IMPLEMENTATION OF FOREIGN AWARDS IN INDIA, UK AND USA

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INTRODUCTION

In the area of trade and commerce, invariably relief sought and granted from judges and arbitrators is in some form of monetary payments. With international trade involving a number of currencies, it is but natural that disputes relating to international trade, will include issues relating to the currencies involved.[1] When any relief or judgment is made in favour of a party, it must be in monetary terms, if damages or compensation is involved. Monetary expression must be in some currency. Accordingly, judgments and awards, indicating relief, do so in currency.[2]

Due to the international nature of dispute settlement, currency expressions may be alien to the place where the judgments or awards are to be enforced.[3] These and other issues are discussed in this paper with an emphasis on a comparative position by taking the case of three countries namely, India, United States (hereinafter US) and United Kingdom (United Kingdom).

JUDGMENTS IN FOREIGN CURRENCY

OVERVIEW

A judgement rendered at home or abroad in a foreign currency throws up several problems. An important problem is the reference point for the rate of exchange. Somewhere along the way, a sum expressed in a foreign currency judgement may require conversion into the home currency.[4] When the money of amount differs from the money of payment, it is necessary to ensure that the rates of exchange do not cause injustice in a conversion from one 'money' to another.[5]

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[1] F Mann, *The Legal Aspect of Money* (7th edn, OUP 2012) 120.

[2] ibid 121.

[3] Paul A Samuelson et al, *Economics* (16th edn, The McGraw-Hill Companies 1998) 45.

[4] ibid 48.

[5] Mann (n 1) 98.

It can be shown through an illustration; one can assume that an Indian seller and an American buyer enter into a contract for the supply of some item, worth $100,000. The American buyer breaches this contract and does not pay the sum.[6] Now, the Indian seller is entitled to claim $100,000, but various options are possible in expressing the same in Indian currency.[7] Assuming that the rupee depreciates gradually vis-à-vis the dollar then,

	Rate of Exchange	Sum that can be claimed
Contract Date	1$= Rs.60	$100,000= Rs. 60,00,000
Breach Date	1$= Rs.65	$100,000= Rs. 65,00,000
Judgment Date	1$= Rs.70	$100,000= Rs. 70,00,000
Payment Date	1$= Rs.75	$100,000= Rs. 75,00,000

From the above table, one can discern that the date on which the $100,000 sum is converted into Indian rupees is of crucial importance for the buyer, as he may obtain either a far greater sum than he is entitled to if the earliest date, the breach date is followed or he could perhaps obtain at the current rate, a sum truly representative of the dollar claim.[8] Assuming if the rupee were to appreciate against the dollar then,

	Rate of Exchange	Sum that can be claimed
Contract Date	1$= Rs.75	$100,000= Rs. 75,00,000
Breach Date	1$= Rs.70	$100,000= Rs. 70,00,000
Judgment Date	1$= Rs.68	$100,000= Rs. 68,00,000
Payment Date	1$= Rs.65	$100,000= Rs. 65,00,000

Here, the Indian seller would favour conversion at the earliest date, the contract date since that would give him a great advantage.[9]

STATUTORY POSITION IN INDIA

The law on foreign currency obligations in India is very scanty. It is considered in two judgments of the Supreme Court, which have attempted to lay down the principles.[10] There exist no direct statutory provisions on the point and it would be appropriate to refer to the few sections in the Foreign Exchange Management Act (hereinafter FEMA)

[6] Mann (n 1) 125.

[7] Paul (n 3) 78.

[8] Paul (n 3) 79.

[9] Mann (n 1) 108.

[10] The Foreign Exchange Management Act 1999.

for guidance.[11]

The Code of Civil Procedure (hereinafter CPC) is silent on the point, but there are general provisions dealing with enforcement of foreign judgment that perhaps could be applied in a foreign currency judgment, provided it is a foreign one.[12] The CPC clarifies that a foreign judgment shall be decisive with regard to any matter directly decided upon the same parties or between parties under whom they or any of them claim litigating under the same title.[13] The bar in case of foreign currency judgments being enforced is that it will result in breach of Indian Law.[14] Hence, it is essential to examine whether a foreign judgment expressed in a foreign currency will violate the relevant Indian law i.e. FEMA.[15]

POSITION IN ENGLAND

The law in England relating to foreign currency judgments has undergone change since 1960.[16] In that year, a rule of three hundred and fifty years vintage, has affirmed, that stated English Court has no power to decide the cases where the payment of claim is in foreign currency hence to resolve such issues in England, a foreign currency debt must be converted into sterling with reference to the rate of exchange prevailing on the date when the debt was payable.[17] The modern foundations of this rule are discernible in *Manners v. Pearson*[18], wherein it was held that courts of England had no jurisdiction to order payment of money except in the currency of England.[19] This was called the home currency rule. Besides, it was also held that the date of breach of the contract was the appropriate time for determining the exchange rate for conversion.[20]

The pronouncement in the *Tomkinson v. First Pennsylvania Banking & Trust* (hereinafter *Havana Case*[21]) was different from earlier precedents that had struck to the breach date-

[11] Vaughan Black, oreign Exchange Regulation Act,81.al 61,81. ws*Foreign Currency Claims in the conflict of Laws* vol 2 (Hart 2010) 167.

[12] The Code of Civil Procedure 1908.

[13] James Grandolfo et al,'India' [2010] 44(01) The International Lawyer 663, 680.

[14] The Foreign Exchange Management Act 1999 s 3(b); *Forasol v ONGC* AIR 1984 SC 24.

[15] The Foreign Exchange Management Act 1999 s 2(m).

[16] Roger Bowles et al, 'Judgments in Foreign Currencies: An Economist's View' [1976] 39(02) MLR 196, 201.

[17] *Woodhouse AC v Nigerian Produce Marketing* [1972] AC 741 (HC).

[18] *Manners v Pearson* [1898] 1 Ch 581 (CA).

[19] ibid.

[20] Black (n 11) 189.

[21] *Tomkinson v First Pennsylvania Banking & Trust* [1960] 2 All ER 332.

home currency rule since the injured party had actually benefitted from them in those cases.[22] However, in the *Havana Case*, the pound lost its value and consequently the injured creditor had to be content with receiving an iniquitous sum. This was criticised as unjust.[23]

Interestingly enough, after the decision in *Havana*, a series of statutory changes were effected that allowed for conversion of the judgment sum on the date of judgment instead of the breach date.[24] They included conversion in cases involving carriage of goods by air. Besides, in respect of carriage of goods by railroad and rail, conversion could take pace upon the date of payment. Thus, parliament itself intervened to remove sanctity attached to this rule.[25]

Meanwhile in *Beswick v. Beswick*[26], the House of Lords held that to make money payment, House of Lords could order a specific performance. This was sufficient to allow for extending by analogy specific performance of a contract to make a foreign money payment.[27]

Miliangos Case

The *Miliangos case*[28], which proved to be a turning point in the law relating to foreign currency judgments, arose under interesting circumstances before the House of Lords.[29] It essentially concerned an action brought by a Swiss against an English company claiming a certain sum of Swiss Franc due to him for the price of polyester sold and delivered to the English Company under a written contract.[30] The court in England that demanded adherence to the home currency-breach date rule was probably known to the plaintiff, for he originally asked for satisfaction of his claim in sterling. However, upon the judgment in *Schorsch Meier G.M. B.H. v. Hennin*[31], the claim of the plaintiff was amended asking for the amount to be paid in Swiss francs as an alternative prayer. The trial court refused to grant this new prayer and decreed the amount in sterling. The

[22] ibid.

[23] ibid.

[24] Black (n 11) 119.

[25] Black (n 11) 120.

[26] *Beswick v Beswick* [1973] 3 All ER 498.

[27] ibid.

[28] *Miliangos v George Frank Textiles* [1975] 3 All ER 801 (HL).

[29] ibid.

[30] ibid.

[31] *Schorsch Meier GM BH v Hennin* [1975] 1 All ER 152.

Court of Appeal reversed the trial court's ruling and granted the claim in terms of Swiss francs. The English company preferred on appeal to the House of Lords.[32]

In the House of Lords, the majority abrogated the longstanding home currency rule and recognized that English Court was entitled to grant judgment in terms of foreign currency but qualified this to a situation where the sum of payment as well as the money of amount was foreign and the contract was governed by foreign law.[33] Thus, a practice direction of the House of Lords was invoked to depart from the old rule, for a new and more satisfactory rule to emerge.[34]

Post Miliangos Era

The principles in *Miliangos* were extended to other situations, as a claim based on damages for tests and for breach of contract.[35] In two connected appeals, the House of Lords extended the *Miliangos* principle of allowing claims in foreign currency beyond the mere action for a sum due to other claim.[36] The *Miliangos* rule that the money of payment as well as the money of amount be foreign and that the contrast be governed by foreign law was dispensed with in later cases. The *Owners of M.V. Eleftherotria v. the Owners of M.V. Despina R.*[37] went further in demonstrating the wisdom of moving away from the sterling judgment and breach date rules. *Miliangos* and, its progeny have recognised that, while the mechanical sterling judgment and breach date rules may have achieved just results when the sterling was a strong world currency, this foundation for the rules disappeared with the advent of floating currencies, a development made possible through the judicial mind.[38]

INDIAN CASE LAWS

Forasol v. Oil & Natural Gas Corporation.[39]

In India, the issue of foreign currency conversion came for the first time before SC in the

[32] *Miliangos Case* [1975] 3 All ER 801 (HL).

[33] Cheshire et al, *Private International Law* (14th edn, OUP 2009) 225.

[34] Black (n 11) 136.

[35] Ross P Buckley, 'The Bankruptcy of Nations: An Idea Whose Time Has Come' [2009] 43(03) The International Lawyer 1189, 1216.

[36] ibid 1192.

[37] *Owners of MV Eleftherotria v Owners of MV Despina R* [1979] 1 AC 685.

[38] ibid.

[39] *Forasol v ONGC* AIR 1984 SC 24.

case of *Forasol* for the enforcement of foreign currency claims.[40] There was a contract entered into by Forasol, a foreign company and Oil & Natural Gas Corporation (hereinafter ONGC), a Government of India undertaking. Dispute arose between the parties when certain terms and conditions of the contract were not followed and subsequently the matter was taken to arbitration as per the arbitration clause under the contract.[41] The matter was governed under Indian Arbitration Act, 1940. The award by the court was in French franc but the issue was about converting the same into Indian rupees so that claim can be settled.[42] Now, there were different dates of conversion before the court, such as the date when the action was commenced, or the one when the court gave the final order or the date when the order of the court was executed.[43]

Faced with these difficulties, the judgment in *Forasol* proceeded to choose the date of judgment as the appropriate date for converting the sum expressed into Indian Rupees as this was the latter date and was beset with the least difficulties.[44] In relation to arbitration, the date when the award is expressed through a decree would be the relevant time to calculate the sum in Indian rupees.[45]

Renusagar Power Co. Ltd v. General Electric Co[46]: The subject matter was an arbitral award that had been rendered in which the sum payable was expressed in foreign currency.[47] It was however first contended that the ruling in *Forasol* applied to only arbitral awards governed by the Indian Arbitration Act, 1940 and not to Foreign Awards falling within the realm of Foreign Awards (Recognition and Enforcement) Act, 1961.[48] The contention was in the negative, stating that no such selective application of the decision in *Forasol* could be made.[49]

The contention that the matter of conversion of foreign currency is a matter substance and is governed by proper law of the contract was also rejected using various authorities in English Law and Private International Law.[50] The reconsideration of *Forasol* that

40 ibid.

41 ibid.

42 ibid.

43 ibid.

44 ibid.

45 Cheshire (n 33) 156.

46 *Renusagar Power Co Ltd v General Electric Co* AIR 1994 SC 860.

47 *Union of India v AL Rallia Ram* AIR 1963 SC 1685.

48 *Oil and Natural Gas Commission v Offshore Enterprises* AIR 1993 Bom 217.

49 *State of Haryana v M/S SL Arora & Company* (2010)2 SCR 297.

50 *Shin-Etsu Chemical Co Ltd v M/S Aksh Optifibre Ltd* AIR 2005 SC 5048.

was urged in favour of a date of payment rather than a date of judgment was not accepted by the SC, due to the difficulties apparent in doing as pointed out in the *Forasol* judgment.[51]

POSITION IN USA

The American legal system approached the currency-of-judgment problem in the same way as the English courts did, and the cases that have come before its judges have presented problem similar to those faced by the English counterparts.[52] Yet the position to which the US arrived at differs from the English one in a number of ways.[53]

The United States adheres to the strict rule of home currency-breach date that has been a virtually unquestioned assumption that the U.S. courts can render judgment only in U.S. currency, supported by judgments and commentators.[54] The American judge, Justice Holmes, in two opinions considered that in case judgments rendered abroad where expressed in foreign currency then they must necessarily be converted into U.S. currency by following the Date of Breach. However, the federal courts also seem to follow the practice that in case the obligation payable or the cause of action arose in foreign jurisdiction, the exchange rate existing on the date of judgment will apply.[55]

The US courts sometimes follows the federal rule that alternates between the dates of payment; otherwise, they follow the Breach Rule uniformly regardless of the place of payment.[56] However, confronted with the fact that even the mighty dollar is subject to the possibility of violent fluctuations, the law in America seems to undergo change from the rigid position of home currency-breach date.[57] The trend in America thus seems to be changing in favour of a judgment date and for recognition of judgments and awards rendered in foreign currency.[58]

[51] *RM Investments & Trading Co v Boeing Co* AIR 1994 SC 1136.

[52] A Dicey et al, *Conflict of Laws* (15th edn, Sweet & Maxwell 2016) 122.

[53] Cheshire (n 33) 175.

[54] Vikram Raghavan, 'Foreign Currency Judgments: Need for a Proper Legal Regime' [1998] 10 National Law School Journal 61, 81.

[55] Black (n 11) 106.

[56] Jennifer Freeman, 'Judgments in Foreign Currency: A Little Known Change in New York Law' [1989] 23(03) The International Lawyer 737, 753.

[57] Cheshire (n 33) 198.

[58] Cheshire (n 33) 199.

CONCLUSION

It would be pertinent to suggest the incorporation of the judgment of the Supreme Court on foreign currency into the relevant statute. For this purpose, whole series of amendments to various acts are required. Especially against the background of incomplete capacity for private parties to reduce the existing uncertainty through contractual provisions, the room for some jurisdictions to modify their current approach to the currency-of-judgment problem is obvious.

The UK and various American states have enacted legislation based on the Uniform Foreign-Money Claims Act (hereinafter UFMC), and have adopted systems that conduce a greater certainty. The UFMC Act goes furthest in this regard, it provides clear standards for determining the mandatory proper money of a claim and reserves the inherently uncertain feeling-the-loss test for that limited class of cases where its primary rules cannot apply.

The greater problem is that no amount of certainty achieved within any jurisdiction will eliminate the difficulties that exist in the cross-border arena, including international commercial arbitration. Until international action addresses that, traders, litigants and their legal advisors will have to do their best to cope with the confusing situation described in this paper.