legacy of the home-currency rule, paying particular attention to whether any continuing barriers to foreign currency awards exist. Section three looks at the recent abandonment of the home-currency rule by authoritative commentators. Section four analyzes the implications of the *Erie* doctrine for currency choice decisions in order to understand the possibilities of conflict between federal and state law.

Section five discusses the recent decisions which have significantly undercut the home-currency doctrine and looks for any identifiable principles which can be applied to future cases. Section six compares the three major theories on implementation of foreign currency awards and concludes that no current approach produces a satisfactory balance between compensation of the victim and predictability for parties engaged in international commerce. The final section concludes that courts and legislatures addressing the issue should adopt an approach which looks at the actual economic injury suffered by the plaintiff when determining the appropriate currency of judgment, instead of relying on mandatory rules.

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14 See Brand, *supra* note 5, at 139 ("It is time for the United States to abandon its out-dated rules on foreign currency liabilities and adopt an approach consistent with modern commercial realities.").
2. LEGACY OF THE HOME-CURRENCY RULE

The decisions in *In re Oil Spill by the Amoco Cadiz*\(^1\) and *Mitsui & Co. v. Oceantrawl Corp.*\(^2\) granting awards in foreign currencies, broke dramatically from the overwhelming weight of precedent and tradition requiring U.S. courts to only issue awards in dollars. The concept that a court may only issue awards in domestic currency dates back over 350 years in the Anglo-American legal tradition,\(^3\) with even earlier roots in the law of ancient Rome.\(^4\) In the United States, the home-currency rule has long been accepted as a basic common law tenet, with substantial judicial precedent since the nineteenth century.\(^5\)

Until 1976, English courts continued to adhere to the home-currency doctrine. However, the seminal House of Lords decision in *Miliangos v. George Frank, Ltd.*, granting a breach of contract award in Swiss francs, overruled the centuries old common law tenet. Since the *Miliangos* decision, English courts have developed a foreign currency rule applicable in all cases where the injured party sustains a loss denominated in a foreign currency. Despite the demise of the home-currency rule's English common law predecessor, the majority of courts in the United States continue to accept the principle that the forum may only award judgments in its own currency.\(^6\)

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\(^{15}\) 954 F.2d 1279 (7th Cir. 1992).
\(^{17}\) See *Miliangos*, 1976 Law Reports at 443 (citing cases dating back to the seventeenth century which required all judgments be denominated in sterling pounds using a breach-day conversion rate); Becker, *supra* note 1, at 154; Lion, *supra* note 1, at 871 n.2 ("The historical reason for the rule in England was that the sheriff could not be expected to know the value of foreign currency and thus could not enforce any judgments by execution unless expressed in pounds sterling.").
\(^{18}\) See Dach, *supra* note 5, at 155 n.1 (tracing the problem of conversion of foreign currency into domestic currency back to Roman law).
\(^{19}\) See *Hicks v. Guinness*, 269 U.S. 71 (1925); *Frontera Transp. Co. v. Abunza*, 271 F. 199 (5th Cir. 1921); *Guinness v. Miller*, 291 F. 769 (S.D.N.Y. 1923); Dach, *supra* note 5, at 156 ("[I]t is a well-settled rule that courts cannot render judgment for payment of any other money than American dollars.").
\(^{20}\) Only the Second and Seventh Circuits have indicated dissatisfaction with the domestic currency rule. See *Mitsui*, 906 F. Supp. at 202; *Amoco Cadiz*, 954 F.2d at 1279. Though 20 jurisdictions have adopted the UFMCA, only a Massachusetts court has actually awarded a foreign sum. See *Manches & Co. v. Gilbey*, 646 N.E.2d 86, 89 (Mass. 1995) (awarding a judgment in pounds, to be paid in pounds or the dollar equivalent, using the payment-day conversion rate).
The courts invoking the home-currency doctrine have not relied on any one definitive source for the rule. Several justifications for the rule have been asserted, including federal statute, judicial precedent, and principles of state sovereignty. Understanding the justifications for the home-currency rule is crucial to determining the rule’s current significance.

2.1. The Coinage Act of 1792

The home-currency rule traditionally followed by U.S. courts, has never been specifically codified. A few courts have referred to section 20 of the Coinage Act of 1792 which stated, “money of account of the United States shall be expressed in dollars or units, dimes or tenths, cents or hundredths . . . and all proceedings in the courts . . . shall be kept and had in conformity to this regulation,” as statutory support for a home-currency rule. Though a strict reading of the language appears to prohibit any foreign money award by a court, the purpose of the section was evidently not to establish a home-currency rule, but to require that governmental accounts be kept according to a decimal system, instead of a system based on other fractional units. Significant doubt has been expressed about whether § 20, in fact, ever prohibited foreign money judgments. With the 1982 repeal of section 20,

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21 See Brand, supra note 5, at 158 (referring to the source of the home-currency rule as “obscure”); Freeman, supra note 1, at 738-40 (discussing several different justifications given by various courts, including the federal statute, common law, and the sovereignty theory).
22 See Freeman, supra note 1, at 738-40; Westerheim, supra note 1, at 1208.
23 See Becker, supra note 1, at 157 (finding no federal statute barring foreign money awards); Brand, supra note 5, at 157-59 (expressing doubt that the Coinage Act ever prohibited foreign money awards).
25 See Int’l Silk Guild, Inc. v. Rogers, 262 F.2d 219, 224 (D.C. Cir. 1958); Shaw, Savill, Albion & Co. v. The Fredericksburg, 189 F.2d 952, 954 & n.5 (2d Cir. 1951); RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 823, Reporters’ Notes 1 (1987); cf. Baumlin & Ernst, Ltd. v. Gemini, Ltd., 637 F.2d 238, 243 & n.9 (4th Cir. 1980) (expressing uncertainty as to whether 31 U.S.C § 5101 would prohibit a foreign currency award).
26 See 31 U.S.C. § 5101, historical and revision notes (1988); Brand, supra note 5, at 158 n.106 & n.107 (analyzing the legislative history and writings surrounding the Coinage Act of 1792 and concluding that there was no intention to require domestic currency judgments).
27 See Becker, supra note 1, at 157 (“[Very little] stands in the way of the adoption of the new form of judgment by American courts . . . .”);
omitting the language "all proceedings in the courts . . . shall be kept and had in conformity to this regulation' [as] surplus," any statutory barrier to non-dollar judgments became less apparent, since the statute no longer specifically applies to courts.

Numerous commentators have asserted that because of the deletion of the language requiring court proceedings to be kept in dollar units, there no longer exists a statutory prohibition of foreign currency awards.28 The Restatement (Third) of Foreign Relations goes so far as to state that "[c]ourts in the United States . . . are not precluded from giving judgment in the currency in which the obligation is denominated or the loss was incurred" and supports this conclusion by extensive citation to changes in the Coinage Act.30

The possibility that the revision did not significantly change the law has been considered by at least one commentator. Professor Suzanne Raggio Westerheim notes the clear legislative intent not to substantially change the law or impair the precedential value of earlier judicial decisions, and contends that a more faithful interpretation of the Coinage Act revision may be that the home-currency doctrine remains unchanged.31 If this contention is accepted, courts would still be prohibited under federal law from awarding judgments in any currency other than dollars.

Brand, supra note 5, at 158 (suggesting the original intent of the Coinage Act does not support the home currency rule); Dach, supra note 1, at 183 (addressing the question of whether the law of the United States actually prevents foreign currency awards).

28 See 31 U.S.C. § 5101 historical and revision notes (1988) ("The words . . . 'and all proceedings in the courts shall be kept and had in conformity to this regulation' are omitted as surplus.").

29 See Amoco Cadiz, 954 F.2d at 1328; Competex, S.A. v. LaBow, 783 F.2d 333, 337 & n.9 (2d Cir. 1986) (calling for reexamination of the home-currency rule after the repeal of the Coinage Act); Westerheim, supra note 1, at 1209-13 (evaluating the proposition that the repeal of the Coinage Act allows for foreign money awards).

30 RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 823(1) & reporters' note 1 (1987).

31 See Westerheim, supra note 1, at 1213 ("In light of . . . the well-entrenched nature of the prohibition against foreign-currency judgments at the time section 5101 was codified and enacted, it is more consistent with the Supreme Court's established interpretation of codified statutes to find that foreign currency judgments are still prohibited."). A third alternative is offered: that the omitted language "remove[s] statutory bars to contrary judicial interpretations, while . . . preserve[ing] the existing federal common law interpreting the Coinage Act." Id.
Judicial interpretations of the changes in the Coinage Act have produced inconsistent results. Several decisions following the repeal of the Coinage Act continued to apply the home-currency rule. However, the revised language led the Second Circuit, in Competex v. LaBow, to call for reexamination of the presumption that courts may not enter foreign money awards. Most significantly, the repealed text served as the basis for the declaration in Amoco Cadiz that "[t]here is now no bar to judgment in the appropriate currency." The holding of the Amoco Cadiz court has been considered by some to open the door to awards in foreign currencies.

2.2. Judicial Precedent

Despite the proclamation by the Amoco Cadiz court, the home-currency rule continues to present an obstacle to foreign money awards. The majority of federal courts have relied on the common law rather than the Coinage Act as authority for this rule. The repeal of the Coinage Act impacts the developed federal common law only slightly. A full century of federal precedent remains in support of the home-currency rule.

2.2.1. Implications of Federal Common Law

Entrenched federal court precedent regarding currency choice presents the biggest obstacle to foreign money judgments. Independent of the Coinage Act, federal courts sitting in both diversity and non-diversity cases have developed a long line of precedent requiring judgments in dollars. The strength of this chain

32 See Sainz Gonzalez v. Banco de Santander-Puerto Rico, 932 F.2d 999 (1st Cir 1991) (converting damages calculated in pesetas into dollars); In re Good Hope Chem. Corp., 747 F.2d 806 (1st Cir. 1984) (requiring bankruptcy claim denominated in German marks be converted to issue judgment); Nikimiha Sec. Ltd. v. Trend Group Ltd., 646 F. Supp. 1211, 1226 (E.D. Pa. 1986) (discussing recent changes in the law in detail and concluding that judgment must be entered in dollars); Fils Et Cables D'Acier De Lens v. Midland Metals Corp., 584 F. Supp. 240, 246 (S.D.N.Y. 1984) ("[T]his court is empowered to award a money judgment expressed only in American dollars.").

33 Competex, 783 F.2d at 338 & n.9.

34 Amoco Cadiz, 954 F.2d at 1328; see infra section 5.3.

35 See Amoco Cadiz, 954 F.2d at 1279; Mitsui, 906 F.2d at 202; infra Sections 5.2.1-5.2.2.

36 See Hicks, 269 U.S. at 80, 89; Good Hope, 747 F.2d at 809; Jamaica Nutrition Holdings v. United Shipping Co., 643 F.2d 376, 381 (5th Cir. 1981); Lie-
of decisions demonstrates the determinative role federal courts have played in formulating currency choice policy.

The decisions of Frontera Transp. Co. v. Abaunza and Hicks v. Guinness usually serve as the judicial foundation for the home-currency rule. Though nascent examples of the home-currency rule appeared before the turn of the nineteenth century, these cases are rarely cited. Justice Holmes' opinion in Hicks, like most other decisions stating the rule, "support[s] it with citations to earlier cases that have made the naked statement," and does not further explain the rationale for the home-currency rule.

The home-currency rule laid down in Frontera and Hicks quickly took on the weight of doctrine, despite the absence of explicit explanation of its source by the Supreme Court. In subsequent cases, the inability of courts to enter non-dollar awards has been considered settled law by federal courts, most often not even necessitating discussion.

2.2.2. Use of Sovereignty Theory by Courts

The lower court decision affirmed in Hicks embodies the "sovereignty" theory of the home-currency rule. The concept of

beskind v. Mexican Light & Power Co., 116 F.2d 971, 974 (2d Cir. 1941); Fredericksburg, 189 F.2d at 975.
37 271 F. 199, 202 (5th Cir. 1921) (rejecting a lower court's award expressed in Mexican pesos and stating that the court does not "ha[ve] the right to render a judgment ... otherwise than in money of the United States").
38 269 U.S. 71, 71 (1925) ("[A] court in the United States can not enter a decree or judgment in foreign money.").
39 Examples of commentators citing these cases as primary justification of the home currency rule include, Freeman, supra note 1, at 739, and Westerheim, supra note 1, at 1214.
40 See Bronson v. Rodes, 74 U.S. (7 Wall.) 229 (1868); Butler v. Horwitz, 74 U.S. (7 Wall.) 258 (1868); The Edith, 8 F. Cas. 307, 307 (S.D.N.Y. 1871) (No. 4,281). For a discussion of the holdings in these cases, see Brand, supra note 5, at 159-61. Professor Brand concludes that language in these early opinions does not disapprove of foreign currency judgments. See id.
41 See Brand, supra note 5, at 157 & n.97.
judicial sovereignty is most simply summarized using Judge Learned Hand’s words in the district court decision: “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.” This justification suggests that a nation and its judiciary lack the authority to create an obligation in a foreign currency and may only enforce awards denominated in the currency of their sovereign state. Though not frequently cited by courts, the sovereignty theory may help to explain some courts’ treatment of the home-currency rule as self-evident.

Over the course of the last century, federal court precedent has virtually cemented the home-currency rule. The presumption that a court may not enter awards in a foreign currency goes largely unquestioned. The strong federal court doctrine barring these awards has significantly impacted state law, compounding the barriers to foreign money awards.

2.3. State Law Barriers

State law could present significant barriers to foreign money awards. Though federal diversity jurisdiction is the most common arena for disputes concerning foreign money obligations, these cases also arise in state courts. More importantly state law practices could influence the federal courts via the Erie doctrine, which requires that the substantive law of the forum state applies to federal courts sitting in diversity. These implications will be discussed further in section four of this comment.

The barriers to foreign money awards in state court derive largely from federal law. Fourteen states, including New York, have statutes in effect which may be construed to prohibit courts from issuing foreign currency awards, some of which are pat-

43 Guinness v. Miller, 291 F. 769, 770 (S.D.N.Y 1923), aff’d, 299 F. 538 (2d Cir. 1924), aff’d Hicks v. Guinness, 269 U.S. 71 (1925). The sovereignty principle expounded in Guinness assumes that a court cannot enforce any law but that of its own sovereign. See id. at 770. For a more detailed analysis of the sovereignty principle, see Westerheim, supra note 1, at 1215-16.

44 See Westerheim, supra note 1, at 1220 n.119 (citing numerous cases where state courts have followed federal precedent regarding currency-conversion issues).


46 See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
terned after the Coinage Act. Because some state statutes mirror the Coinage Act verbatim, their current validity is uncertain. Additionally, federal precedent concerning the home-currency rule has influenced many state courts, and as a result state courts have developed their own line of precedent confirming the home-currency rule. These existing barriers to foreign currency awards present an additional area of concern when considering modernization of the United States' approach.

3. CRACKS IN THE HOME-CURRENCY RULE

The home-currency rule, though long held doctrine in U.S. courts, never enjoyed universal acceptance. Since World War II, when floating currency systems began to spread, most of the United States' trading partners have allowed foreign money awards. Many commentators have criticized the United States for failing to keep up with other states and relying on an antiquated rule with no valid source in natural law. Despite the prevalence of this criticism, only recently have prominent legal authorities in the United States urged that the home-currency rule be displaced. The new perspective is apparent in both the UFMCA and the Restatement (Third) of Foreign Relations.


48 See Becker, supra note 1, at 57; Brand, supra note 5, at 169 (questioning the status of state laws (three of which are currently in effect) which mirror the language of the Coinage Act); Dach, supra note 5 at 156.

49 See Westerheim, supra note 1, at 1219 & n.119.

50 See Brand, supra note 5, at 154 n.85 (detailing Canadian policy in foreign currency judgments which requires home currency judgments); see generally Dach, supra note 5 (discussing the modernization of European conversion rules following World War II).

51 See Becker, supra note 1, at 157 (advocating that U.S. courts adopt the Miliangos holding); Brand, supra note 5, at 139 (referring to the rule as "outdated"); Dach, supra note 5, at 183 (noting the need for flexibility by courts in conversion day choices).

52 See UFMCA, at 61; Restatement (Third) Foreign Relations § 823 (1987).
3.1. The UFMCA’s Foreign-Currency Rule

In 1989, the National Conference and Commission on Uniform State Laws approved the Uniform Money Claims Act. Since then, it has been enacted in substantial part by twenty states, with an additional state, Massachusetts recognizing it as persuasive authority for judge made law. The primary intention of the UFMCA was to replace the home-currency rule with an approach calling for awards in foreign currencies.

The drafters of the UFMCA apparently believed that a home-currency rule was no longer satisfactory. The UFMCA lists the following reasons for formulating a foreign currency rule: the increase in foreign money claims as a result of international trade, the fluctuation in the value of the dollar in relation to other currencies, and the use of foreign money awards by the United States’ trading partners. The UFMCA does not specifically mention the existence of statutory or common law barriers to foreign money awards either in its preface, notes, or body.

Though no mention of the potential conflict is made, the terms of the UFMCA clearly violate the home-currency rule. The UFMCA specifically requires “judgments and arbitration awards . . . be entered in the foreign money rather than United States dollars” when the obligation is denominated in the money of a foreign country. The UFMCA does allow for the payment of a foreign money award in dollars using the payment date as the conversion date at the debtor’s option. This, however, is economically identical to payment in the foreign currency. Since the UFMCA provides this as a choice of the debtor and not of the court, it can not be reconciled with the home-currency rule. The UFMCA allows a forum court to determine the currency of

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53 See UFMCA, Tbl. of Jurisdictions, at 60; Manches & Co. v. Gilbey, 646 N.E.2d 86, 88-89 & n.7 (Mass. 1995) (awarding judgment in pounds sterling based on the UFMCA’s payment day rule, but leaving open the question of whether to adopt other applications of the UFMCA).

54 See UFMCA, at 61. The prefatory note explains the purpose of the act as follows: “[to facilitate] 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.” Id.

55 See id.

56 See id.

57 See id. at 61.

58 See id. § 7(b).
judgment in only one situation: when the parties do not agree on which currency should be used. Potential disagreements on the currency of judgment are likely to occur in situations where there has been a shift in relative currency values. Therefore, under the UFMCA a court may frequently be required to determine the currency of judgment. However, the factors provided by the UFMCA for determining the appropriate currency focus on the economic dealings of the parties and give no preference to the currency of the forum. Thus, courts would not be able to use the UFMCA default currency choice rules as a means of implementing a home-currency rule.

The UFMCA was constructed specifically to facilitate foreign money awards. The positive reception it has received by so many states indicates that support for the home-currency rule is waning. In Section four of this Comment, the UFMCA’s legal significance will be discussed further.

3.2. The Restatement’s Flexible Rule

The Restatement (Third) of Foreign Relations also adopts the view that foreign money awards should be permitted. The rule it sets forth in section 823, simply asserts that U.S. courts “are not precluded from giving judgment in the currency in which the obligation is denominated or the loss was incurred.” The Restate-

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59 See id. § 4.
60 See Westerheim, supra note 1, at 1222-24.
61 See UFMCA, at § 4. This section provides:

(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.

Id.
ment finds no bar to foreign currency awards in either the Coinage Act or common law.\textsuperscript{63}

The text of the rule does not reveal a preference for either dollar or foreign money awards.\textsuperscript{64} However, in the comment to section 823, courts are urged to issue judgment in a foreign currency at the request of the injured party when such a judgment fully compensates the injured party without providing either party with a windfall.\textsuperscript{65} The guiding objective behind the Restatement's policy is the equitable treatment of both parties.\textsuperscript{66} To accomplish this goal in all situations, a foreign currency judgment or its economic equivalent use of payment-day conversion rate must be available as a remedy.

The Restatement approach has been considered persuasive authority by courts addressing the issue of currency conversion choice.\textsuperscript{67} By allowing for foreign currency awards, the Restatement seriously injures the efficacy of the home-currency rule. However, the Restatement is not a substitute for binding law. To determine the legal status of the home-currency rule consideration must be given to issues of federalism and the impact of recent case law.

4. POTENTIAL CONFLICTS BETWEEN FEDERAL AND STATE LAW

The adoption of the UFMCA by twenty states highlights the importance of determining whether currency choice rules are substantive or procedural for purposes of \textit{Erie} analysis. Conflict among federal and state law in this area is a relatively new development. Prior to 1987, it appeared that no state had statutes calling for foreign currency judgments.\textsuperscript{68} State courts typically looked to federal precedent regarding currency choice and uni-

\textsuperscript{63} See id. cmt. b.
\textsuperscript{64} See id.
\textsuperscript{65} See id.
\textsuperscript{66} See id. cmt. c (explaining that the courts' goal should be to "assure that neither party receives a windfall or is penalized as a result of currency conversion").
\textsuperscript{67} See \textit{In re} Oil Spill by the Amoco Cadiz, 954 F.2d 1279, 1328 (7th Cir. 1992); Competex, S.A. v. LaBow, 783 F.2d 333, 336 n.5 (2d Cir. 1986); Mitsui & Co. v. Oceantrawl Corp., 906 F. Supp 202, 203 (S.D.N.Y. 1995).
\textsuperscript{68} See Brand, \textit{supra} note 5, at 169-71 (cataloging the position of state statutes regarding foreign money awards).
formally applied the home-currency rule. Federal courts sitting in state jurisdictions requiring foreign money awards have not squarely addressed the issue of which rule would prevail.

4.1. Implications of Erie for Choosing Currency of Judgment

The fate of the currency choice issue under the *Erie* doctrine has not been confronted. Federal courts might look toward their treatment of currency conversion rules as a pattern for currency choice decisions. Federal courts consider the choice of foreign currency conversion rules to be substantive and not procedural. Consistent with *Erie* doctrine, federal courts apply state law governing conversion rules in diversity suits and federal law when sitting in non-diversity cases.

Federal courts, however, have treated the issues of currency choice and conversion rules separately. When dealing with the issue of currency choice, federal courts consistently cite earlier

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69 See Westerheim, *supra* note 1, at 1220, n.119 (citing numerous cases where state courts have followed federal precedent regarding currency-conversion issues).

70 See Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

71 See *Competex*, 783 F.2d at 334; *Vishipco Line v. Chase Manhattan Bank*, N.A., 660 F.2d 854 (2d Cir. 1981); *Dynamic Cassette Int'l Ltd. v. Mike Lopez & Assoc.*, 923 F. Supp 8 (E.D.N.Y. 1996). The *Vishipco* court repeated the syllogism that since “there is no Federal Rule of [Civil] Procedure on the subject” the rule “is substantive rather than procedural” followed the dictate of *Erie* by applying New York’s breach-day rule instead of the federal common law rule of judgment day conversion. *Vishipco*, 660 F.2d at 865-66.


73 Typically, courts have made a cursory conclusion that a decision must be issued in dollars, ruling on its substantive or procedural characterization, and then proceeds to consider the currency conversion rule and state law implications. See cases cited *supra* note 42 and accompanying text.
federal precedent in support of the home-currency rule, without considering the substantive/procedural characterization of this choice or referring to state law.\textsuperscript{74} Until the recent adoption of the UFMCA and the decision by the Massachusetts Supreme Court in *Manches & Co. v. Gilby*\textsuperscript{75} awarding judgment in pounds, no potential for conflict existed, making the issue of which law controlled moot.

Now the unsettled issue is of key significance in determining the efficacy of the home-currency rule. Three different interpretations are possible. First, if currency choice is considered, like conversion rules, to be substantive, state law would govern and foreign currency awards would be permissible in all the states adopting the UFMCA and any state which chose by statute or judicial decision to allow foreign money awards. Second, if currency choice is deemed procedural, as done by the House of Lords in *Miliangos*, federal law would govern in federal diversity, as well as non-diversity, suits.\textsuperscript{76} This would allow foreign money awards in federal circuits that permit them, but prevent plaintiffs from receiving foreign money awards in circuits following the traditional home-currency rule. A third possibility exists: that federal courts will find currency choice substantive, but consider it to have international significance warranting the development of controlling federal common law.\textsuperscript{77} If currency choice falls into this exception, as some commentators have suggested, the federal common law regarding the home-currency rule may serve as an obstacle to foreign currency awards, even if authorized by state statute.

4.2. Conflict Between State and Federal Law

The express purpose of the UFMCA, adopted by twenty states, runs counter to the home-currency rule. The preface to the UFMCA states as its purpose to "facilitate[] uniform judicial de-

\textsuperscript{74} See cases cited supra note 42.

\textsuperscript{75} 646 N.E.2d 86, 88 (Mass. 1995) (applying the payment day rule as a matter of common law and awarding judgment in pounds).

\textsuperscript{76} See Brand, supra note 5, at 172.

\textsuperscript{77} See id. at 174-76 (arguing that the development of federal common law in currency rules is necessary to achieve international comity and encourage free trade and that any federal common law should provide for foreign money awards); Westerheim, supra note 1, at 1217-19 (discussing how the international importance and treaty implications of currency rules make federal common law appropriate).
termination 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 U.S. dollars. The mandate that awards be paid in the currency of obligation may be avoided in only two situations. First, if the currency of obligation is disputed the UFMCA provides criteria to determine the currency for payment, giving no preference to awards in dollars. Second, at the debtor’s option payment may be made in dollars at a payment-day conversion rate. The UFMCA provides no other means by which a forum court could insist on issuing an award in dollars.

An obvious conflict exists between the law of the twenty-one U.S. jurisdictions (including Massachusetts) which have accepted UFMCA principles and the federal home-currency rule. However, this issue has yet to be confronted, let alone resolved, by the courts, leaving the status of the UFMCA in doubt. No reliable indications exist as to how a conflict between the UFMCA and the federal home-currency rule will be resolved.

4.3. Potential Conflict Between Federal and New York State Law

One explanation for federal court failure to confront the UFMCA is the fact that the most frequent forum state for international litigation, New York, does not recognize the

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78 UFMCA prefatory note, at 61 (Supp. 1997).
79 See id.
80 See id. § 4.
81 See id. § 7(b). This choice has no effect upon the economic substance of the claim, since upon receipt, the creditor could also convert the award into the other currency of his choice, with no potential for gain or loss. See Competex, 783 F.2d at 338-39.
82 See Manches, 646 N.E.2d at 87, 88 (finding no rule of law which bars an award of damages expressed in foreign currency, the court looked to the UFMCA and Amoco Cadiz as persuasive authority and granted an award in English pounds, to be paid in pounds or dollars converted at the payment day rate); see also statutes cited supra note 4.
83 See Freeman, supra note 1, at 748 n.74 (citing the City Bar Association Memorandum in Support of S. 5625-A and A. 7563-A (July 20, 1987)). The New York amendment to § 27 was apparently motivated in part by a desire to maintain New York’s leadership as a forum for international litigation. See id. at 748.
New York law, however, also presents potential conflicts with a federal home-currency rule.

Until 1988, New York Judiciary Law required that judgments be computed in dollars and New York courts consistently applied a breach-day rule. Likewise, federal courts within New York applied the New York breach-day rule. The 1988 amendment to the judiciary laws added a section that sets forth a mandatory rule whereby:

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.

The added passage, like the UFMCA, requires that a foreign money claim be entered in the currency of the underlying obligation. However, the New York law mandates conversion of any foreign amount into U.S. dollars. Presumably, the resulting judgment must be paid in U.S. dollars, and could not be satisfied by the payment of the foreign money judgment in the foreign currency.

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84 See UFMCA, Table of Jurisdictions, at 60.
86 See Middle E. Banking Co. v. State St. Bank Int'l, 821 F.2d 897 (2d Cir. 1987); Competex, 783 F.2d at 334; Vishipco, 660 F.2d at 854. Curiously, one federal court continued to apply the breach-day rule after the Judiciary Law was amended and the Second Circuit indicated that the judgment day rule should be followed. See Elevator Motors Corp. v. Leistritz Aktiengesellschaft, 1990 WL 127596 (E.D.N.Y. Aug. 21, 1996).
87 N.Y. JUD. LAW § 27(b) (McKinney 1996).
88 See Freeman, supra note 1, at 750. Freeman provides the following illustration:

[A] court may initially provide for the rendering of a judgment in French francs, but the court must then convert those French francs
If the New York rule does not actually call for enforcement of a foreign judgment, but only specifies a judgment-day conversion rule, then no conflict exists with a federal home-currency rule. Federal courts need only apply the conversion rule of the New York forum, as they have done in the past. In fact, this change brings New York law in closer conformity with federal court rulings, which have recently expressed a preference for the judgment-day conversion rule.\textsuperscript{89}

Post-1987 federal court decisions indicated inconsistent interpretations of the New York statute. The bulk of cases have read the change as creating no conflict with the home-currency rule and merely requiring application of a judgment-day conversion rule.\textsuperscript{90} One case, \textit{Elevator Motors Corp. v. Leistritz Aktiengesellschaft},\textsuperscript{91} failed to reach this interpretation and continued to apply the old breach-day rule after both the 1988 amendment and a New York Superior Court decision in \textit{Teca-Print, A.G. v. Amacoil Mach., Inc.},\textsuperscript{92} calling for use of the judgment-day rule.

The proposition that the change in New York law authorizes foreign money judgments without requiring payment in dollars is

\begin{itemize}
  \item into U.S. dollars; the prevailing litigant does not necessarily receive by judicial decree his recovery in French francs . . . . Apparently such a judgment must ultimately still be converted back into U.S. dollars.
\end{itemize}

\textit{Id.}

The most compelling argument for this interpretation results from the effect of a contrary interpretation. If the New York statute were read to provide the debtor a choice of settling the obligation in either the foreign currency or dollar amount of the award (determined using the judgment-day rate), the debtor would be able to settle the claim by paying the sum which is worth less on the payment day. To illustrate, suppose:

\begin{align*}
\text{Original Obligation: } £100 \\
\text{Judgment in U.S. at exchange rate of } £1 = $1: $100 \\
\text{Value of } £100 \text{ on payment date at exchange rate of } £1 = $.75: $75
\end{align*}

Obviously, the debtor would tender the £100.

\textsuperscript{89} \textit{See Agfa-Gevaert, A.G. v. A.B. Dick Co.}, 879 F.2d 1518, 1524 (7th Cir. 1989); \textit{In re Good Hope Chem. Corp.}, 747 F.2d 806 (7th Cir. 1985).

\textsuperscript{90} \textit{See Dynamic Cassette}, 923 F. Supp. at 12; Sainz Gonzalez v. Banco De Santander-Puerto Rico, 932 F.2d 999, 1003 (1st Cir. 1991) (requiring compensatory damages calculated in pesetas to be converted to dollars according to New York's judgment-day rule); \textit{Agfa-Gevaert}, 876 F.2d at 1524 (requiring damages to be converted using New York's judgment-day conversion rule).

\textsuperscript{91} 1990 WL 127596 (deciding case while apparently unaware of the change in the law). The district court has reevaluated New York law and now applies the judgment-day rule. \textit{See Dynamic Cassette}, 923 F. Supp. at 12.

\textsuperscript{92} \textit{See Teca-Print}, 525 N.Y.S.2d at 540.
not without support. Legislative history indicates that the availability of foreign money awards in foreign jurisdictions concerned proponents of the law who desired to keep New York competitive. Additionally, the District Court for the Southern District of New York has cited section 26 of the New York Judiciary Law as apparent support for awarding a judgment in foreign currency. Though it is conceivable that courts could stretch the New York law to authorize non-dollar judgments, federal courts have not recognized this potential conflict.

5. RECENT CASE LAW

After the repeal of the Coinage Act in 1982, federal courts continued to gloss over the issue of foreign currency judgments. Courts took nearly a decade to recognize the demise of the English common law predecessor to the American home-currency rule. The revolutionary House of Lords decision in Miliangos v. George Frank Ltd. rejected hundreds of years of precedent behind the home-currency doctrine, finding it inapplicable to modern commercial reality.

5.1. The Impact of Miliangos

In Miliangos, the House of Lords overruled centuries of English common law requiring all judicial awards be denominated in pounds sterling. The case involved a contract dispute over a transaction that was handled in Swiss francs. At the time, English precedent dictated that all judgments be entered in sterling pounds to be converted using a breach-day conversion rule which

93 See Freeman, supra note 1, at 746-49 (discussing the history surrounding the § 26 amendment, specifically the motivation to amend the conversion rule in order to remain competitive with forums offering foreign currency and payment-day remedies).
94 See Mitsui & Co. v. Oceantrawl Corp., 906 F. Supp. 202, 204 (S.D.N.Y. 1995). Not claiming to be applying New York law, Judge Cedarbaum quoted only the following language: "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." Id. The portion of the statute requiring conversion to dollars was omitted. See id.
95 See Competex S.A. v. LaBow, 783 F.2d 333, 337 (2d Cir. 1986).
97 See id.
set the exchange rate at the date money originally became due. Because of the devaluation of the sterling pound in relation to the Swiss franc that occurred between the time of breach and recovery, the plaintiff faced potential loss of £28,000.

This potential for unfairness created by fluctuations in the modern currency market was the primary reason cited by Lord Wilberforce for adopting a rule allowing for foreign currency awards. The House of Lords was strongly motivated by a desire to formulate a rule which would not disadvantage plaintiffs in times of decline in the value of the pound. The home-currency rule combined with a breach-day conversion rate had historically served plaintiffs well when the pound enjoyed ascendency among world currencies. However, the decline in status of the pound relative to world currencies was deemed to require revision of the traditional rule.

To address this problem, the House of Lords chose a foreign-currency rule. The rule applied in the case allowed the defendant the choice of paying the amount of the award, as expressed in foreign currency, or paying the equivalent sum as determined on the date of payment. Effectively, this granted the debtor the choice between the economic equivalents of a foreign currency award and payment-day conversion rule. This method decreased the potential for gamesmanship presented by the breach rule, since any fluctuation in exchange rates would be reflected in the domes-

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99 See Becker, supra note 1, at 155 (“[B]etween the date in 1971 when payment was due and the date of the hearing, sterling had fallen in value as against the Swiss franc from 9.90 to 6.00 to the pound. If Miliangos could recover judgment in Swiss francs he would recover, in sterling terms, some £60,000, whereas the sterling equivalent at the 1971 rate would yield only £42,000.”).

100 In his speech to the House of Lords, Lord Wilberforce discussed the instability of the currency market caused by floating currencies and the negative impact this might have on injured parties, asserting that change was “urgent in the interest of justice.” Miliangos 1976 Law Reports at 463. In his opinion, the payment day approach taken by the court was “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.

101 Id.

102 See Brand, supra note 5, at 153.

103 See Competex, 783 F.2d at 338.
tic currency award. The majority decisions in the House of Lords did not address the potential that the new rule might work against an injured party in times of a strong pound. Their primary concern apparently was to formulate a rule which best served the economic realities of the day.

A straight payment-day conversion rule could implement the Miliangos principle without requiring an actual judgment in foreign currency. This could be achieved by expressing an award in a dollar amount to be determined on the date of payment in the future; the dollar amount would be equivalent to the foreign money award using the prevailing rate of exchange on the day of payment. A system like this might very well circumvent the home-currency rule, though some procedural barriers do exist.

The Miliangos decision generated a considerable response in the United States. At least one federal court and one state court

104 See Agfa-Gevaert, A.G. v. A.B. Dick Co., 879 F.2d 1518 (7th Cir. 1989) (noting the wide availability of hedging to offset the injured parties exposure to risk from currency fluctuation and suggesting that a breach-day rule is not desirable); Competex, 783 F.2d at 338-39 (discussing neutrality of payment-day and judgment-day rules); supra Section 3.2.

Courts in the United States have not addressed the fact that a payment-day rule only benefits a plaintiff in times of weak domestic currency. Using the Miliangos example, assuming that sterling has risen in value from 9.00 to 12.00 francs per pound, the plaintiff would be entitled to the equivalent of £28,000 less under the payment day approach then under the old breach-day rule. Miliangos, 1976 Law Reports at 443.

Some commentators have argued that the shift in approach by the British court was directly motivated by the declining value of the sterling in relationship to other currencies. See Lion, supra note 1, at 887-88 & n.87. Lord Denning is quoted as follows:

Why have we in England insisted on a judgment in sterling and nothing else? It is, I think, because of our faith in sterling. It was a stable currency which had no equal. Things are different now. Sterling floats in the wind . . . . This change compels us to think again about our rules.

Id.; see also Brand, supra note 5, at 153. See generally, Dach, supra note 5 (arguing that currency rules are not fixed but flexible and responsive to economic pressures).

105 See Becker, supra note 1, at 156 (quoting Lord Wilberforce who explains "[t]he situation as regards currency stability has substantially changed even since 1961 . . . . [and] the search for a formula to deal with it becomes urgent in the interest of justice").

106 See Competex, 783 F.2d at 338. The court in Competex refers to procedural obstacles to both foreign-currency judgments and a payment-day rule presented by Forms 31 and 32, Appendix of Forms to Fed. R. Civ. P., which call for entry of the specific dollar amount of judgment. See id.
have embraced the approach set forth in *Miliangos* of allowing the debtor the choice of foreign currency payment or domestic currency payment at the payment-day conversion rate. All twenty states adopting the UFMCA, likewise, have put into effect legislation modeled on the seminal English case. An additional state, Massachusetts, applies the principles of *Miliangos* via judicially formulated law.

Additionally, the core of the *Miliangos* doctrine appears in the Restatement (Third) of Foreign Relations, which provides that U.S. courts “are not precluded from giving judgment” in nondollar form, and that “[a] judgment denominated in a foreign currency may be satisfied either in that currency or by payment of an equivalent amount in dollars measured by the rate of exchange in effect on the date of payment.” The *Miliangos* decision has provoked reexamination of the traditional home-currency rule, despite the fact that the holding has no binding implication on U.S. law.

Though delayed by decades, the impact of *Miliangos* in the United States is now evident. The once stalwart home-currency rule shows signs of weakness from nearly every direction: federal courts, state courts, state legislatures, and persuasive authorities. Federal courts have shown mounting dissatisfaction, and in some cases, disregard for the conventions of past courts, putting the United States in a position quite similar to the British judiciary right before *Miliangos*.

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107 *See In re Oil Spill by the Amoco Cadiz, 954 F.2d 1279, 1327 & 1337 (7th Cir. 1992)* (awarding an amount in French francs and recognizing the ease with which an award denominated in foreign currency may be converted to an equivalent dollar amount on the day of payment); *Manches & Co. v. Gilbey, 646 N.E.2d 86 (Mass. 1995)* (following the UFMCA which essentially embodies the *Miliangos* rule).

108 *See UFMCA, prefatory note at 61 (Supp. 1997)* (explaining the purpose of the rule to advance a payment-day approach and citing *Miliangos* as the leading example of the rule).

109 *RESTATMENT (THIRD) FOREIGN RELATIONS § 823(1) & cmt. b (1987).*

110 *See UFMCA, Table of Jurisdictions, at 60; RESTATMENT (THIRD) FOREIGN RELATIONS § 823 (1987); Amoco Cadiz, 954 F.2d at 1279; Manches, 646 N.E.2d at 88-89 (rejecting home-currency rule and awarding judgment in pounds); Mitsui & Co. v. Oceantrawl Corp., 906 F. Supp. 202 (S.D.N.Y. 1995).*

111 *See Competex, 783 F.2d at 336-37.*

112 *See Amoco Cadiz, 954 F.2d at 1279; Mitsui, 906 F. Supp. at 202.*
5.2. A Call for Reexamination: Competex v. LaBow

As in Miliangos, one of the primary concerns of courts in the United States has been the potential unfairness of the breach-day rule. In Competex v. LaBow, the Second Circuit undertook a broad examination of the breach-day rule, concluding that the rule goes beyond the intended purpose of making the plaintiff whole and promotes gamesmanship by the creditor who is effectively given the option to choose the exchange rate most beneficial to him.\(^{113}\) The court went on to express its preference for "a conversion rule of general application that is neutral between the parties with respect to currency fluctuation."\(^{114}\) According to the analysis of the court, either a foreign currency rule or payment-day conversion rule can best achieve neutrality, but a judgment-day rule also is acceptable.\(^{115}\)

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\(^{113}\) See Competex, 738 F.2d at 338-39. To illustrate, the following example is provided using the same figures provided by the court:

Plaintiff brings suit in an English court and receives judgment for £1. On the date of the English judgment, the prevailing exchange rate was £1 = $1. Two scenarios are examined: (a) on the date of action in a United States court the pound has depreciated and the rate is £1 = $0.60 and (b) on that date of action in the United States the pound has appreciated in value and the exchange rate £1 = $1.30.

Under the breach day rule the plaintiff would be entitled to collect in a U.S. court the amount of dollars equivalent to the judgment as converted using the rate in effect at the time of the English judgment, thus, receiving $1.00.

In situation (a) where the pound has depreciated, the plaintiff would seek to collect on the U.S. award of $1.00, instead of the English award worth only $0.60. However, if the pound has appreciated, the plaintiff will disregard the U.S. award worth $1.00, and collect in England on the original judgment, now worth $1.30. See id. at 338-39

The obvious result is that the plaintiff will collect on the highest judgment with the highest value at the time of collection. This opportunity for gamesmanship presumes that the defendant has property in both countries. If the defendant only has property in one country, the breach-day rule is neutral, since the choice of where to collect is eliminated. See id. at 336 & n.4.

\(^{114}\) Id. at 337. This echoes the principle expressed by Justice Holmes, in Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517 (1926), that an award should not be enlarged simply because it is enforced in a United States court.

\(^{115}\) See Competex, 783 F.2d at 337-39. The court argues that the judgment-day rule is neutral because the plaintiff is exposed to the same risk and has the same potential for benefit as if he had collected on the original award. The court's example follows:

If plaintiff holds an English judgment for £1 and the value of £1 depreciates from $1.00 to $.60 as of the date of the American judgment, the American court enters judgment for $0.60, and plaintiff loses $.40. But that is merely the consequence of holding an obligation in pounds.
In Competex, the court expressed its disfavor with the Restatement's proposals. The court apparently approved of the Restatement's provisions allowing foreign judgments in U.S. courts and the use of a payment-day conversion rule. The area of contention surrounded comment (c) of the Restatement, which requires courts to choose the currency conversion rate most favorable to the plaintiff:

[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 injury or breach, judgment should be given at the rate of exchange applicable on the date of judgment or the date of payment.]

Believing this rule to be a "more extreme rule of creditor's preference," the court felt it allowed the creditor to speculate without facing risk. The ideal of neutrality in conversion rules promoted by the Competex court is not reflected in Miliangos or its progeny. The primary objective in British courts, as well as most U.S. courts, has been the fair compensation of the plaintiff. Though some have interpreted the Miliangos rule to require mandatory application of the foreign currency rule for foreign obligations, even if

Had plaintiff executed his English judgment, he would have lost the equivalent of $.40 as a result of the pound's appreciation. Conversely, if the value of £1 appreciates from $1 to $1.30, the American court enters judgment for $1.30, and plaintiff makes $.30, the equivalent of what he would have made had he executed on the English judgment.

Id. at 338-39.

116 See id. at 336.
117 See id. at 337-38.
118 See RESTATEMENT (THIRD) FOREIGN RELATIONS § 823, cmt. c (1987).
119 See Competex, 783 F.2d at 336.
120 See RESTATEMENT (THIRD) FOREIGN RELATIONS § 823, cmt. c (asserting that the traditional objective of putting the plaintiff in the same position as if the injury had not occurred applies equally to currency selection issue); Miliangos, 1976 Law Reports at 465 ("[J]ustice demands that the creditor should not suffer from fluctuations in the value of sterling.").
detrimental, indications are that British courts will approach currency choice with a pro-plaintiff bias. Apparently, British courts exercise deference to the plaintiff when determining the proper currency for judgment and do not automatically accept that a foreign currency is appropriate if it would disadvantage the plaintiff.

As in Britain, neutrality in conversion rules has not been the foremost objective of U.S. courts. Though the Competex court calls for neutral rules in selecting currency and conversion rates, it is unclear how other courts would handle the situation where the plaintiff faces injury because of depreciation in the foreign currency exchange rates.

5.3. Foreign Currency Awards in the United States

There have been three decisions awarding amounts in foreign currency since the repeal of the Coinage Act in 1982. These instances represent the exceptions, rather than the rule. Each case has involved unique circumstances and has not evolved into a generally accepted rule.

5.3.1. The Amoco Cadiz

The Seventh Circuit's decision In re Amoco Cadiz represented the first instance of a U.S. federal court squarely refuting the assumption that courts cannot enter judgments in a foreign currency. The case involved the 1978 wreck of an oil tanker off the coast of Brittany. The liability issue was consolidated at the

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121 See Brand, supra note 5, at 180 n.220 (citing to courts and commentators that express the opinion that fairness requires application of the Miliangos foreign currency rule in all cases).
122 See Amoco Cadiz, 954 F.2d at 1328 ("[T]he dominant principle of currency selection in British law is adequate compensation of the victim . . . .").
123 See id. at 1328 (expressing dissatisfaction with the British approach of looking backwards from the perspective of compensating the creditor to choose a judgment currency in cases involving multiple currencies). But see Brand, supra note 5, at 180 n.220 (discussing various interpretations of the British foreign currency rule).
124 See Amoco Cadiz, 954 F.2d at 1279; Mitsui, 906 F.Supp. at 202; Manches, 646 N.E.2d at 86; cf. Fils Et Cables D'Acier De Lens v. Midland Metals Corp., 584 F. Supp. 240 (S.D.N.Y. 1984) (granting an award in French francs to be converted to dollars at the rate effective on the date of judgment).
125 See Amoco Cadiz, 954 F.2d at 1328 (finding "no bar to judgment in the appropriate currency" and affirming an award in French francs).
126 See id. at 1285.
district court level and resulted in a judgment awarding one plain-
tiff, Petroleum Insurance Limited, 21,215,054.68 pounds sterling
and a second group of French claimants almost 600 million
French francs. On appeal, the Seventh Circuit affirmed the
award of francs, but required the sum in sterling to be converted
into dollars. The court recognized the ground breaking signifi-
cance of its decision and asserted that, "there is now no bar to
judgment in the appropriate currency." Besides citing the re-
peal of the Coinage Act of 1792, the Restatement (Third) of For-
egn Relations, and the UFMCA, the court also relied heavily
upon post-Miliangos English cases to support its decision to affirm
the foreign currency award.

The court set forth a mechanical rule for choosing the proper
currency for judgment. The court declared that in all cases,
without exception, the currency of judgment should be that se-
lected by the parties for their own dealings: "When all the transac-
tions occur in dollars, the award should be in dollars. Always.
When they occur in some other currency, the award should be in
that currency. Always." The court recognized that this basic
rule could not apply to relationships enveloping multiple curren-
cies, but did not articulate criteria for choosing one currency over
another.

The Seventh Circuit's rationale for announcing a rigid cur-
rency of transaction rule was apparently the desire for neutrality
and predictability in the currency selection process. The court
expressed disapproval of the flexible British practice in foreign
currency cases of determining what is the appropriate currency of
judgment by looking backwards at what best compensates the in-

127 See id. at 1290.
128 See id. at 1330.
129 Id. at 1328.
130 See id. ("[T]he English rule should be used in the United States too . . .
because it is the right rule for commerce."). The court cited numerous English
cases and discussed the British case Attorney General of Ghana v. Texaco Over-
seas Tankships Ltd., No. 1988/2606 (Q.B. July 30, 1991) in greater detail than
any United States case pertaining to the issue. See id. at 1328.
131 See Amoco Cadiz, 954 F.2d at 1329-30 (characterizing the proposed rule
as inflexible and mechanical).
132 Id. at 1329.
133 See id.
jured party. The court selectively referred to the Restatement (Third) of Foreign Relations provisions on foreign currency awards. The court approved of Section 823(1) that allows for foreign currency judgments and the reporters' note 3, calling for the expression of damages in the "currency in which the price is expressed." However, the court omitted reference to significant portions of the Restatement expressing a pro-plaintiff motivation.

Instead, the court emphasized the objective of respecting both parties' choice of currency for the transaction, presuming that by choosing to deal in a particular currency, the parties assumed the risk of fluctuation in that currency. The court was particularly critical of flexibility in currency choice or conversion rules, believing that they cause unnecessary risk for the litigating parties. According to the court, its simple 'currency-of-transaction = currency-of-judgment' rule allows "the parties to handle the risks themselves."

The court also recognized the role of hedging—when parties exposed to risk in a certain currency obtain offsetting positions in another currency in order to insulate themselves against downturns in exchange rates—in the context of foreign claim cases.

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134 See id. at 1329-30 (analyzing British case law and determining that it allowed for flexibility in setting the currency of judgment in order to benefit the plaintiff).

135 Id. at 1329 (quoting RESTATEMENT (THIRD) FOREIGN RELATIONS § 823(1) reporter's note 3). Applied to the facts of the case, the Restatement's currency rule would probably result in the same choice as made by the court, awarding damages in dollars, not pounds. This would follow because crude oil is a commodity price expressed in dollars throughout the world. See Amoco Cadiz, 954 F.2d at 1329.

136 RESTATEMENT (THIRD) FOREIGN RELATIONS § 823, cmt. c, quoted supra note 118.

137 See Amoco Cadiz, 954 F.2d at 1328 ("Parties that conduct their dealings in francs, rubles, pesos, yuan, bolivars, or australs either accept the risk of changes in the value of that currency or have made provisions to hedge against that risk.").

138 See Amoco Cadiz, 954 F.2d at 1329 (expressing the view that "[t]he highest objective is predictability"). The court saw this predictability as closely tied to respecting the parties' assumption of risk by dealing in a particular currency, suggesting that uncertainty in currency or conversion rules is a greater risk than fluctuation in exchange rates. See id.

139 Id.

140 See id. at 1330. The court used the following example to explain how hedging could work:
The court apparently approved of hedging strategies, finding it better that parties take measures themselves to alleviate risk, than for the court to step in with its own opinion. Though not explained in detail, the court was probably correct to assume that hedging is readily available and frequently used by parties involved in transactions using certain currencies to offset their risk exposure. Consideration of hedging within currency markets may provide a true picture of the actual economic consequences of currency choice on some parties, but a currency choice rule which presumes that hedging occurs may not fully compensate an injured party who has not or could not engage in these activities.

By considering the possible outside economic motivations and practices of the parties, the court in *Amoco Cadiz* departs from the traditional focus of U.S. courts on conversion rate choices:

As soon as the court announces the award, the parties may eliminate exchange risk by using the currency futures markets. For example, if PIL [one of the claimants in *Amoco Cadiz*] wants to hedge against the risk that the pound will fall against the dollar, it can buy a dollar futures contract, promising to pay in sterling. When Amoco satisfies the judgment with sterling, PIL can close its futures position and receive the dollar value of the award.

*Id.* at 1327.

141 See *id.* at 1328. The court presumed that "[f]lights over conversion dates are inevitable whenever judges enter dollar awards to redress injuries denominated in other currencies." *Id.* So to alleviate the risk of uncertain conversion rates, a mechanical foreign payment rule should be applied. With the result that "[a]ll problems about conversion dates vanish, and the parties' hedging strategies (or lack thereof) proceed unimpeded." *Id.*

142 See *Agfa-Gevaert*, 879 F.2d at 1518 (discussing the wide availability of currency futures and their potential to negate loss due to currency fluctuations); *Freeman*, *supra* note 1, at 737 (noting that international transactions and litigation can be designed to suit a foreign currency/payment-day rule).

143 See *Brand*, *supra* note 5, at 178 (concluding that a judgment-day rule or a payment-day rule creates unfairness for the plaintiff when the home currency is the stronger of the currencies involved).

As an illustration, suppose that in a breach of contract claim a plaintiff becomes due £100 and brings suit in the U.S. If the rate of exchange on the day of breach (and for simplicity) on the day of judgment is entered in the U.S. is £1 = $1, the plaintiff is entitled to $100 using the breach day or judgment day rules. However, if a payment-day or foreign currency rule is used, and the pound has dropped in value so that on the day of payment £1 = $.75, the plaintiff recovers £100, worth only $75, or the claim computed at that exchange rate, also, $75. This is likely to work particularly unfair results in tort cases or when the injured party is not economically sophisticated and has not engaged in hedging.
fair compensation of the plaintiff. The two dominant rules — breach-day conversion and judgment-day conversion — though having different results, were designed to serve the same essential goal: fair compensation for the plaintiff. The approach can best be summarized by the principle expressed in the Restatement (Third) of Foreign Relations: "[I]n general ... courts have endeavored to select the rule that, in a given case, will prevent the loss due to fluctuation of exchange rates from being borne by the injured or non-breaching party." The mechanical rule of the Amoco court departs from the traditional objective of U.S. courts by favoring predictability and respecting the parties' prior business choices.

A limited degree of support for the Amoco Cadiz court's contention, that parties to a transaction assume the risk of fluctuating currency, can be found in Justice Holmes' opinion in Deutsche Bank. The Amoco Cadiz court does not cite to his opinion, but implicitly draws upon it. In Deutsche Bank, Justice Holmes' argument was that a foreign obligation should not be enlarged (or, presumably, decreased) simply because it is brought in the United

144 See RESTATEMENT (THIRD) FOREIGN RELATIONS § 823 cmt. c reporter's note 4 (1987).
145 See In re Good Hope Chem. Corp., 747 F.2d 806 (2d Cir. 1985) (applying a breach-day rule as required by New York law, but expressing a preference for the judgment day rule because it awarded greater compensation to the plaintiff. The date actually chosen as the breach-day was manipulated to be as close as possible to the judgment date.); Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 866 n.7 (2d Cir. 1981) (explaining that the purpose of the breach-day rule is to protect the plaintiff from currency fluctuations); Teca-Print A.G. v. Amacoil Mach., Inc., 525 N.Y.S.2d 535, 540, 138 Misc. 2d 777, (N.Y. Sup. Ct. 1988) (changing the New York court's position from breach-day to judgment-day because it produces more fair and equitable results for the injured party.); Librairie Hachette v. Paris Book Ctr., 309 N.Y.S.2d 701, 62 Misc. 2d 873, 873 (N.Y. Sup. Ct. 1970) (noting the equitable result of application of the breach-day rule because the franc had depreciated relative to the dollar); Brand, supra note 5, at 163 n.135 & n. 137, 180 n.220 (discussing courts flexibility in applying rule to benefit the plaintiff).
146 RESTATEMENT (THIRD) FOREIGN RELATIONS § 823, reporter's note 4.
147 The court is not alone in taking the position that certainty of a specific conversion rule is as important as the rule itself. See Good Hope, 747 F.2d at 812 n.8 (noting "the parties' interest in a clearly defined rule, which affords them some degree of certainty" as justification for applying a breach-day rule the court felt did not fully compensate the plaintiff).
148 See Deutsche Bank, 272 U.S. at 519; Brand, supra note 5, at 163 n.137; Freeman, supra note 1, at 737.
The Holmes opinion should not be interpreted as implying that a party assumes the risk of devaluation of a foreign obligation indefinitely. The case referred only to the risks involved in foreign obligations prior to enforcement in a U.S. court. It would be erroneous to draw from the Deutsche Bank opinion the idea that even after a judgment is issued in the United States the creditor still faces the risk of currency devaluation until the day when the debtor decides to pay.

By granting an award in foreign currency, the Amoco Cadiz decision breaks important ground. However, the court’s attempt to go beyond issuance of foreign money awards by developing rigid rules for currency choice lacks sufficient support. Without relevant precedent from U.S. courts on which to rely, the court substituted economic speculation for a consideration of what best conforms to U.S. law and best advances justice. The result does not comport with the traditional objective of fairly compensating the injured party or insuring that the risk of currency devaluation falls on the wrong-doer.

5.3.2. Enforcement of an Arbitration Award in Yen: Mitsui

The only other federal case to award a sum in foreign currency is Mitsui & Co. v. Oceantrawl Corp. This case involved the confirmation of an international arbitration award denominated in yen. Since the award and currency were stipulated, the only issue to be resolved was whether the judgment could be enforced without conversion to dollars. The court concluded that it was not prevented from awarding a foreign money judgment. For authority to issue a non-dollar award, the court cited the repeal of the Coinage Act of 1792, as well as the Amoco Cadiz decision.

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149 See Deutsche Bank, 272 U.S. at 517. Justice Holmes endeavored to reach this result by adopting a judgment-day rule whereby a foreign obligation brought in a U.S. court is converted to equivalent U.S. dollars at the judgment-day rate, no matter the impact upon either party. See id. at 520. The purpose was to discourage forum shopping by not rewarding a creditor for bringing suit in the U.S. See id. at 519.

150 See id.


152 See id. at 204.

153 See id. at 203.
The court indicated agreement with the rule set out in *Amoco Cadiz*, expressing the view that "[e]ntry of judgment in the currency of the parties' transactions accords with principles of fairness and with the goal of making injured parties whole because it provides them with payment in the currency for which they bargained." However, the decision indicated assent with the Restatement principle that foreign currency judgments should only be issued "when requested by the judgment creditor, and only when it would best accomplish the objective of making the injured party whole and avoiding rewarding a debtor who has delayed in carrying out the obligations." Though both *Amoco Cadiz* and the Restatement allow for foreign currency awards, their approach to the choice differs substantially. The *Mitsui* court does not specify whether it agrees with the rigid rule of *Amoco Cadiz* or favors the flexible Restatement approach. Thus, the decision does not suggest which approach would govern future cases.

Curiously, the court cites section 27(b) of the New York Judiciary Law as support for issuing an award in yen, despite the fact that the law goes on to require conversion into dollars using the judgment-day conversion rate. The purpose of the reference is made additionally unclear since the court was not sitting in diversity jurisdiction, but under § 9 of the Federal Arbitration Act. Thus, the *Mitsui* court was under no compulsion to apply New York law.

5.3. Foreign Awards in State Court

The Massachusetts Supreme Court, in *Manches & Co. v. Gilbey*, also recognized the ability of U.S. courts to award foreign currency judgments. The court found that "no rule of law... bars the award of damages in Massachusetts expressed in a foreign currency." Though Massachusetts has not adopted the UFMCA, the court authorized payment in either foreign cur-

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154 Id. at 204.
155 *Restatement (Third) Foreign Relations* § 823, cmt. b, quoted in *Mitsui*, 906 F. Supp. at 204.
156 *N.Y. Jud. Law* § 26(b) (McKinney 1983).
158 *See supra* Section 4.2.
160 Id. at 88 n.3.
The court justified the foreign currency rule under the principle expressed by Justice Holmes in *Deutsche Bank*, that the plaintiff is not entitled to receive more than otherwise due simply by bringing their case in a particular forum.\(^{162}\)

6. THE FUTURE OF FOREIGN MONEY AWARDS AND THE HOME-CURRENCY RULE

The three recent cases issuing awards in foreign currency fail to establish a clear rule of law. The home-currency rule followed by U.S. courts for over a century should not be discounted because of three anomalous cases. Since its pronouncement by Justice Holmes in *Hicks v. Guinness*, the home-currency rule has been doctrine. Until there is a concerted force against it among the federal circuits or a pronouncement by the Supreme Court, the home-currency rule will remain the guiding doctrine. Yet, the weight of criticism and recent cases ruling to the contrary indicate that a *Miliangos*-like revolution may be imminent.

Like the pound, the dollar’s status in comparison to foreign currencies, is not the same as it was when traditional currency-conversion rules were formulated.\(^{163}\) The changes in currency markets and transactions have made it necessary to reexamine basic presumptions about the home-currency rule to determine what is the best approach for the future.

6.1. The “Equitable-Lift” Solution

In order to avoid the unfairness of the breach day rule when the forum currency declines relative to the currency of the obligation, one court has awarded a separate sum to compensate for damages equal to the decline in value between the breach-day and the judgment-day.\(^{164}\) This method insures adequate compensation for the plaintiff regardless of the rule applied.

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161 See id. at 87-89.
162 See id. at 88-89.
164 See B.V. Bureau Wijsmuller v. United States, 633 F.2d 202 (2d Cir. 1980) (awarding the plaintiff an amount increased to reflect the decline in the value of the dollar compared to the guilder).
One commentator, Professor Brand, has proposed a similar approach be coupled with a mandatory foreign currency rule.\(^{165}\) Thus, all awards would be made in the currency of the obligation, provided that if awarding a foreign currency sum results in loss to the plaintiff due to currency fluctuation between the time of judgment and payment, the court separately compensates the injured party for these damages. This would allow the plaintiff to benefit from the increases in the payment-day exchange rate without risking loss from delay of payment. However, it provides little certainty to the parties who cannot easily determine their exposure to risk.

Two significant problems arise from the equitable uplift approach. First, the concept of "nominalism"—that a plaintiff in a civil suit may recover an additional award for interest and not any other sum—appears to prevent such an award.\(^{166}\) If the doctrine of nominalism is applied to currency fluctuation damages, it would prevent an adjustment to the award for currency-exchange losses.\(^{167}\) The principle of nominalism, though applied in other areas, might be overlooked in the foreign currency context.\(^{168}\) Awarding an equitable uplift may have collateral implications by opening the door to other forms of damages since it would erode the principle of nominalism.

The second problem involves the lack of certainty these rules provide to parties. Since the award amount is contingent upon what rate favors the plaintiff, when structuring a transaction, parties are prevented from appropriately gauging the actual risks in-

\(^{165}\) See Brand, supra note 5, at 184. He proposes an alternative to the Restatement which requires all judgments be rendered in the most appropriate currency factoring in: the currency of the claim, the currency in which the loss was felt, and the currency used by the plaintiff to pay for the loss. To compensate for any harm that this might cause by devaluation, Brand provides this additional rule: "If the currency in which the judgment is given... has depreciated in value as compared to another currency which is related to the cause of action, a court may, in appropriate circumstances, award damages for the loss caused by the depreciation of the judgment currency." Id.

\(^{166}\) See Brand, supra note 5, at 185-89 (noting the history of the rule, but arguing for it not to be applied in foreign currency cases); Dach, supra note 5, at 182-83 (discussing the rule and its application to foreign money claims); Note, Conversion Date of Foreign Money Obligations, 65 COLUM. L. REV. 490, 491 (1965).

\(^{167}\) See Brand, supra note 5, at 186.

\(^{168}\) See id. at 186-88 (advocating nominalism not be applied to foreign currency conversion losses); Dach, supra note 5, at 183 (questioning whether damages from currency devaluation may be issued in U.S. courts).
This results in terms, which when played out, may not reflect the parties' intentions. Professor Brand's approach alleviates the extent of uncertainty since the two potential rates are the judgment-day and payment-day rate. Since the real risk of fluctuation begins only after a judgment is entered, parties have enough information about the obligation to engage in hedging in order to offset any potential fluctuations.  

6.2. Mandatory Foreign Judgment Rule

The court in *Amoco Cadiz* asserts that the currency transaction should always be in the currency of judgment. This rule, as discussed by the court, provides the highest degree of protection against risk from fluctuation. This rigid rule, however, does not protect the injured party in all situations. As discussed previously, a mandatory foreign currency rule could result in serious injustice to a plaintiff in certain currency markets.

The *Amoco Cadiz* court relied too heavily on the "assumption-of-risk" argument. The contention that parties assume the risk of fluctuation of the currency of transaction is not supported sufficiently to serve as the basis for the mandatory rule of the court. While it is correct to assume that parties have assumed the risk of currency fluctuation in connection with normal profits and losses which result from carrying out a transaction, it does not necessarily follow that parties, simply by agreeing to payment in a particular currency, accept the risk of currency fluctuation losses in extraordinary circumstances, such as breach by the other party, litigation, or unforeseeable events. The contention that the parties have thereby assumed the risk for the duration of protracted litigation or until the debtor decides to pay is questionable. By placing the bulk of this risk on the plaintiff, the mandatory rule runs counter to traditional notions of fairness and also to the his-

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169 *See In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1329 (7th Cir. 1992).
170 *See supra* notes 102-04 and accompanying text.
171 *See Amoco Cadiz*, 954 F.2d at 1328; *supra* notes 97-98 and Section 5.1.
172 *See supra* notes 104, 141.
173 *See Westerheim, supra* note 1, at 1225 (arguing that assumption of risk for currency fluctuation does not extend indefinitely, noting that even an "established course of dealing between the parties only indicates that the plaintiff was willing to assume the risk of exchange rate fluctuation for the term of each particular contract").
torical objective of U.S. courts—fair compensation of the injured party.

The UFMCA, though ostensibly offering the creditor the choice of currency, in actuality, would work as a mandatory rule. The UFMCA’s means of resolving conflicts between parties as to the currency for judgment is a “currency-of-transaction” rule, similar to the rule applied in *Amoco Cadiz.* Any time there has been an appreciable shift in currency values, the parties would be motivated to prefer different currencies. Because of the inevitable conflict, the UFMCA’s default rule determines the currency to be used, regardless of any negative impact on the injured party.

6.3. *Equitable Approach*

The Restatement and numerous other commentators have favored a flexible approach, applying the appropriate conversion rule, which best compensates the plaintiff without granting either party a windfall, this includes the foreign currency/payment-day option. This requires analysis of the facts and figures of each case to determine the most equitable solution. The chief problem with this approach is the lack of certainty it provides parties in both structuring a transaction and conducting litigation. Unpredictable results interfere with commerce, frustrate the parties intentions and drive parties to litigate in other forums. Furthermore, it frustrates hedging activities, which serve the positive goal of protecting against currency risks.

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174 See id. at 1222-23 (noting that the apparent choice in UFMCA § 6(a), providing that “a ‘person may assert a claim in a specified foreign money,’” is “more illusory than real; ‘[i]f a foreign-money claim is not asserted, the claimant makes the claim in United States dollars’”).

175 See UFMCA § 4.

176 Restatement (Third) Foreign Relations § 823, cmt. c; Lion, supra note 1, at 899.

177 See *Amoco Cadiz,* 954 F.2d at 1329 (emphasizing the need to respect the parties’ choice of currency); *In re Good Hope Chem. Corp.,* 747 F.2d 806 (2d Cir 1985) (noting the parties interest in being able to rely upon a particular conversion rule); Brand, supra note 5, at 174 (arguing for the development of a consistent federal common law regarding foreign currency judgments in the interests of commerce and international comity).
6.4. An Empirical Approach

An empirical approach requires courts to determine what a plaintiff intended to do with the money received under the original agreement. If the plaintiff upon payment would have converted the sum into U.S. dollars, then in order to give him the value of what he bargained for, the breach day rate must be applied.\(^{178}\) However, if the plaintiff would have held this money in the foreign currency, then the payment-day rate exposes the plaintiff to no additional risk of currency devaluation than he otherwise would have received.\(^{179}\) This solution prevents the plaintiff from receiving a windfall in either case and ensures that the award amount corresponds to the actual injury suffered by the plaintiff.

As a rule, this approach may be difficult to enforce as it requires courts to speculate about the parties' intentions. However, as a first step, a default rebuttable presumption that the plaintiff would convert the money into the currency of their domicile could be utilized.\(^{180}\) Thus, a company operating primarily in one country, presumably, would convert the money into the currency of that country and face risk of devaluation in that currency, not the currency of transaction. This method more likely mirrors the true nature of the parties' assumptions concerning currency value.\(^{181}\) In comparison, companies that maintain accounts with considerable balances in the currency of the obligation could be denied the presumption of conversion to the domiciliary currency, since they demonstrate a degree of assumption of risk in that currency. By looking at the actual financial practices of the parties, this approach is better able to address the parties' true expectations than the Amoco Cadiz rule based upon generalized notions of assumption of risk.

The empirical approach provides relative certainty where the injured party has ties to only one country, but introduces considerable uncertainty in dealings between multinational enterprises. Each case would be a matter of judicial judgment with potential large stakes since the difference would be between breach-day and

\(^{178}\) See Note, supra note 163, at 497.

\(^{179}\) See Lion, supra note 1, at 899 & nn.101-06.

\(^{180}\) See Note, supra note 166, at 498.

\(^{181}\) See Westerheim, supra note 1, at 1227; Note, supra note 166, at 498 ("[S]uch an approach accords with the general expectation that nationals will bear the risk of fluctuations in their own currency.").
payment-day rates, opening the parties to a high level of risk and interfering with their ability to guard against currency fluctuation through hedging.

The virtue of the empirical method is that it comports with the guiding principle in Anglo-American contract law: that the injured party should be restored, as close as possible, to the position which would have resulted absent the injury. The major fault with this approach is equally compelling; it would impede international trade and commerce since parties would be unable to accurately gauge their exposure to risk when dealing with multinational enterprises. A solution may be offered by combining the principle behind the empirical approach, namely emphasis on the currency in which the plaintiff ultimately suffered the harm, with the certainty of a mandatory currency of obligation rule.

7. FACTORING IN THE CURRENCY OF THE HARM

Though seemingly contradictory to a currency of transaction rule, consideration of the currency in which the plaintiff experiences harm can work as one component for determining what is the appropriate currency of judgment. The UFMCA already recognizes this by providing that the currency in which the harm is felt can play a part in the determination of the appropriate currency. However, it goes on to indicate that this factor only plays a marginal role.

In some situations, it is apparent that the injured party has not assumed the risk of fluctuation in the value of the currency of transaction or obligation. Tort cases are an obvious example. An injured party may suffer damages denominated in foreign currency, without assuming the risk of that currency’s fluctuation.

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182 See Note, supra note 166, at 497.
183 See UFMCA § 4(a)(3).
184 See UFMCA § 4(a)(3), cmt. 2 (stating that “the three rules will normally apply in the order stated”).
185 Consider the simplistic example of a tourist injured on vacation in England who desires compensation for medical expenses incurred in England. The medical bill of £100 was paid out of the plaintiff’s pocket at a time when the exchange rate was £1 = $1. Thus, the plaintiff has incurred a loss of $100. Once a judgment is issued in a U.S. court for £100 and the debtor finally pays the judgment the exchange rate is £1 = $.75. The plaintiff would then receive the equivalent of only $75 dollars. It cannot be presumed that the injured party assumed the risk of currency fluctuation.
This could also occur in a breach of contract case. Suppose a contract required payment in Mexican pesos for the convenience of the party who eventually breached. The injured non-breaching party kept all accounts and assets in dollars and could only obtain remedy against the defendant in a U.S. court. In this situation, it cannot be inferred that the injured party assumed the risk of fluctuation in the currency of the contract beyond the contemplated time span of the transaction. They only assumed the risk of fluctuation during the ordinary course of the transaction. After the completion of the contract the plaintiff intended to exchange the pesos to dollars and risk currency fluctuation only in dollars. To subject the innocent party to currency fluctuation risk in pesos throughout litigation and indefinitely until the date of eventual payment denies the plaintiff what the parties actually bargained for, limited risk of fluctuation in the value of the peso. When it is clear that the currency of payment is incidental to the harm and does not truly delineate it, then it should not be applied in the interest of fair compensation.

This approach does not necessarily introduce uncertainty into commercial dealings. It need only be applied when the currency of harm is unambiguous, such as when a party has nearly exclusive dealing in one currency and would definitely have converted any payment to a particular currency. Presumably, parties, when structuring a transaction, would have knowledge of this factor and could gauge ultimate risk in terms of that currency. Though it does not facilitate hedging activities, it serves the more traditional goal of compensating the injured party without providing a windfall and placing the risk of currency fluctuation upon the wrong-doer. Where the injured party has substantial dealings, assets, or reserves in the currency of the transaction, it appears more evident that the parties have assumed the risk of fluctuation in that currency of the transaction, so that equity would not demand consideration of their domiciliary currency.

The risk of injustice to parties who have not assumed the risk of foreign currency fluctuation requires that a mandatory currency of obligation approach be rejected. In order to assure fair compensation to the plaintiff, consideration must be given to the harm actually suffered by the plaintiff. Both federal and state courts must reject mandatory home-currency or foreign-currency rules and follow an approach which carefully weighs the impact that a foreign currency judgment has upon a particular plaintiff to ensure that equity is achieved.
A mandatory home-currency or foreign-currency rule can not achieve fair results under all situations. What appears to produce equity during times of weak domestic currency may not produce fair results later when the home currency is strong. Therefore, the best approach is to look at the economic dealings of the individual parties, not the general trend of the forum's currency when making currency choice decisions.

8. CONCLUSION

The explosion of international trade over the last few decades has made the issue of foreign money claims more crucial. More trade means more contracts and inevitably more disputes. Indications are that the traditional approach of United States courts to award amounts only in dollars is not sufficient to meet the needs of commercial litigation. Currently, the federal courts take divergent positions, ranging from a continued reliance on the home-currency rule to calling for a mandatory currency-of-transaction rule. States have also taken it upon themselves to provide for foreign currency awards when an obligation is not denominated in dollars.

However, no consistent principles have evolved from the ad hoc responses of the federal courts and states, which have tackled the problem. The experiences of Great Britain since Miliangos are instructive, but should not substitute for analysis of the demands of traditional civil law principles. Legislatures and courts must be careful of confusing the efficacy of foreign currency awards with adequate compensation of the plaintiff. To accomplish this goal, the actual harm experienced by the injured party should be the starting point for currency choices.