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The Need to Retreat from Inflexible Conversion Rules - An Equitable Approach to Judgement in Foreign Currency

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I. INTRODUCTION

Finding the proper method for converting foreign money judgments into domestic currency when the relative value of the domestic currency and the foreign currency fluctuates has perplexed Anglo-American courts and legal scholars for decades.¹ In Anglo-American Law, traditional doctrine has been that courts cannot render judgment in a foreign currency.² As a result, when judgment is awarded for a contractual obligation on a debt that is expressed in terms of foreign currency, the court must convert the amount owed into an equivalent amount in domestic currency. This would be simple if it were not for the fact that foreign monies fluctuate relative to one another. At one point the dollar may equal five German marks, but two months later it may be worth only three marks. Difficulties arise regarding the applicable rule for determining conversions. For example, assume that X contracted to build a bridge for Y in France and X breaches this contract. Y sues X in the United States for payment due of one hundred francs. The court, however, can only enter judgment in American dollars. On the day of breach, one hundred


². Jamaica Nutrition Holdings v. United Shipping, 643 F.2d 376, 379 n.5 (5th Cir. 1981); Frontera Transportation Co. v. Abunza, 271 F. 199 (5th Cir. 1921); 31 U.S.C. § 371 (1976). See Morris, English Judgments in Foreign Currency: A "Procedural" Revolution, 41 Law & Contemp. Probs. 44 (1977). 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.
francs were equivalent to one hundred dollars, but by the
time judgment day arrives, three years later, one hundred
francs will buy only seventy-five dollars. The problem con-
fronting the court is that it must employ a conversion rate
prevailing upon a chosen date. If the court measures the dam-
ages as of the day of breach (breach day rule) Y would receive
one hundred dollars; if, however, the court measures the dam-
ages as of the day of judgment (judgment day rule), Y would
receive only seventy-five dollars.

In 1975, English courts allowed judgments to be entered
in the foreign currency. This procedure eliminates problems
of conversion and injustices resulting from fluctuations in the
foreign money subsequent to the date of judgment, but, as
discussed below, it is not necessarily the best solution in all
cases.

The issue of when foreign currency should be trans-
formed into money of the foreign country, whether at day of
breach or day of judgment, often comes before the courts on
the heels of a revolution or a war. With the fall of South Vi-
etnam in 1975 and the Iranian revolution of 1979, the courts
are again confronted with a number of cases involving the
problem of exchange rates. This comment explores the prin-
cipal rules and methods that have been advanced by courts
and legal scholars as possible solutions to the problems of con-
version. It illustrates that no easy mechanical formula will
provide a fair solution in all situations. Finally, this comment
analyzes foreign and domestic cases involving conversion
problems and suggests adoption of an "equitable rule" as op-
posed to restrictive procedural rules which could lead to ineq-
uitable administration of the laws.

4. See Dach, supra note 1.
5. See generally id. Drake, supra note 1; Fraenkel, supra note 1.
settled Aug. 24, 1981); Durrent v. Bank of America, No. C-78-1813 (N.D. Cal. Filed
660 F.2d 854 (2d Cir. 1981).
II. Breach Day Rule

A. General Principles

Under the breach day rule, when a plaintiff is entitled to recover a sum expressed in a foreign money, the measure of damages will be converted into dollars at the rate of exchange prevailing at the date of breach of the contract, or the date when the debt became due.\(^7\) In 1923, this procedural method of conversion,\(^8\) was adopted by the New York Court of Appeals in *Hoppe v. Russo-Asiatic Bank*\(^9\) and has been upheld in many subsequent cases.\(^10\) Like New York, the English courts also adopted and followed the breach day rule\(^11\) until it was invalidated by the House of Lords in *Miliangos v. George Frank (Textiles) Ltd.* in 1975.\(^12\)

In the cases decided in New York and in England prior to 1975, the courts tried solving the problem of valuating foreign money by relying on the theory of commodities.\(^13\) The courts have used this concept of money to justify application of the breach day rule.\(^14\) Under the commodities theory, foreign currency is equivalent to commodities.\(^15\) Therefore, the measure of damages will be converted into dollars at the rate of exchange prevailing at the date of breach of contract, or the date when the debt became due.\(^16\)

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9. 235 N.Y. 37, 138 N.E. 498 (1923). Although conversion of foreign currency at the rate of exchange prevailing at the date of breach of contract was adopted by the courts prior to *Hoppe* in Gross v. Mendel, 171 A.D. 237, 157 N.Y.S. 357 (1916), *aff'd*, 225 N.Y. 633, 121 N.E. 871 (1918), the court in that case based its decision on the doctrine of “re-exchange.” For further discussion see Frenkel, *supra* note 1, at 368-69.
money is treated like silver, copper, coin, and wheat; it fluctuates in price in relation to domestic currency. Damages for failure to deliver foreign money pursuant to a contract would be assessed in the same manner as would damages for breach of contract to deliver any of the above mentioned commodities. Therefore, damages would be calculated on the day of breach. This is meant to put a plaintiff in the same position he would have been in had the commodity been purchased on the specific date at the agreed upon purchase price.\(^6\)

The fallacy in this theory is that foreign money is not always a commodity. If someone in New York had speculated on the position of the English pound in the world market by entering into a contract payable in English money, then the commodity theory would apply; because the money, like silver or gold, is being dealt with to make a profit.\(^6\) In other words, the currency has its own intrinsic value. Where a contract is made in France, however, and payment for goods are to be made in francs, it would be incorrect to argue that the parties viewed the francs as a commodity—to them, the francs were merely a medium of exchange. Money in this context has no intrinsic value; it serves only to facilitate the purchase.\(^7\)

The courts and legal scholars eventually realized that the commodity justification for the breach day rule was not merited in many cases. With the strength of the British pound and American dollar, however, the New York and English courts were hesitant to adopt the judgment day rule, because under that rule the defaulting debtor benefited from depreciating foreign currency. This generated a search for other rationales to support the breach day rule. As a result, a number

\(\text{Hosiery Co., 222 A.D. 502, 226 N.Y.S. 582, aff'd 248 N.Y. 630, 162 N.E. 553 (1928); Gluck, The Rate of Exchange in the Law of Damages, 22 COLUM. L. REV. 217, 235 (1922).}

15. For example, B (buyer) makes a contract with S (seller) to deliver a cow to B. If the seller fails to deliver the cow on the stipulated date, B must, if he still wants a cow, go into market and buy one at the market price at the date of breach. B should be allowed to recover as damages the replacement cost of that cow at the date when the seller breached his contract. Likewise, if S fails to pay or deliver a sum of dollars or francs at the stipulated date, B must, if he still wants that currency, go into the market on the breach date and acquire the currency at the rate of exchange on that date. If B does not choose to go into the market and buy currency or as in the first hypothetical, another cow, which the seller failed to deliver, this should not alter the measure of damages.

16. Fraenkel, supra note 1, at 364.

17. See Cohn, supra note 1.
of justifications for the rule have been suggested as well as a number of criticisms.

First, an advantage of the breach day rule expressed by the courts is that in most contract cases it restores the plaintiff to the position he would have occupied had the contract not been broken. The fallacy of this argument is that the plaintiff might receive a lesser or a greater amount than he would have received had he sued in the foreign country, depending on the relative value of the currencies at the time of judgment. For example, if the franc was worth 50 cents at the date of breach and 25 cents at the date of judgment, the breach day rule would permit the plaintiff to recover twice the amount he would have recovered in France. Likewise, if the franc appreciated, plaintiff would receive a lesser judgment than he could have received in the French courts. Hence, a disadvantage of the breach day rule is that it encourages plaintiffs to forum shop in pursuit of the jurisdiction which will award the greatest amount of damages.

A second justification for the breach day rule, which closely resembles the first, is that full compensation can only be equal to the purchasing power of the foreign currency at the time the obligation fell due. This is likewise not merited. In fact, if the value of the foreign currency has depreciated and/or the value of the domestic currency has appreciated, the foreign creditor would receive more purchasing power than payment on the original date would have brought by bringing suit in the United States rather than in his own country. This flies in the face of the principle of nominalism which governs the treatment of money obligations in almost all countries today. Under this theory, the creditor should receive the equivalent in domestic currency of what he would receive in foreign currency had the suit been brought in the foreign country. Pursuant to nominalistic principles, unless the creditor bears the risk of depreciation of the foreign cur-

19. In Sirie v. Godfrey, 196 A.D. 529, 188 N.Y.S. 52 (1921) the court refused to apply the breach day rule because under the rule, the plaintiff would have received a much greater recovery than she would have received had she sued in France.
21. See infra notes 67-71 and accompanying text.
rency, the creditor could recover more than the debtor promised to pay.

A third argument advanced in favor of the breach day rule is that adoption of the judgment day rule tempts litigants to delay proceedings in the hope of profiting from the fluctuation in exchange rates. The breach day rule, however, permits the same kind of speculation because a creditor, for example, may seek to delay trial to benefit from the appreciation of a domestic currency.

Because of the many fallacies in the arguments for the breach day rule, it would appear that the New York and English courts' primary goal was to achieve an equitable result, one that would protect creditors against losses caused by depreciating currency and prevent breaching debtors from benefiting from their defaults. Hence, the procedural remedy was adopted as a means to justify the end; but at the same time, the courts appeased the legal community by establishing a procedural rule on which parties could rely.

During the period following World War I, the breach day rule appeared to provide the fairest conversion rate. During that time, when an action to recover a foreign obligation was brought in either New York or England, the foreign currency usually had depreciated in relation to the money of the forum state. By requiring the debtor to pay the amount owed before depreciation, the creditor was indemnified for losses resulting from depreciating currency, and the debtor was precluded from obtaining a windfall. The benefits of this rule,


23. For example, if defendant owed plaintiff 120 francs when three francs equalled one dollar, the creditor could delay the trial and judgment in the hopes that the domestic currency would appreciate. If there was appreciation such that, four francs equalled one dollar, the creditor would receive $40.00 under the breach day rule. This $40.00 could then be exchanged for 160 francs. Thus, plaintiff would benefit by 40 francs by successfully delaying judgment.

24. See, e.g., supra notes 10-11. In essence, if the equities favored application of the breach day rule, the courts applied it.


26. Suppose an obligation arose in France for 1000 francs which at the time equalled $1,000 on the day of breach. The French creditor sues the American debtor in New York. On the day of judgment, the francs depreciated to the equivalent of only $500. If the rate of exchange is valued at the date of breach, the creditor suffers no loss as a result of the depreciation of the franc, nor would the debtor receive un-
however, went sour when the domestic currency began to depreciate relative to the foreign currency. The inequitable effects of a single, rigid procedural rule will become more apparent after further analysis of New York and English decisions.

B. New York Cases

Prior to the adoption of the breach day rule by the Court of Appeals of New York in Hoppe v. Russo-Asiatic Bank, a lower court adopted the judgment day rule in Sirie v. Godfrey. In Sirie, a Parisian sued an American to recover the purchase price of wearing apparel sold in France. The defendant tried to pay the plaintiff the amount due in francs nearly six years after delivery of the goods. The defendant claimed that the amount was insufficient because the francs had significantly depreciated in value. The Appellate Division ruled that since the debt was due in France, it was dischargeable in francs and hence the plaintiff was not entitled to recover the value of the francs at the date of breach, but rather at the day of judgment.

Subsequent to Sirie, New York's highest court decided Hoppe. In that case, the defendant, a Russian banking corporation, received a check, the proceeds of which it agreed to pay the plaintiff at the defendant's London office. Upon demand, the defendant refused to make the payment. In a per curiam opinion, the court did not even cite to Sirie and held that:

In an action properly brought in the courts of this state by a citizen or an alien to recover damages, liquidated or unliquidated, for breach of contract or for a tort, where

just enrichment. If, on the other hand, the court applies the judgment day rule, the debtor would only pay creditor $500 instead of $1,000 and thereby would benefit from profitably speculating in the money of the foreign forum.

27. 235 N.Y. 37, 138 N.E. 497 (1923). It should be noted that some New York courts applied the breach day rule to foreign currency conversion problems prior to 1923, but support of that rule was based on the doctrine of re-exchange. See Gross v. Mendel, 171 A.D. 237, 157 N.Y.S. 357 (1916), aff'd, 225 N.Y. 633, 121 N.E. 871 (1918); Fraenkel, supra note 1, at 369.

28. 196 A.D. 529, 188 N.Y.S. 52 (1921).

29. Id. at 538-39, 188 N.Y.S. at 58. The court was concerned with unjust enrichment by the creditor and held that just by bringing an action in the United States the plaintiff acquired no right to a more favorable judgment than she could have obtained had the action been brought in France.

primarily the plaintiff is entitled to recover a sum expressed in foreign money, in determining the amount of the judgment expressed in our currency the rate of exchange prevailing at the date of breach of contract or at the date of the commission of the tort is under ordinary circumstances to be applied.\textsuperscript{31}

Just two years after Sirie was decided, and one year after Hoppe, the lower appellate court distinguished Sirie in Orlik \textit{v. Weiner Bank of Verein}.\textsuperscript{32} The plaintiff, an American citizen, brought suit to recover from an Austrian bank a deposit of 60,000 kronen he had demanded be paid in 1919. Citing Hoppe, the court held that the plaintiff was entitled to the value of kronen as of the date demand was made. The court did not apply the judgment day rule as in Sirie because in that case the plaintiff was a resident of a foreign state. Again, the reason for the court's distinction and its adoption of the breach day rule appears to be based on principles of fairness—on July 16, 1919, 60,000 kronen were equivalent to $2,190, but by the time of trial the value of 60,000 kronen had depreciated to $420.00.\textsuperscript{33} Had the court applied the judgment day rule, the defendant would have received a windfall of $1,770 at the plaintiff's expense.

The New York courts' interest in fairness led to subsequent decisions applying both the breach day rule and the judgment day rule. The courts' decisions depended on such distinctions as whether the contract was to be performed entirely within a foreign county,\textsuperscript{34} or whether the controversy was a suit for payment of an overdue loan rather than an action for damages.\textsuperscript{35} Finally, in Kantor \textit{v. Aristo Hosiery Co.},\textsuperscript{36} the New York Court of Appeals abolished these distinctions holding “that in the interest of uniformity the breach-day rule should be followed in the absence of clear proof of exceptional conditions.”\textsuperscript{37} New York courts have since applied the breach day rule to all possible transactions.\textsuperscript{38}

\begin{itemize}
  \item[31.] \textit{Id.} at 39, 138 N.E. at 498.
  \item[32.] 204 A.D. 432, 198 N.Y.S. 413 (1923).
  \item[33.] \textit{Id.} at 433, 198 N.Y.S. at 414.
  \item[34.] See Metcalf Co. v. Mayer, 213 A.D. 607, 211 N.Y.S. 53 (1925).
  \item[35.] See Matter of King, 129 Misc. 244, 221 N.Y.S. 730 (Sup. Ct. 1927).
  \item[36.] 222 A.D. 502, 226 N.Y.S. 582 (1928), \textit{aff'd}, 248 N.Y. 630, 162 N.E. 553 (1928).
  \item[37.] \textit{Id.} at 503, 226 N.Y.S. at 584.
  \item[38.] See Hughes Tool Co. v. United Artistos Corp., 279 A.D. 417, 110 N.Y.S.2d
C. English Cases:

Although the courts in a number of cases prior to World War I adopted the breach day rule, England's modern approach to this rule was expressed in *Di Ferdinando v. Simon, Smits & Co.* In that case, an Italian merchant contracted with the defendant in England to ship merchandise to Italy. The defendants breached this agreement and the plaintiff brought suit in England to recover damages. At the time of breach, damages equalled 48,000 lire or 1555 pounds, but subsequently, the lire depreciated by one-half of that value. The Court of Appeal held that the damages for breach of contract must be converted into pounds sterling at the rate of exchange prevailing on the day of breach. Had the court opted for the judgment day rule, defendant would have benefited by only having to pay plaintiff 780 pounds instead of the breach day debt of 1555 pounds.

A year later, the House of Lords upheld the breach day rule in *S.S. Celia v. S.S. Volturno.* This action arose out of a collision between an English ship and an Italian ship whereby the losses to the Italian ship, which resulted mainly from the negligence of the English crew, totaled 304,418 lire. Before final judgment, the lire depreciated relative to the English pound. The House of Lords held that the proper date for ascertaining the rate of exchange for the purposes of converting lire into English currency was the date when the damage occurred.

These two cases thus settled the English law as to the conversion date for damages in breach of contract and tort. In these and several other leading English cases in which the breach day rule was adopted, a similar fact pattern appeared in each case: (1) the debt was created in a foreign jurisdiction; (2) the breach occurred in a foreign jurisdiction; (3) suit was

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41. See [1920] 3 K.B. 409, 411.

42. [1921] 2 A.C. 544.

43. Id. at 547.

44. See supra note 22.
brought in an English court; and most significantly, (4) in each case there was a depreciation of the foreign currency between the time the obligation became due and the date of judgment. In other words, the English courts’ primary concern was that the defendant not benefit from his dereliction of duty. The courts adopted the breach day rule as a means of addressing this concern.

English law was settled in the area of unliquidated damages, but controversy remained over which conversion date to apply regarding liquidated debts. In 1961, the House of Lords in *In re United Railways of the Havana and Regla Warehouses*, settled the controversy by asserting that claims for a liquidated debt will be treated the same as claims for an unliquidated debt.

D. Application of the Breach Day Rule

After analysis of cases applying the breach day rule, it is clear that the different courts used the rule to achieve what they believed to be a more just result under the circumstances. At the time, the United States and Great Britain were two countries with relatively strong currency, and the breach day rule provided legal justification for protecting the interests of creditors from the effects of depreciating foreign currency. Now, it appears that the courts may have straightjacketed themselves into arbitrary uniformity. As a result, when sterling depreciated in terms of foreign currency, unlike in the earlier cases, the breach day rule no longer protected the creditor.

The English courts’ concern for justice, however, led to

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46. Unliquidated damages are not stipulated by the parties at the time of entering the contract, and are ascertained by the court. In contrast, liquidated damages are a stipulated calculable sum agreed upon by the parties at the time of entering into the contract.


49. *See* Dach, *supra* note 1, at 181. The fact that there are numerous conversion rules "itself suggests that none of these rules have the force of some natural law." *Id*. Further, the author concludes that changes of conversion dates within particular countries is not based on logic or legal principles but rather is a product of the courts' desire to protect creditors against loss caused by depreciating foreign currency.
the *Miliangos* decision in 1975 and the abolition of the breach day rule in England.\(^{50}\) Furthermore, in a fairly recent case before the New York Supreme Court, *Librairie Hachette, S.A. v. Paris Book Center, Inc.*,\(^{51}\) the court did not consider application of the breach day rule necessarily superior to the judgment day rule in contract disputes. By the time plaintiff in *Librairie* brought suit in New York, the foreign currency debt had depreciated. The court held that “[i]n this case, the equities favor application of the ‘breach day rule.’ If it were not applied, the defendant would be rewarded for defaulting in his obligation to pay for the merchandise.”\(^{52}\) Although, the court agreed with plaintiff that the weight of authority in New York was that the breach day rule should apply, it noted that “[t]here should be no rigid rule of thumb.”\(^{53}\)

The decisive consideration for the New York court appears to have been that the defendant would have received a windfall for his default if the judgment day rule were applied. The rule selected was a secondary consequence of the court’s primary concern for equity. It could be assumed that if the foreign currency had appreciated instead of depreciated, the judgment day rule would have governed.

The early English and New York cases thus demonstrate the need for the courts to adopt particular guidelines to promote equitable results. The *Miliangos* and *Librairie* decisions suggest that the courts are willing to move away from mechanical procedural rules in favor of an “equitable rule.”\(^{54}\)

### III. Federal Rule—Dual Approach

#### A. Breach Day and Judgment Rules

The Federal courts, unlike the New York or pre-1975 English courts, use both the breach day and the judgment day rule, depending on place of payment.\(^{55}\) When a debt is paya-

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50. See infra notes 88-97 and accompanying text.
53. 62 Misc. at 877, 309 N.Y.S.2d at 705.
54. Several countries after World War I went from a breach day to a judgment day rule while others went in a reverse direction. See Dach, supra note 1.
55. See A. Nussbaum, Money in the Law, National and International, 387 (rev. ed. 1950). The author mentions that “it is not clear whether the place of pay-
ble in foreign currency in a foreign country, or the contract is to pay foreign money in a foreign country, the proper date of conversion is the judgment date, and not the date on which the obligation arose. Conversely, when payment is to be made in the United States or the cause of action arises in the United States, the courts will apply the breach day rule.

The question of conversion was first addressed by the United States Supreme Court in Hicks v. Guinness. In that case, a German firm was indebted to an American firm in the amount of 1,079.35 marks, payable in the United States. The debt was incurred before World War I, but the value depreciated drastically after the war. Justice Holmes, who spoke for the Court, held that because the plaintiff's claim for dollars arose at the time the debt was incurred, the damages should be converted at the exchange rate prevailing at the date of breach. Just a year later, however, a slim majority in Die Deutsche Bank Filiale Nurenburg v. Humphrey held that where a debt is owed in a foreign country by a foreign debtor, it should be converted into dollars at the exchange rate prevailing on the judgment date. Justice Holmes, again speaking for the Court, held that: "[a]n obligation in terms of the 


57. See Sutherland v. Mayer, 271 U.S. 272 (1926); Hicks v. Guinness, 269 U.S. 71 (1925); Wichita Mill & Elevator Co. v. Naamlooze Industrie, 3 F.2d 931 (5th Cir. 1925).

58. 269 U.S. 71 (1925).

59. Id. at 80. This result seems equitable; the American creditor should not suffer a loss due to depreciation of foreign currency while he can demand payment in U.S. dollars. See Note, Conversion Date of Foreign Money Obligations, 65 Colum. L. Rev. 490, 495 (1965).

60. 272 U.S. 517 (1926).

61. Id. at 519-20. See also Societe des Hotels le Touquet Paris-Plage v. Cummings, (1922) 1 K.B. 451. The confusion in the area of exchange rates of foreign obligations is evidenced by the fact that although Die Deutsche Bank is cited by subsequent cases for establishing the judgment day rule, Justice Holmes claimed that the rate of exchange should be at the date of commencement of the action rather than the judgment date. See Fraenkel, supra note 1, at 383 n.83; Morris, supra note 2, at 47.
currency of a country takes the risk of currency fluctuations and whether creditor or debtor profits by the change, the law takes no account of it." 62

Justice Sutherland, in a strong dissent, observed that the judgment day rule put an undue emphasis upon the character of the thing delivered and ignored the essential element of the time when delivery was to be made. 63

Hicks and Die Deutsche Bank led to application of the conflict of laws approach when choosing a date of conversion for foreign money obligations. 64 For example, the First Restatement of Conflict of Laws provides for a rule of conversion that is based upon where the cause of action was created. 65 Under this approach, the judgment day rate would apply when foreign law governs the transaction and the breach day rate would apply when the law of the American forum governs. 66

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62. 272 U.S. at 519. See also Cole v. Cunningham, 133 U.S. 107 (1890) (holding that no plaintiff should benefit from forum shopping).

63. 272 U.S. at 522 (Sutherland, J., dissenting). Justice Sutherland stated that, in an action brought here to recover upon a failure to deliver marks in Germany, the question of time becomes material; for here a mark is not money, but a commodity; and if plaintiff is to be compensated in dollars for his loss, we must inquire, When [sic] did the loss occur? just as we must make that inquiry in order to fix in dollars the value of wheat in a suit to recover for the non-delivery of that commodity. Id. (emphasis in original).

64. See Note, Fluctuating Rates of Exchange and the Conflict of Laws, 40 Harv. L. Rev. 619 (1927).

65. Restatement of Conflict of Laws §§ 423, 424 (1934). Section 423 provides: "Damages for breach of a contract to deliver money not currency of the state where the delivery is to be made are measured in currency of the state of performance at the rate of exchange current at the time of breach." Section 424 provides: "Where judgment is rendered on a cause of action for damages created in another state, the rate of exchange adopted is that which exists at the time when the judgment is rendered."

The present Restatement does not explicitly discuss the breach day and judgment day rules, but provides:

When in a suit for the recovery of money damages the cause of action is governed by the local law of another state, the forum will convert the currency in which recovery would have been granted in the other state into local currency as of the date of the award.

Restatement (Second) of Conflict of Laws § 144 (1971).

B. Nominalism

The primary justification for the judgment day rule resides in the concept of nominalism. Under our law, an obligation for payment of a sum expressed in domestic money remains unaffected by inflation or depreciation of the dollar. Thus if X is indebted to Y for $1,000.00 as of March 1, he is not obligated to pay back $1,050.00 in principal if, due to inflation, the value of the dollar has fallen 5% subsequent to March 1. Similarly, a successful plaintiff cannot recover for foreign currency depreciation in a contract dispute. To allow recovery for foreign currency depreciation would have the same effect as allowing a plaintiff to increase his damage award to compensate for inflation.

This nominalistic concept is assumed to prevail in all countries. If an obligation is expressed in the money of the foreign place of payment and is subject to its laws, the federal courts will treat this as "money" rather than as a commodity, thereby ignoring fluctuations in value or in purchasing power. This concept was clearly announced by Justice Holmes in *Die Deutsche Bank*:

> Obviously, in fact a dollar or a mark may have different value at different times but to the law that establishes it it is always the same. If the debt had been due here and the value of dollars had dropped before suit was brought the plaintiff could recover no more dollars on that account. A foreign debtor should be no worse off.

Under nominalism, conversion of foreign money to domestic currency at the judgment date would yield an equivalent amount of dollars for the creditor as would a suit brought in a foreign country. Although the debtor may be

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69. 272 U.S. at 519.

70. For example, X contracts to deliver French merchandise to Y in America for 1000 French francs. Y refuses to pay at a time when one franc equals one dollar. Subsequently, the franc depreciates. On the day of judgment the franc is worth only
required to pay less in United States dollars when the foreign currency has depreciated in relation to the dollar than he would have had there been no depreciation, the courts have never looked to the debtor side of a transaction to assess plaintiff's damages. Contract and tort law in the United States have always allowed the injured party to recover only that amount which would put him in the same position he would have enjoyed had there been no injury. Just as one can argue that the debtor should not receive a windfall due to world currency fluctuations, likewise, a creditor should not benefit from such variations. This is precisely what happens when the breach day rule is applied and the foreign currency depreciates subsequent to the breach.\(^7\)

Although many commentators have insisted that the judgment day rule is consistent with the principle of nominalism, this is not entirely correct. Currency fluctuations between the date of judgment and the date of payment can result in a greater or lesser recovery than if the suit had been brought in a foreign country.\(^7\) Thus, conversion on day of payment, rather than day of judgment, “gets nearest to securing to the creditor exactly what he bargained for.”\(^7\)

C. Analysis of the Judgment Day Rule

Although the greatest aspect of the judgment day rule is that it achieves uniform results no matter where the plaintiff brings suit, this mechanical formula will not provide a fair solution in all situations. For example, where parties to a con-

\(^{50}\) cents. Pursuant to the nominalist theory, even though it seems inequitable, the defendant only has to pay plaintiff $500 instead of $1,000. When plaintiff converts the money into francs he will recover the full 1000 francs for which he originally bargained. Plaintiff is put in as good a position as that in which he would have been put by full performance of the contract. Furthermore, he receives the same judgment he would have received had the suit been brought in France. An in depth discussion on the application of nominalism is provided in Cohn, supra note 1, and in Hauser, Breach of Contracts Damages During Inflation, 33 Tul. L. Rev. 307 (1959).

\(^7\) See supra notes 18-20 and accompanying text.

72. For example, if P sues D in the United States for 100 francs owing on a debt due in France and on judgment day the rate of exchange for five francs is $1.00, D must pay P $20.00. P may then exchange the $20.00 for 100 francs. The injustice of the judgment day rule is evidenced when on the day of payment the dollar depreciates and $20.00 will buy only 75 francs. Hence, P recovers less than D promised to pay. Morris, supra note 2, and Dach, supra note 1, at 386 n.95, both support the “payment day” rule.

tract exchange foreign currency as a commodity for trade, like copper or wheat, the judgment day rule is unsatisfactory because the currency is not being used to purchase a product, but rather is itself the product being purchased. If the value of the foreign currency depreciates in relation to the domestic currency and the judgment day is chosen as the day of conversion, the purchaser receives less of the product than he agreed to purchase. The only way plaintiff could be properly compensated is by awarding him the value of the commodity, in this case foreign currency on the day the contract was breached.

Another criticism of the judgment day rule was expressed in Justice Sutherland's dissent in Die Deutsche Bank where he stated that: "To take the date of judgment for determining the value is to adopt for the measurement of a loss a test resting upon the fluctuating chances of a court calendar instead of upon an event already fixed, that is,—to put aside certainty for uncertainty." Although this contention is not without merit, possible fluctuations and uncertainty in the value of a judgment are nonetheless present in suits not involving conversion of foreign currency. This is so because the United States follows the nominalistic principle of money and refuses to consider changes in the value of money when determining the rights and obligations of the litigants.

Criticism of the judgment day rule has also been expressed when domestic currency appreciates in relation to the foreign currency stipulated in a contract. Some courts will apply the breach day rule rather than the judgment day rule in such cases; otherwise, the defendant would benefit from his default. Conversely, the creditor should not be put in a better position than he would have enjoyed had the contract been fulfilled. This, however, is the result when the breach day conversion rule is applied where domestic currency has depreciated and/or foreign currency has appreciated. Therefore, under strict contract theory, the judgment day rule is theoretically preferable because, although defendant receives a windfall, plaintiff should be put in neither a better nor worse position than that for which he has bargained.

74. See Note, supra note 59, at 492; Gluck, supra note 1.
75. 272 U.S. at 523 (Sutherland, J., dissenting).
quently, when the value of the foreign currency depreciates, the courts should disregard such depreciation because under the nominalistic theory courts are not to consider change in the value of money when determining the amount of damages.

It appears from the discussion above that neither the judgment day rule nor the breach day rule will provide a fair solution in every case. Although the federal courts have adopted both rules based on place of payment, that factor alone is insufficient to guarantee a fair result. The federal courts should try to resolve each case so that the injured party receives damages that are closely related to the wrong he or she has suffered. Only in this way can the court avoid straightjacket solutions based on inflexible procedural rules. In the recent case of B.V. Bureau Wijsmuller v. United States, the United States District Court for the Southern District of New York applied principles of equity and public policy in protecting a professional salvage company from suffering because of a decline in the value of the dollar in relation to the Dutch guilder between the day of breach and the date of judgment. The court awarded the plaintiff $175,000 for his reasonable services and rendered an “uplift” factor to protect him “against the consequences of currency fluctuation which tends to diminish [his] reward.”

Although the court applied general maritime law, claiming that the rate of exchange problem cannot be determined by reference to principles derived from other areas of law, the fact remains that equitable solutions are available to the courts if they can look beyond established, inflexible precedent.

IV. Miliangos—Payment Day or Payment in Foreign Currency

When the breach day rule was first established in Great Britain, the pound sterling was strong, and only foreign currency depreciated. The rule was acceptable, because to decide otherwise, would have rewarded the debtor for defaulting on his obligation to pay the creditor. Of course, when the pound sterling depreciated in relation to foreign currencies, the in-

78. See infra notes 115-37 and accompanying text.
80. Id. at 179.
justices of the breach day rule became apparent to the courts. The English Court of Appeal in 1975 and the House of Lords in 1976 reconsidered the rule for judgment and conversion rates.

In *Schorsch Meier G.m.b.H. v. Hennin* goods were supplied by a German auto parts dealer to an English buyer under a contract calling for payment in German currency. When the debt became due in February 1972, the sterling equivalent was 452 pounds, but when the German seller issued his writ in July 1975, the sterling equivalent had depreciated to 641 pounds. For two reasons, the Court of Appeal disregarded 350 years of precedent and held that plaintiff was entitled to the amount of judgment either in Deutschmarks or in the sterling equivalent at the date of payment.

First, the court relied on Article 106 of the Treaty establishing the European Economic Community (EEC) which required the English court, as the national court of a member state, to give the creditor residing in another member state judgment in his own currency under the contract.

Second, the court held that the breach day rule and the rule that judgment had to be in pounds sterling were no longer valid because the reasons for the rule had been eroded by changes in the form of money judgments.

An opportunity to take the next logical step came before

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81. F. MANN, LEGAL ASPECT OF MONEY 358 n.2 (3d ed. 1971). See Mann, *The Rate of Exchange: An Urgent Appeal for a Minor Reform of the Law*, 15 MOD. L. REV. 369, 369-71 (1952) [hereinafter cited as Mann, *Rate of Exchange*]. If the breach day rule had been applied when the value of the pound depreciated relative to foreign currency, the creditor would have received less than he would have received by suing in the country of the foreign currency.


84. The rule adopted by the House of Lords in *Miliangos*, was advocated as far back as 1952 by F.A. Mann: "where the claim is for a sum of foreign currency, the judgment . . . should be for that sum or its sterling equivalent at the date of payment." Mann, *Rate of Exchange, supra* note 81, at 371.


87. As Lord Denning aptly stated:

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. It changes like weathercock with every gust that blows. So do other currencies. This change compels us to think again about our rules.

the House of Lords in the *Miliangos* case. In May 1971, the plaintiff, a Swiss native, delivered a quantity of polyester yarn to English defendants for payment in a certain amount of Swiss francs, the sterling equivalent of which was 42,000 pounds. The purchaser failed to pay on the due date, and the plaintiff brought suit. Due to the depreciation of the sterling pound, as of the date of trial in 1974, the sterling equivalent increased to 60,000 pounds. In this case, unlike in *Hennin*, the Treaty of Rome was not available because Switzerland was outside the EEC. The House of Lords nevertheless gave the defendant an option: he either could pay the plaintiff the precise amount of foreign currency stated in the judgment, or he could, on the date of payment (not the breach date or the judgment date), pay an equivalent amount in domestic currency. If the defendant were to appeal the judgment, the date of conversion would be postponed and new equivalents would take effect. This decision had the effect of putting the creditor in the same position he would have been in had the contract been performed, or had suit been filed in Switzerland. If the court instead had applied the breach day rule, the creditor would have recovered less than the debtor promised to pay, and less than the creditor would have been awarded had he sued in Switzerland.

The House of Lords based its conclusion on several factors. First, Lord Wilberforce, speaking for the court, rejected the commodity theory of foreign money as erroneous. Second, the court noted that because of floating currencies it was no longer the exception that change in the relative value of the currencies occurred between the date of breach and the date of judgment (or payment). This compelled the court to find a rule that would do justice to creditors when the domestic currency depreciated relative to the foreign currency. Third, the court felt that problems of conversion would be avoided by making orders calling for payment in foreign currencies. Finally, the court felt that it was wrong in principle
to allow procedure to detrimentally affect the creditor's substantive rights.\textsuperscript{93} The court indicated that the creditor who bargained only in his currency should not benefit or suffer from procedural rules. Furthermore, the court agreed with Justice Holmes' concept of nominalism discussed in \textit{Die Deutsche Bank};\textsuperscript{94} the creditor should take the domestic currency (in this case the pound sterling) as he finds it.

The court limited the application of \textit{Miliangos} to claims for debts expressed in foreign currency where the law of the contract is that of the foreign country.\textsuperscript{95} The \textit{Miliangos} rule, however, was extended by the Court of Appeal to claims involving damages for tort\textsuperscript{96} and breach of contract.\textsuperscript{97}

\textit{Miliangos} ended 350 years of English precedent which had run the full gamut of legal analysis. The breach day rule was adopted primarily on equitable grounds, but it no longer provided an equitable remedy, because the world economy had changed. The problem with the \textit{Miliangos} rule, like any other procedural rule, is that the courts again may be confronted with radical world monetary fluctuations and unique factual circumstances. If the rule became inappropriate under changed circumstances, stare decisis might inhibit any necessary change. The courts should not bind themselves to particular formulas for foreign currency conversion, because the interests of equity require different formulas for different circumstances.

\textbf{V. AN EQUITABLE RULE}

It has been suggested by at least one scholar and implied by others that \textit{Miliangos} provides the best rule when it comes
to judgments involving foreign contracts, torts, and other obligations and therefore the United States should adopt this rule instead of continuing with the judgment day rule. It is argued that conversion of the foreign obligation at the date of payment "gets nearest to securing to the creditor exactly what he bargained for," whereas conversion on the date of judgment allows for currency fluctuations between that date and the date for payment.

Although the payment day rule will usually achieve a just result, this will not always be the case. Rather, the different rules for date of conversion should be considered together in each case as procedural guidelines which can help the court reach the most equitable result. Below are reasons why the American courts should apply such an "equitable rule" and thereby institute a standard based on flexibility instead of adopting inflexible rules.

A. Payment with Intent to Convert

The first weakness with the mechanical rules described above can be illustrated by the following example. If an American creditor contracts for payment in a foreign currency, he will presumably convert the money into dollars upon receipt. The creditor might, however, intend to retain the foreign currency. In this situation, instead of relying on only one rule, the court should be able to apply either the judgment day rule or the breach day rule depending on whether the creditor would have retained the foreign currency or converted into dollars upon payment.

98. See Morris, supra note 2, at 53; Dach, supra note 1, at 386 n.95; Mann, supra note 76.
100. Direct support for this approach to foreign currency conversion has been limited. Although, some support is found in Note, supra note 59, at 490. The author refers to an "empirical approach" to foreign currency conversion. See Restatement Second of Conflict of Laws § 144 Reporter's note (1971) (there may be support for an "ad hoc" approach).
101. As a further illustration, suppose an American citizen contracts to deliver heavy machinery to an Austrian corporation for the sum of 60,000 schillings. At the time of delivery, the defendant refuses to pay for the amount in question ($2,000). Pursuant to the contract, defendant brings suit in the Federal court against the Austrian corporation for the contract price of 60,000 schillings, which the court must convert into dollars. However, subsequent to the day of breach, the schilling depreciates in relation to the dollar so that 60,000 schillings now buys only $1,000. If the court were to apply the judgment day rule, defendant would pay plaintiff $1,000
The judgment day rule, rather than the breach day rule, should be applied in cases where plaintiffs would have retained the foreign currency received under the contract.\textsuperscript{103} Not only is this consistent with nominalism, but it is also consistent with the basic precepts of recovery in Anglo-American judicial systems because it places the plaintiff in the position he would have been in had the contract been fulfilled. If the court were to apply the breach day rule it would result in awarding inadequate compensation or a windfall to the plaintiff depending on whether the foreign currency appreciates or depreciates subsequent to the day of the breach. Suppose, however, two parties had engaged in similar transactions which had always resulted in immediate conversion of francs to dollars. In this case the reasonable expectation of the parties would not be given effect if the court used the judgment day rule. If the francs depreciated, the American plaintiff would receive a lesser equivalent in dollars to satisfy the foreign currency debt. This is not what the parties expected; rather, the currency was to be paid in francs\textsuperscript{105} which, in the usual course of dealing, would have been exchanged immediately for dollars.\textsuperscript{104} In this situation, the court should apply the breach day rule and award plaintiff the value of the bargained for dollars.\textsuperscript{105} The court should not recognize the re-

whereby plaintiff would subsequently convert the $1,000 into 60,000 schillings. Although defendant appears to benefit from this transaction, plaintiff is put in the same position he would have been in had the contract been fulfilled. If, on the other hand, the plaintiff had intended at the time he entered into the contract to convert the schillings into dollars upon payment, the judgment day rule would be unjust. In the end, the plaintiff would receive only $1,000 instead of the $2,000 he would have acquired had he been able to receive and exchange the 60,000 schillings on the day it was owed.

102. See Note, supra note 59, at 497.

103. Foreign money might be used for a number of reasons, e.g., it could be easier to work with for both parties during the exchange.

104. Similarly, if the Mihiangos rule were employed, the plaintiff would not receive the benefit of his bargain. Although the plaintiff is paid in francs, the Mihiangos rule does not account for the plaintiff's intent to immediately exchange the francs for dollars upon payment. As a result, if the franc depreciates subsequent to the breach date, the amount of francs paid to plaintiff will be insufficient to acquire the dollars he would have acquired had he been paid the francs when due.

105. See Note, supra note 59, at 495-96. The inequities of the "federal rule," under which the place of payment determines the use of the breach day rule or judgment day rule, are evident when, regardless of place of payment, plaintiff would have converted the foreign currency into dollars. For example, where two Americans make separate agreements for payment, one in London and the other in New York, and both Americans intended to convert to dollars upon receipt of payment, plaintiff who
strictive nature of procedural rules and simply apply the judgment day rule in order to conform to the result of a foreign court. It appears, therefore, that before the court can hand down an equitable remedy, it must first inquire whether the plaintiff would have retained the foreign currency he was to be paid or would have converted it to dollars had defendant paid at the specified time.108

The manner of conversion for tort claims should be no different than for contract claims, because both causes of action employ the same rationale for awarding recovery: The plaintiff should be put in the position he would have enjoyed had the injury not taken place.107 If an injured American were forced to convert his dollars to foreign currency in order to pay expenses incurred as the result of an injury, the court should then award him an amount in dollars according to a conversion date that would most accurately reflect the expenses he would need to pay in the foreign currency. In this way, the court could place the plaintiff closer to the relative position he occupied before the injury by protecting him from currency fluctuations.

B. Devaluation and War—Case on Point

Periods of war illustrate the need for retreating from inflexible procedural rules and adopting an "equitable rule."108 During times of war and foreign trade restrictions, the courts have managed to bend either the breach day rule or the judgment day rule to arrive at equitable rates of exchange.109 In

was to be paid in New York is protected against any possible devaluation of foreign money under the breach day rule, whereas plaintiff who was to be paid in London, although receiving sufficient foreign currency, will not receive the benefit of his bargain if the foreign currency depreciates. The restatement has abolished the "place of payment" distinction and applies the judgment day rule when the cause of action is governed by the law of a foreign state. RESTATEMENT (SECOND) CONFLICT OF LAWS § 144 (1971).

106. See Drake, The Rule, the Principle, the Standard in Fluctuating Exchange, 25 Mich. L. Rev. 860 (1927). The major difficulty with this inquiry of course, is establishing the prior intention of the plaintiff, but prior course of dealings and customary commercial practice may help the court establish this intention. Note, supra note 59, at 498-99, provides further discussion regarding proof of the prior intentions of the plaintiff to convert or retain foreign currency obligations.


108. See generally Cohn, supra note 1, at 522-28.

Sutherland v. Mayer\textsuperscript{110} for example, a suit was brought by the Alien Property Custodian to obtain assets involved in an accounting between an American and his German partners. The assets were located in Germany when World War I caused a dissolution of the partnership. Settlement with the American partner was legally impossible until the close of the war because business transactions were forbidden. After World War I the German mark depreciated substantially. The court, however, refused to apply the breach day rule\textsuperscript{111} in a partnership situation where the obligor-partner would innocently suffer the entire loss. It was an "ineluctable consequence of the war"\textsuperscript{112} and no one was to blame. The court, held that the conversion date should be placed at the first opportunity which the debtors had to satisfy their obligations. In other words, the value at which the foreign currency was to be translated into dollars was calculated at the exchange rate when commercial intercourse and communication between citizens of the United States and Germany was restored after World War I.\textsuperscript{113}

The difficulty with Sutherland is that it has been limited to situations in which the breach day rule would ordinarily have applied.\textsuperscript{114} Why can't the rationale of Sutherland be extended to cases where the judgment day rule would apply or, as in England, where the Miliangos rule would be appropriate? The inequity of inflexible adherence to either rule was acknowledged by Lord Simon of Glaisdale in his dissenting opinion in Miliangos.\textsuperscript{115} Lord Simon posed the hypothetical of an Englishman who agrees to buy an art collection from Count Comneus of Central Europe for 10 million Ruritanian

\textsuperscript{110} 271 U.S. 272 (1926).

\textsuperscript{111} Hicks v. Guinness, 269 U.S. 71 (1925), also involved a foreign currency obligation subject to American law and payable in the United States. Procedurally then, the court should have used the breach day rule.

\textsuperscript{112} 271 U.S. at 292.

\textsuperscript{113} The same rule was applied in Aratani v. Kennedy, 317 F.2d 161 (D.C. Cir. 1963), and International Silk Guild v. Rogers, 262 F.2d 219 (D.C. Cir. 1958), which involved obligations arising out of World War II.

\textsuperscript{114} See Cohn, \textit{supra} note 1, at 527; International Silk Guild v. Rogers, 262 F.2d 219, 225 (D.C. Cir. 1958).

\textsuperscript{115} [1976] A.C. at 470.
talers which are equivalent to one million pounds. The collection is shipped to England but the purchaser fails to pay on the due date because war breaks out and strict exchange controls are imposed. As a result of the war and subsequent revolution, the Ruritanian taler becomes worthless. The count, penniless, manages to escape to England and file suit to recover one million pounds for his art collection. Under the Miliangos rule, defendant would have to pay 10 million Ruritanian talers or the equivalent in pounds sterling at the day of payment. Because the Ruritanian taler has become worthless, however, the Count receives nothing under either method. The inequity of applying these rules based on "nominalistic theory" is self-evident—the Englishman acquires valuable property without having to pay for it while the creditor is left penniless. If this same situation were to occur in America, the court would employ the judgment day rule. The Count would be no better off because, as stated earlier, the equitable principles expounded by the court in Sutherland are inapplicable where the judgment day rule applies.

Two cases from the same set of circumstances, which are analogous to Lord Simon's hypothetical in Miliangos, were recently settled in the United States District Court. Though settled, Co v. Bank of America provides a useful example of the problems created by inflexible conversion rules and the benefits of an equitable approach. In Co, the plaintiff, a national of the Republic of Vietnam, filed a complaint to recover damages, inter alia, for money deposited in the Saigon branch of the defendant, Bank of America. In February 1975, Mr. Co deposited 300,050,000 piasters worth 428,642 dollars. On April 24, 1975, the Saigon branch was closed by Bank of America due to increased fighting in that area between South Vietnam and North Vietnam. Mr. Co was not notified and was, therefore, prevented from obtaining money due. On April 30, 1975, Saigon fell to North Vietnam. Subsequent to the day of

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116. Id. at 488-89.
breach, the piaster became worthless. Upon his arrival in the United States, plaintiff demanded and was denied the breach day dollar equivalent of his deposited piasters.

Because Bank of America's obligation to Mr. Co arose under, and was governed by the laws of South Vietnam, the federal rule would have forced the court to use the conversion rate applicable on the day of judgment. Under these circumstances plaintiff would recover nothing. The same result would occur if the court were to apply the Miliangos rule of paying either the piasters due or their dollar equivalent on date of payment.

On the other hand, because the federal court was sitting in diversity, it was required by *Erie Railroad v. Tompkins* to apply the foreign currency conversion rules employed by the courts of California, which have applied the breach day rule in the past. Pursuant to the breach day rule, the bank would pay Mr. Co roughly one-half million dollars.

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120. In September of 1975 the new provincial revolutionary government issued regulations for the exchange and conversion of the old regime's piasters into a new currency called the Southern dong. This subsequently was converted into the Vietnamese dong. The time periods for the conversions were limited to only several days. Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion for Summary Judgment at 3-4, Co v. Bank of America, No. C-79-1213 SW (Filed Feb. 25, 1981). In 1979 one dollar was equivalent to 2.17 dongs. CENTRAL INTELLIGENCE AGENCY, HANDBOOK OF ECONOMIC STATISTICS (1980). Further information regarding exchange rates of the dong is contained in *International Financial Statistics, Supplement on Exchange Rates*, BUREAU OF STATISTICS OF THE INTERNATIONAL MONETARY FUND, No. 1, 1981.


123. For the sake of argument, it is assumed that the bank will be held liable under these hypothetical situations. An in depth look at the liability of U.S. parent banks for their foreign branches is provided in Heininger, *Liability of U.S. Banks for Deposits Placed in Their Foreign Branches*, 11 LAW & POL'Y Int'l Bus. 903 (1979); Vishipco Line v. Chase Manhattan Bank, 660 F.2d 854, 862-64 (2d Cir. 1981).


Whatever rule a court deems appropriate to utilize, it seems unjust that one party must bear the entire burden of currency fluctuations where blame for the situation rests upon neither party. The court in this situation should adopt a conversion plan supported by principles of equity and public policy.\textsuperscript{126} Although adopting a conversion date other than the judgment date would be inconsistent with the principle of nominalism and thus, encourage forum shopping,\textsuperscript{127} the court's objective should be to award just compensation to plaintiffs for their damages.

Analogous issues were raised in the case of Banco Nacional De Cuba v. Chase Manhattan Bank.\textsuperscript{128} The Cuban national bank brought actions against numerous American banks to recover amounts owing. One of the banks, Chase Manhattan, conceded liability to Banco Nacional in the amount of $9,794,020, but counterclaimed to set-off the amount owing by a sum equal to the value of its Cuban assets confiscated following the 1959 revolution of Cuba.

The court concluded that Chase was entitled to a set-off of $6,094,870 for the taking of its Cuban branches. The court then addressed plaintiff's contention that any judgment granted on Chase's counterclaims should be converted to Cuban pesos on the day of judgment. The plaintiff was seeking to eliminate the set-off's effect since Cuban pesos were without value in the United States.

The court concluded that Chase Manhattan and the other American banks were entitled to damages based on the conversion rate prevailing on the day of confiscation. The court did not apply the traditional judgment day rule, holding that "to require a conversion on a date not related to reality would create an obvious injustice under the circumstances of this case."\textsuperscript{129} Noting that the purpose of the judgment day rule is

\textsuperscript{126} See Sutherland v. Mayer, 271 U.S. 272 (1976). Even if the Sutherland rule is applicable where the judgment day rule is ordinarily applied, plaintiff would still receive nothing in this case because the piaster was worthless when commercial intercourse resumed.

\textsuperscript{127} If the judgment day rule is not adopted, the amount recovered will not equal that amount which would have been recovered in the foreign jurisdiction on the same date. Therefore, plaintiff will seek the jurisdiction which will provide the greatest amount of damages.


\textsuperscript{129} Id. at 464. The court, at the outset of its opinion, claimed that it had diver-
to prevent forum shopping, the court concluded that such a
danger was not present in the case.\textsuperscript{130}

The circumstances of Mr. Co's case was similar. There
was no danger of forum shopping, because the Bank of
America would never subject itself to personal jurisdiction in
the communist regime of Vietnam.\textsuperscript{131} Furthermore, application
of the judgment or payment day rules would produce re-
results similar to those labelled an obvious injustice in \textit{Chase
Manhattan Bank}.\textsuperscript{132}

If Mr. Co would not have been able to receive value for
his piaster even without the breach or if the court would be
forced to speculate about the deals he could have made on the
black market,\textsuperscript{133} then it would make sense to have him bear
the risk of the currency depreciating.\textsuperscript{134} In fact, there had
been a legitimate market for converting piasters to a valuable
currency. Five months after the fall of South Vietnam, the
new regime established a currency program whereby piasters
could be exchanged for "southern dongs."\textsuperscript{135} Under the 1975
exchange rate, one southern dong was worth 500 piasters. In
time, the southern dong was to be converted into northern
dongs and eventually the piaster became worthless.\textsuperscript{136} Had
Mr. Co obtained his piasters, he would have at least been able
to exchange a portion of them for the communist regime's new
currency.

The problem presented by this case is one of determining
a proper currency-conversion date. It is obvious that neither
the breach day nor the judgment day rules will provide an equ-
uitable conversion rate. Choosing the applicable date of con-

\textsuperscript{130} To prevent forum shopping, the court concluded that such a
danger was not present in the case.

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\textsuperscript{136} The problem presented by this case is one of determining
a proper currency-conversion date. It is obvious that neither
the breach day nor the judgment day rules will provide an equ-
uitable conversion rate. Choosing the applicable date of con-
version is a complex and difficult task. The court must, nevertheless, balance the interests of the parties, without losing sight of the policies underlying the rules on conversion, which are to put the plaintiff in the same position he would have enjoyed had the wrong not occurred and not to indemnify him against losses from appreciating domestic currency and/or depreciating foreign currency.\textsuperscript{137}

C. Guidelines

Concepts of equity and flexibility seem desirable and just, but if courts are not directed by appropriate guidelines, arbitrary and inconsistent decisions will result. Several procedural rules should be adopted to promote certainty and uniformity of judgments, which will in turn encourage defendants' offers to settle. Some recommended guidelines include the following:

1) Where parties to a contract intend to treat foreign currency as a commodity (i.e., the object of the sale), the courts should apply the breach day rule.\textsuperscript{138}

2) The judgment day rule should be changed to the payment day rule as expressed in \textit{Miliangos}.\textsuperscript{139}

3) Where a plaintiff contracts for payment in a foreign currency, if the plaintiff would have retained the foreign currency paid, the court should apply the payment day rule. If plaintiff, in the usual course of dealing, would have converted the foreign currency into domestic currency immediately upon payment, the court should apply the breach day rule.\textsuperscript{140}

4) The rules of conversion applied in contract cases should be applied similarly in tort cases.\textsuperscript{141}

5) When it appears that employment of either the traditional breach day rule or payment day rule will create an injustice under the circumstances of the case, the courts must

\textsuperscript{137} One approach might be to compute how many dong(s) plaintiff could have exchanged for his piasters had he been able to withdraw them. Then on day of judgment look to the rate of exchange for dong(s). In this way, plaintiff is not indemnified for currency fluctuations.

\textsuperscript{138} See Note, supra note 59, at 492; Gluck, supra note 1. See also supra notes 13-16 and accompanying text.

\textsuperscript{139} Conversion of foreign money to domestic currency on day of payment protects both parties from monetary fluctuations occurring subsequent to the judgment date, but prior to the payment date. See Schorsch Meier G.m.b.H. v. Hennin, [1975] Q.B. 416.

\textsuperscript{140} See supra notes 101-06 and accompanying text.

\textsuperscript{141} See supra note 107 and accompanying text.
be free to devise a measure of recovery that best approximates justice.

VI. CONCLUSION

In the past, different dates of conversion have been favored at different times, under different circumstances, and for different reasons. So long as the value of currencies continues to fluctuate relative to each other, the courts must continue to grapple with the problem of converting foreign money judgments into domestic currency. Compelled by a desire to do justice, the courts have designed procedural formulas in their search for a perfect solution. Unfortunately, these inflexible rules have been far from perfect in all cases. In sum, the courts should take an equitable approach to foreign currency conversions; with the help of flexible guidelines, they should look at the circumstances of each case, balance the interests of the parties involved, and thereby determine a fair conversion rate.

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