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Currency Issues in Multinational Business Reorganizations

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NOTES

CURRENCY ISSUES IN MULTINATIONAL BUSINESS REORGANIZATIONS

I. INTRODUCTION

The corporate world continues to shrink, due at least in part to growth in foreign investment and in the number of multinational corporations. This shrinkage necessarily implies that the demise of any one corporation is increasingly likely to affect creditors outside of the insolvent corporation's home country. As a result, familiarity with or expertise in international insolvencies continues its inevitable move from esoterica to necessity for all firms that serve as counsel to money center financial institutions or other sophisticated players—be they creditors or debtors—in international commerce.

During the last few years, several large-scale international bankruptcies[1] have indicated the need to establish a standard means of approaching the complex problems that arise within this setting.[2] Proof of the commitment to facilitating the process is found in the rapid growth of Insol International, the world-wide group of insolvency practitioners, to upwards of 5,000 members,[3] and by the development of the Model Inter-

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1. In particular, see discussions of *Maxwell Communications, L J Hooker, Maruko, Inc.*, and of lesser notoriety in the United States, the insolvencies within the British insurance industry, *infra* parts III, IV.

2. Richard A. Gitlin & Ronald J. Silverman, *International Insolvency and the Maxwell Communication Corporation Case: One Example of Progress in the 1990's, in* INTERNATIONAL BANKRUPTCIES: DEVELOPING PRACTICAL STRATEGIES 7, 9 (PLI Commercial Law & Practice Course Handbook Series No. 628, 1992) [hereinafter DEVELOPING PRACTICAL STRATEGIES].

3. E. Bruce Leonard & R. Gordon Marantz, *Cross-Border Issues Between the United States and Canada, in* DEVELOPING PRACTICAL STRATEGIES, *supra* note 2, at 439, 470.

national Insolvency Cooperation Act (MIICA)[4] by Subcommittee J[5] of the International Bar Association to remedy the deficiency of a workable international insolvency treaty.[6]

The discussion in much of the literature has emphasized the important issues of comity and jurisdiction over assets and debtors, with particular attention to concepts such as territoriality, universality and the proper mix of the two along the continuum.[7] MIICA focuses on the recognition of foreign representatives of the debtor or estate[8] by courts presiding over proceedings ancillary to cases filed under the bankruptcy codes of other nations which have adopted MIICA.[9] More recently, there has been an increase in the discussion of issues that occur after the court has decided the threshold issues of recognition of foreign representatives or claims.[10]

This paper is intended as an overview of the issues related to choice of currency and rate of exchange, which clearly can have a tremendous impact on the outcome of multinational business reorganization cases. For example, with hundreds of

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4. MODEL INT'L INSOLVENCY COOPERATION ACT (Third Draft 1988).

5. Leonard & Marantz, *supra* note 3, at 467. Committee J is the Committee on Insolvency and Creditors' Rights, and has approximately 1,000 lawyers from over sixty countries. *Id.*

6. See Caryn M. Chittenden, Comment, *After the Fall of Maxwell Communications: Is the Time Right for a Multinational Insolvency Treaty?*, 28 WAKE FOREST L. REV. 161 (1993) for an analysis of the Modern International Insolvency Cooperation Act and earlier attempts at treaties such as the Council of Europe's 1990 Draft (which has met with only marginal success) and the various drafts resulting from the European Community's Draft Conventions on Bankruptcy.

7. Jay Lawrence Westbrook, *Choice of Avoidance Law in Global Insolvencies*, 17 BROOK. J. INT'L L. 499, 513 n.54 (1991); *see also* Charles D. Booth, *Recognition of Foreign Bankruptcies: An Analysis and Critique of the Inconsistent Approaches of United States Courts*, 66 AM. BANKR. L.J. 135 (1992); Stacy A. Morales & Barbara A. Deutsch, *Bankruptcy Code Section 304 and United States Recognition of Foreign Bankruptcies: The Tyranny of Comity*, 39 BUS. LAW. 1573 (1984).

8. MODEL INTERNATIONAL INSOLVENCY COOPERATION ACT off. cmt. (Third Draft 1988) states:

> The ultimate goal of model legislation for international insolvency cooperation is universality which envisions a single administration providing protection of the insolvent debtor's estate from dismemberment, and an equitable distribution of assets among both domestic and foreign creditors in liquidation . . . [M]echanisms must be provided for the recognition of foreign representatives, the stay of local proceedings . . . and other forms of ancillary relief.

9. *Id.* § 1(b), stat. cmts.

10. *See, e.g.*, Daniel M. Glosband & Christopher T. Katucki, *Claims and Priorities in Ancillary Proceedings Under Section 304*, 17 BROOK. J. INT'L L. 477 (1991); Westbrook, *supra* note 7.

millions or billions of dollars, pounds, or marks at stake in the "mega-cases,"[11] a one-percent change in the rate of exchange can mean a difference of tens of millions of the chosen currency to those receiving distributions. Section II of this paper traces the development of the common law related to currency exchanges in the United States, and to a lesser extent Great Britain. The caselaw is generally outside of the business reorganization setting, and provides an interesting background against which one can note the innovation in the results reached in and plans approved by the bankruptcy courts. Section III analyzes the interplay between the choice of currency and conversion rate, and gives an overview of potentially applicable provisions of the United States Bankruptcy Code[12] ("the Code") and the insolvency laws of other nations. Section IV analyzes the currency-related provisions of the Maxwell Scheme of Arrangement and Confirmation Plan, and raises some issues that may occur in future cases. In concluding, Section V will suggest that currency-related issues in multinational insolvency cases should not be left to time-consuming case-by-case negotiation between creditors, but that the court (or joint administrators[13] with the court's approval) should determine early in the (multi-currency) case whether a plan requiring conversion of all funds into one currency is both equitable and feasible, especially where the insolvency involves more than one bankruptcy code and court. This will give creditors some semblance of certainty and predictability in settings where prior cases can be of limited assistance because of the number of potential variations of resolutions.

11. Bankruptcy "mega-cases" are those involving debtors with assets exceeding $100 million. *See In re* Maruko, Inc., 1993 WL 359801 at *12 n.1 (Bankr. S.D. Cal. Sept. 10, 1993).

12. 11 U.S.C. §§ 101, 105(a), 109, 303-305, 361-363, 502, 506, 508, 547-548, 1126 (1988).

13. *See* Debtor's Disclosure Statement in Relation to Plan of Reorganization and Related Scheme of Arrangement for Maxwell Communication Corporation plc, *In re* Maxwell Communication Corp. (Bankr. S.D.N.Y. April 13, 1993) (No. 91 B 15741) [hereinafter Debtor's Disclosure Statement.

II. COMMON LAW APPROACHES TO CURRENCY EXCHANGE RATES[14]

A. No Rendering Judgments in Foreign Currencies

Courts in the United States have historically not rendered judgments for sums of money denominated in currencies other than the United States dollar.[15] Cases early in this century state this conclusorily without citing precedent, probably based on concepts of sovereignty.[16] One court even indicated that courts should either determine the sum payable in American money or decline to render a decree for affirmative relief if such amount was not easily ascertained by the proof offered.[17] More recent cases continue to state this principle in similarly unequivocal language.[18] This same logic can be traced back almost four centuries in England, and was only recently overturned in the landmark House of Lords decision in *Miliangos*

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14. Three articles were extremely helpful in supplying much of the background information which appears in this section: Ronald A. Brand, *Exchange Loss Damages and the Uniform Foreign-Money Claims Act: The Emperor Hasn't All His Clothes*, 23 LAW & POL'Y INT'L BUS. 1 (1991-1992) [hereinafter Brand, *Exchange Loss Damages*]; Ronald A. Brand, *Restructuring the U.S. Approach to Judgments on Foreign Liabilities: Building on the English Experience*, 11 YALE J. INT'L L. 139 (1985) [hereinafter Brand, *Restructuring the U.S. Approach*]; and Fairfax Leary, Jr. & Howard T. Rosen, *The Uniform Foreign-Money Claims Act*, 12 U. PA. J. INT'L BUS. L. 51 (1991). In addition, see F.A. MANN, THE LEGAL ASPECT OF MONEY (4th ed. 1982), an important work which is cited in the above-noted articles as well as the caselaw. For purposes of this paper, I am consciously overlooking Dr. Mann's distinction between "currency of payment" and "currency of account."

15. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 823 reporters' note 1 (1987).

16. Frontera Transp. Co. v. Abaunza, 271 F. 199, 202 (5th Cir. 1921) ("We do not think that the court has the right to render a judgment in Mexican pesos or otherwise than in money of the United States of America."); Liberty Nat'l Bank of N.Y. v. Burr, 270 F. 251, 252 (E.D. Pa. 1921) ("Any judgment entered must be for a sum expressed in the money of account of the United States. The only controversy is over the fixing of this sum.").

17. *Frontera Transp.*, 271 F. at 202.

18. Jamaica Nutrition Holdings, Ltd. v. United Shipping Co., 643 F.2d 376, 379 n.5 (5th Cir. 1981) (citing *Frontera Transp.*); Shaw, Savill, Albion & Co. v. The Fredricksburg, 189 F.2d 952, 954 (2d Cir. 1951) (the rule is "well settled"); B.V. Bureau Wijsmuller v. United States, 487 F. Supp. 156, 176 (S.D.N.Y. 1979), *aff'd*, 633 F.2d 202 (2d Cir. 1980) ("This court, of course, can render judgment only in dollars."); *In re* Good Hope Chem. Corp., 31 B.R. 887, 891 (Bankr. D. Mass. 1983), *aff'd*, 747 F.2d 806 (1st Cir. 1984), *cert. denied*, 471 U.S. 1102 (1985) (a rule "so well entrenched in American law that it is not open to exceptions and requires no further citations [other than *Frontera Transp.*] to authorities"). *See infra* part II.C for a discussion of *In re Good Hope Chem. Corp.*

v. George Frank (Textiles) Ltd.[19] United States courts have yet to line up behind *Miliangos*, in which the House of Lords noted the passing of the days when sterling had a certain, stable value.[20] Academics accept its result and urge the courts to do likewise.[21]

Dubious support for limiting judgments to the forum currency[22] was found in the language of Section 20 of the Coinage Act of 1792, a statute that seems to have another purpose entirely:

> [T]he money of account of the United States shall be expressed in dollars or units, dimes or tenths, cents or hundredths, and mills or thousandths, a dime being the tenth part of a dollar, a mill being the thousandth part of a dollar; and all accounts in the public offices and all proceedings in the courts shall be kept and had in conformity to this regulation.[23]

The court in *Competex, S.A. v. Labow*[24] noted that previous courts and commentators had doubted any Congressional intent to include home-currency judgments within the scope of this law, based upon the 1982 reenactment without the "units of account" passage.[25] Additionally, there were comments by the House Judiciary Committee that the new statute expressed no view on the validity of judgments specifying payment in foreign currencies.[26] The language after "all accounts" was viewed as "surplusage."[27]

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19. [1975] 3 W.L.R 758, 769-770 (cases in the sixteenth and seventeenth century show some flexibility among different types of cases, with later case Manners v. Pearson & Son, [1898] 1 Ch. 581, the first relatively modern case to definitively state the home-currency limitation on judgments). A much earlier statement of the rule is found in Rastell v. Draper, Eng. Rep., vol. 80, p.55 (1605).

20. [1975] 3 W.L.R at 767-68 (In an age of floating currencies, the old principle had "nothing but precedent to commend it.").

21. *See* Brand, *Restructuring the U.S. Approach, supra* note 14, at 176. *See, e.g.,* Leary & Rosen, *The Uniform Foreign-Money Claims Act, supra* note 14.

22. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 823 cmt. b. (1987); Brand, *Restructuring the U.S. Approach, supra* note 14, at 157.

23. *See* 31 U.S.C. § 5101 (1983) (replacing 31 U.S.C. § 371 (1976)) which provides: "United States money is expressed in dollars, dimes or tenths, cents or hundredths, and mills or thousandths. A dime is a tenth of a dollar, a cent is a hundredth of a dollar, and a mill is a thousandth of a dollar." *Id.*

24. 783 F.2d 333 (2d Cir. 1986).

25. *Id.* at 337 n.9.

26. *Id.*

27. Brand, *Restructuring the U.S. Approach, supra* note 14, at 158 (citing H.R.

State law may also play a part in adherence to the home-currency-judgment rule. For example, in *El Universal, Compania Periodista Nacional, S.A. de C.V. v. Phoenician Imports, Inc.*,[28] the court referred to state caselaw from the nineteenth century when determining that a Texas court cannot render a judgment in a foreign currency.[29] A New York statute also provided that "[j]udgments and accounts must be computed in dollars and cents."[30] Although this provision has since been changed, many other states still require judgments to be rendered in dollars.[31]

B. *The New York "Breach Date" Rule*

Generally, *Hoppe v. Russo-Asiatic Bank*[32] is acknowledged as establishing the "breach-date" or "New York" rule.[33] Given the choice between converting French francs on the date of rendering the judgment or the date of the breach, the New York Court of Appeals opted for the latter in a one sentence, per curiam decision.[34] The underlying policy is to "make a plaintiff whole by providing compensation in U.S. dollars for the actual value of the foreign losses as of the date they were sustained."[35] After *Erie v. Tompkins*[36], most federal courts[37]

REP. NO. 651, 97th Cong., 2d Sess. 146-47 (1982), *reprinted in* 1982 U.S.C.C.A.N. 1895, 2041).

28. 802 S.W.2d 799 (Tex. Ct. App. 1990); *see also* Aker Verdal A/S v. Neil F. Lampson, Inc., 828 P.2d 610, 614 (Wash. Ct. App. 1992) (acknowledging that "American courts are unable to render judgments in foreign currency[.]").

29. 802 S.W.2d at 801.

30. N.Y. JUD. LAW § 27(a) (McKinney 1983).

31. *See Brand, Exchange Loss Damages, supra* note 14, at 55 n.234 (listing fifteen such statutes).

32. 138 N.E. 497 (1923).

33. *See, e.g.,* Competex, S.A. v. Labow, 783 F.2d 333, 334 (2d Cir. 1986); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 823 reporters' note 2 (1987).

34. 138 N.E. at 498. The decision reads as follows:

> Held: 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 primarily the plaintiff is entitled to recover a sum expressed in foreign money, in determining the amount of the judgment expressed in our currency the rate of exchange prevailing at the date of the breach of contract or at the date of the commission of the tort is under ordinary circumstances to be applied (citation omitted).

35. Middle E. Banking Co. v. State St. Bank Int'l, 821 F.2d 897, 903 (2d Cir. 1987).

36. 304 U.S. 64 (1938).

37. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 823 reporters'

also had to follow this substantive law[38] when subject matter jurisdiction depended on diversity of citizenship.[39] With very few exceptions,[40] New York courts had adhered to the breach date rule.[41] In 1987, however, in a somewhat confusing provision,[42] New York apparently changed to a judgment date state.

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note 2 (1987) (Most states followed the breach date rule, and therefore, so did most federal courts sitting under diversity jurisdiction.).

38. *See, e.g.*, Vishipco Line v. Chase Manhattan Bank, N.A., 660 F.2d 854, 865-866 (2d Cir. 1981), *cert. denied*, 459 U.S. 976 (1982) (noting that the breach rule is substantive).

39. 28 U.S.C. § 1332 (1988).

40. *See* Fils et Cables D'Acier de Lens v. Midland Metals Corp., 584 F. Supp. 240, 244-45 (S.D.N.Y. 1984) (federal court, asked to confirm an arbitration award, acknowledges sitting with diversity jurisdiction and then mistakenly applies judgment date rule, noting that one owed an obligation in the currency of another country assumes the risk of fluctuation); John S. Metcalf Co. v. Mayer, 213 A.D. 607 (N.Y. App. Div. 1925); Sirie v. Godfrey, 196 A.D. 529 (N.Y. App. Div. 1921).

41. *See, e.g.*, Middle E. Banking v. State St. Bank Int'l, 821 F.2d 897, 903 (2d Cir. 1987) (convert at rate in effect on date when plaintiff honored each withdrawal); Competex, S.A. v. Labow, 783 F.2d 333, 334 (2d Cir. 1986) (grudgingly following New York precedent after enumerating more palatable options); *Vishipco*, 660 F.2d at 865-66. *But cf.* Teca-Print A.G. v. Amacoil Mach., Inc., 525 N.Y.S.2d 535 (N.Y. Sup. Ct. 1988) (even though cause of action accrued prior to 1987, court applied the judgment date rule because (1) since the lifting of the gold standard in 1971, the instability of the United States dollar, relative to the years following the Bretton Woods Conference after World War II, could not be reconciled with strict adherence to the state's breach date rule, and (2) because the primary goal of the New York courts in employing the breach date rule had always been to do equity, not to adhere to a rigid rule).

42. N.Y. JUD. LAW § 27 (McKinney 1987) provides:

> (a) Except as provided in subsection (b) of this section, judgments and accounts must be computed in dollars and cents . . .
> (b) In any case in which the cause of action is based upon an obligation denominated in a currency other than currency of the United States, a court shall render or enter a judgment or decree in the foreign currency of the underlying obligation. Such judgment or decree shall be converted into currency of the United States at the rate of exchange prevailing on the date of entry of the judgment or decree.

With respect to subsection (b), it has been said that "the first sentence is admirable, the last is incomprehensible. Why enter a judgment in the foreign currency and then instantly convert it into domestic money when no payment has been made?" Fairfax Leary, Jr. & Michael Casey, *Fluctuating Currencies: Obligations Payable in Foreign Moneys*, N.Y. B.J., Jan. 1988, at 16, 20.

C. The Federal Rule

The Federal Rule is traced back to two decisions written by Justice Holmes in the 1920s: *Hicks v. Guiness*[43] and *Die Deutsche Bank Filiale Nurnberg v. Humphrey.*[44] In *Hicks*, the Court adopted the breach date approach chosen in New York. The Court noted that the creditor was American, and the debt (in German marks) was to be paid in the United States. "When the contract was broken by failure to pay, the American firm had a claim here, not for the debt, but, at its option, for damages in dollars. It could no longer be compelled to accept marks."[45] It is "fundamental theory" that the liability became fixed at the time of the breach, and the indemnification is for the loss of the expected payment valued as of the time of that breach.[46]

In *Die Deutsche*, the Court distinguished the fact pattern from that in *Hicks*, noting that at the time Humphrey made a demand for his money, the German bank owed him no duty under American law.

> It was not subject to our jurisdiction and the only liability that it incurred by its failure to pay was that which the German law might impose . . . . A suit in this country is based upon an obligation existing under the foreign law at the time when the suit is brought, and the obligation is not enlarged by the fact that the creditor happens to be able to catch his debtor here.[47]

Justice Holmes noted that upon failure to pay, the liability was fixed, by both German law and the terms of the contract, at a certain number of marks, not the then-existing equivalent in any other currency or commodity; this liability could only be satisfied in marks.[48] The extrinsic value of the debt is at all times subject to fluctuation.[49] Under *Die Deutsche*, when en-

43. 269 U.S. 71, 80 (1925).
44. 272 U.S. 517, 518-19 (1926).
45. *Hicks*, 269 U.S. at 80.
46. *Id.*
47. *Die Deutsche*, 272 U.S. at 518-19.
48. *Id.* at 519.
49. *Id.* ("An obligation in terms of the 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."); *see also* Jamaica Nutrition Holdings, Ltd. v. United Shipping Co., 643 F.2d 376, 381 (5th Cir. 1981) (where Jamaican currency had been

forcing an obligation arising from foreign law alone, a court should not enforce an obligation greater than that existing "at the moment when the suit is brought."[50]

The court in *In re Good Hope Chem. Corp.*[51] enumerated the two occasionally conflicting approaches used by courts and commentators in determining when to apply the breach or judgment day rules.[52] The first focuses mechanically on the place of payment, using the judgment day rule when the obligation is payable in a foreign country in that country's currency and using the breach day rule when payment is to be made in the United States.[53] The second approach, which the *Good Hope* court adopted, is as follows:

> The judgment day rule applies only when the obligation arises entirely under foreign law. If, however, at the time of breach the plaintiff has a cause of action arising in this country under American law, the breach day rule applies.[54]

Good Hope was a debtor under Chapter XI of the Bankruptcy Act of 1898, and the breach of contract at issue was a post-petition rejection of an executory contract.[55] The court therefore had to decide if the date of the breach related back by

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devalued after the tort, there was "no reason to place the risk of devaluation on (or to grant the possibility of profit by appreciation to) the injured party"). *But see* The Gylfe v. The Trujillo, 209 F.2d 386 (2d Cir. 1954) (risk of fluctuation falls on the tortfeasor).

50. *Die Deutsche*, 272 U.S. at 520. Although *Die Deutsche* is cited as precedent for the "judgment rule," Justice Holmes in fact appears to have stated that the date of bringing suit was determinative.

Justice Sutherland, writing for a four-Justice dissent in *Die Deutsche*, criticized the majority opinion, which he believed to be based solely upon the fact that the debt was payable in Germany, as being "fallacious, and proceed[ing] from a very narrow view of the principles applied in *Hicks v. Guiness*." *Id.* at 520-21. In fact, it would appear that Justice Holmes relied heavily on the fact that the liability arose under foreign law. In many cases, this distinction may have no practical effect. *See* discussion of RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 144 (1971) *infra* note 59.

51. *In re* Good Hope Chem. Corp., 747 F.2d 806 (1st Cir. 1984).

52. *Id.* at 810.

53. *Id.*

54. *Id.* at 811. The court cited a preponderance of courts and academics favoring this result, and also noted a variation used by two courts wherein the judgment date rule controls a "foreign breach" and the breach date controls a "domestic breach." *Id.*

55. Such rejection was governed at the time by 11 U.S.C. § 103(c) (1976), and is now controlled by 11 U.S.C. § 365 (1988).

statute to the filing date, or if for these purposes, the legal breach took place on the date of the actual breach. In choosing the latter,[56] the court cited the *Hicks* interest in indemnifying the creditor for "his expectancy as of the date his loss became definite."[57]

The *Good Hope* court cited the Restatement (Second) of Conflict of Laws[58] for support. The Restatement (Second) approach[59] is that of *Die Deutsche*, which uses the date of judgment when foreign law governs the cause of action. This represents a move away from strict adherence to the judgment date rule endorsed by the Restatement of Conflict of Laws.[60] This analysis has been endorsed by courts in other circuits and state courts.[61]

D. The Restatement (Third) of Foreign Relations Law § 823

A small number of courts have chosen to follow the flexible (supposedly equitable) approach[62] of the Restatement (Third)

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56. *In re Good Hope*, 747 F.2d at 812.

57. *Id.* (citing *Hicks*, 269 U.S. 71, 80 (1925)).

58. *Id.* In the Citations to the RESTATEMENT SECOND (1971 Appendix), available on Westlaw, there is no mention of the fact that the bankruptcy court and the parties agreed that the conflict was governed by American law. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 144 app. (1971). In describing *Good Hope*, the text incorrectly states that the court held that "where the action arises under foreign law, the conversion was properly calculated as of the time of the breach." *Id.*

59. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 144 (1971):

> Time for Converting Foreign Currency into Local Currency:
> 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.

This Restatement rule is intended to follow the law of the state with the "most significant relationship." The local law of another state should not govern if it does not meet this criteria. Where the foreign state law properly governs, the local forum should seek to give a judgment for damages that the foreign state would, which would be determined by converting the currency as of the date of judgment. The Restatement notes that this rule is necessitated by the requirement that an Anglo-American court render judgments for money damages in local currency. *Id.* cmt. b.

60. RESTATEMENT OF CONFLICT OF LAWS § 424 (1934); *see also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 144 reporters' note (1971).

61. *See* Ingersoll Milling Mach. Co. v. Granger, 833 F.2d 680, 692 (7th Cir. 1987) and cases cited therein.

62. *See* Aker Verdal A/S v. Neil F. Lampson, Inc., 828 P.2d 610, 615-16 (Wash. Ct. App. 1992); El Universal Compania Periodista Nacional, A.A. de C.V. v.

of Foreign Relations Law in determining the proper date for currency conversion.[63] These courts, however, still do not allow judgment or satisfaction in a foreign currency.[64]

In *Aker Verdal A/S v. Lampson*,[65] for example, a Norwegian manufacturer of oil drilling platforms sued the Wisconsin-based manufacturer of a component of a crane which had collapsed in Norway. Plaintiff Aker's damages included its cost to repair the crane and consequential damages resulting from loss of use, all incurred in Norwegian kroner.[66] In awarding Aker damages computed as of the date of judgment, the court declined to follow the "old United State Supreme Court decisions"[67] of Justice Holmes:

> The difficulty with applying this [federal] rule to present-day litigation[ ] is that the distinction made in *Hicks* and *Die Deutsche Bank* is no longer viable. As this case demonstrates, the courts do not always apply the law of the forum in which the tort occurred. Here, the tort occurred in Norway but the court applied Washington law to decide the merits.[68]

The *Aker Verdal* court noted that the court in *Good Hope* admittedly could not put its plaintiff in the same position it would have been in had the contract not been breached, due to the constraints of the Supreme Court precedent.[69]

The *Aker Verdal* court determined that "the Restatement

Phoenician Imports, Inc., 802 S.W.2d 799, 803-04 (Tex. Ct. App. 1990); Teca-Print A.G. v. Amacoil Mach., Inc., 525 N.Y.S.2d 535, 537 (N.Y. Sup. Ct. 1988).

63. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 823 (1987) provides: Judgments on Obligations in Foreign Currency: Law of the United States

> (1) Courts in the United States ordinarily give judgment on causes of action arising in another state, or denominated in a foreign currency, in United States dollars, but they are not precluded from giving judgment in the currency in which the obligation is denominated or the loss was incurred.
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> (2) If, in a case arising out of a foreign currency obligation, the court gives judgment in dollars, the conversion from foreign currency to dollars is to be made at such rate as to make the creditor whole and to avoid rewarding a debtor who has delayed in carrying out the obligation.

64. *See supra* part II.A.

65. 828 P.2d at 610.

66. *Id.* at 610.

67. *Id.* at 614.

68. *Id.* There was no choice of law issue because neither side argued that Norwegian law should be applied. *Id.* at 614 n.5.

69. *Id.* at 615 (citing *In re* Good Hope Chem. Corp., 747 F.2d 806, 812-13 n.8 (1st Cir. 1984).

rule is the only approach which furthers the prevailing principle of tort litigation, i.e., to make the plaintiff whole for the damages suffered at the hands of the defendant."[70] Furthermore, although a court determining the date for currency conversions should take account of the creditor's preference, it still should advance the Restatement's underlying goal of assuring that "neither party receives a windfall or is penalized as a result of currency conversion . . . [T]he date used for conversion should depend on whether the currency of obligation has appreciated or depreciated relative to the dollar."[71] The *El Universal* court, cited with favor in *Aker Verdal*, also protected ("made whole") the Mexican judgment creditor from the depreciation of the Mexican peso by converting the obligation from pesos to dollars exchange rate existing on the date of the breach.[72] The drafters of § 823 would endorse the decision in *Banco Nacional de Cuba v. Chase Manhattan Bank*,[73] where the court (analyzing defendant's counter-claim) declined to follow *Die Deutsche*, despite its applicability, based upon the following circumstances: Federal law prohibited the conversion of Cuban pesos to dollars, and the pesos therefore were without value in this country on the date of the judgment; the absence of the forum-shopping dangers that the judgment rule is intended to prevent; and the likelihood that several more years of appeals would require the conversion on a date "not related to reality."[74]

Federal[75] and state[76] courts criticize § 823 as ironic, because it actually makes it easier for judgment creditors to

70. Aker Verdal v. Neil F. Lampson, 828 P.2d 610, 613 (Wash. Ct. App. 1992). *See generally* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 823, cmt. c & reporters' note 4 (1987).

71. *Aker Verdal*, 828 P.2d at 613. This is directly in conflict with Justice Holmes' view and the holding of Jamaica Nutrition Holdings, Ltd. v. United Shipping Co., Ltd., 643 F.2d 376, 381 (5th Cir. 1981) which is cited in *Aker Verdal*, 828 P.2d at 613, as yielding an inequitable result.

72. *El Universal, Compania Periodista Nacional, S.A. de C.V. v. Phoenician Imprints, Inc.*, 802 S.W.2d 799, 803-04 (Tex. Ct. App. 1990).

73. 505 F. Supp. 412, *modified on other grounds*, 514 F. Supp. 5 (S.D.N.Y. 1980), *modified and aff'd*, 658 F.2d 875 (2d Cir. 1981) (allowing defendant to setoff tangible value of assets *when taken* as part of Cuban revolution, as opposed to going-concern value).

74. *Id.* at 464.

75. Competex, S.A. v. Labow, 783 F.2d 333, 336 n.5 (2d Cir. 1986).

76. Pecaflor Const., Inc. v. Landes, 243 Cal. Rptr. 605, 609-10 (1988) (endorsing the critique of § 823 in *Competex*).

obtain windfalls. In *Competex*, the court stated that the Restatement (Third) actually compares poorly to the disfavored breach-date rule, which grants permission to speculate on currency movement without risk.[77]

E. Rendering Judgments for Damages in Foreign Currencies

The trend in recent cases is to render judgments in foreign currencies. In *Miliangos*,[78] the House of Lords held that British courts need not adhere to the breach-date rule which had long prevented foreign currency judgments. In *In re the Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978*,[79] the language favoring such a policy in the United States was unequivocal:

> Foreign currency awards are rare in federal courts of the United States—this may be the first—because § 20 of the Coinage Act of 1792 [originally was thought to prevent them] .... Judgment in a foreign currency is especially attractive when the commercial activity took place in that currency. 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. Computing an award in cruzeiros and then converting to dollars creates a risk that the parties did not accept—the risk that the judge will select an inapt date or use a currency no one had included in hedging plans. Fights over conversion dates are inevitable whenever judges enter dollar awards to redress injuries denominated in other currencies. Thus the English rule should be used in the United States too—not because the choice-of-law provision in this contract requires it, but because it is the right rule for commerce. The court should enter the judgment in the currency the parties themselves selected for their deal-

77. 783 F.2d at 336. The Second Circuit, applying New York substantive law, said that a judgment debtor could no longer satisfy a judgment overseas where the satisfaction (here, in British pounds) was for less than the equivalent of the dollar-based enforcement judgment, which became the primary judgment when rendered. *Id.* at 341. The creditor could choose which judgment to enforce, as long as there were assets in England upon which to execute. *Id.* at 336. The court noted that currency conversion under § 823 makes the debtor vulnerable to this currency speculation even where the debtor had no assets in England, and therefore was more extreme than the breach-date rule. *Id.*

78. [1975] 3 W.L.R. 758.

79. 954 F.2d 1279 (7th Cir. 1992).

> ings, the currency in which the loss is felt. All problems about conversion dates vanish, and the parties' hedging strategies (or lack thereof) proceed unimpeded.[80]

The Seventh Circuit then crystallized a rule for future cases:

> A conversion problem arises only when the underlying transactions occur in a foreign currency—as for example the French plaintiffs incurred franc-denominated costs to clean up the coast. When all of the transactions occur in dollars, the judgment should be in dollars. Always. When they occur in some other currency, the award should be in that currency. Always. *Certainty* in this practice will enable the parties to hedge against currency risks. Unpredictable currency choices or conversion dates create needless risk. A simple uniform rule that the currency of judgment matches the currency of the transactions will permit the parties to handle the risk themselves. There will still be need for choice when multiple currencies are used in the same transaction[], but it is possible to eliminate the problem for one-currency cases . . . . The highest objective is predictability.[81]

In the case of *In re Maxwell Communications Corp. (MCC)*, the multiple-currency-case distinction was not a problem, as efforts at harmonizing two bankruptcy systems led to a resolution similar to that above.[82] Conversely, the Bank of Credit and Commerce (BCCI) collapse may bear out the Seventh Circuit's caveat.[83]

Other sources, also indicate that other courts in the United States may soon follow the lead of the Seventh Circuit in *Cadiz*. The Restatement (Third) of Foreign Relations Law recognizes that many trading partners of the United States already permit judgments in foreign currencies, and provides

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80. *Id.* at 1328 (citations omitted).

81. *Id.* at 1329 (citations omitted). In the lower court, the decision was equally emphatic:

> It is the conclusion of the court that France suffered its loss in francs, paid its damage claims in francs, proved its case in francs, and has a judgment in francs, however and at whatever expense is required to obtain francs . . . . In summary, the judgment is in francs and Amoco must pay it in francs.

Cadiz, (Part 2 of 2), MDL Docket No. 376, 1988 U.S. Dist. LEXIS 16832, at *310 (N.D. Ill. Jan. 11, 1988), *quoted in* Leary & Rosen, *supra* note 14, at 81.

82. Debtor's Disclosure Statement, *supra* note 13, at 13.

83. *See* discussion of § 304 *infra* part III.A.

that United States courts should not be precluded from doing likewise.[84] This would yield the result favored in *Competex*,[85] in which the Second Circuit added in dicta that such judgments represent the "purest method of preserving the original judgment;"[86] however, a payment-date rule which provides for conversion at the time of execution is its economic equivalent.[87] Even in New York, the legislature revised the law to allow the rendering of judgments in foreign currencies.[88]

Another influential endorsement of the trend is the Uniform Foreign-Money Claims Act[89] (the Act), which is intended to facilitate the judicial determination of claims expressed in foreign currencies.[90] It requires that the United States court enter judgment in the foreign currency, but also permits the debtor's satisfaction of a judgment in dollars equivalent in value to the foreign currency amount on the payment date.[91] The Act fully compensates, or makes whole, the creditor in this manner; the "reasonable expectations" of the parties are met, with the debtor bearing the risks of currency fluctuation.[92] Consistent with this policy, the Act allows for pro rata adjustments for revalorization of currencies.[93]

When determining aliquot shares in the estate of a bankrupt or insolvent debtor, the Act follows United States law, requiring the use of the date that the proceeding was initiated for conversion of foreign money into United States dollars.[94] Although the claim is asserted in the foreign currency, the claimant must prove the United States dollars equivalent as of the date of filing the petition.[95] Another provision of the Act applicable to bankruptcy cases relates to set-off, where only

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84. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 823(1) reporters' note 6 (1987).

85. Competex, S.A. v. Labow, 783 F.2d 333, 337-38 (2d Cir. 1986).

86. *Id.* at 338.

87. *Id.*

88. N.Y. JUD. LAW § 27(b) (McKinney 1987).

89. UNIF. FOREIGN-MONEY CLAIMS ACT 1989, 13 U.L.A. 25 (Supp. 1991), *also reprinted in* Brand, *Exchange Loss Damages, supra* note 14, at 84.

90. *Id.* Prefatory Note & § 7(a).

91. *Id.* Prefatory Note & § 7(b).

92. *Id.* Prefatory Note.

93. *Id.* Prefatory Note & § 12.

94. *Id.* Prefatory Note & § 8. Insolvency or liquidation cases are included in the definition of "Distribution Proceeding." *Id.* § 1(4).

95. *Id.* § 8.

one net sum is to be converted in order to limit the currency risk to the surplus amount.[96]

The Act subordinates itself to forum law regarding interest payments.[97] Specifically, "pre-judgment interest follows the substantive law of the case under conflict of laws rules, both as to the right to recover and the rate."[98] Interest on foreign-money judgments may create theoretical problems under the Act, because applying United States interest rates may result in some over- or undercompensation as compared to what would be awarded in the jurisdiction issuing the foreign money. This problem is believed to be minimized by the existence of fixed statutory rates which are relatively inelastic compared to the value of the respective currencies.[99]

The "Money of the Claim" under the Act is typically, although not necessarily, the currency for payment in the underlying transaction.[100] In the absence of an express agreement between the parties, the court's determination of this currency is based on the currency regularly used between the parties, commonly used by those in the particular international trade or service, or in which the loss was ultimately felt by the claimant.[101]

III. THE BANKRUPTCY CODES

A. *The United States*

1. §§ 502 and 541

The Code does not contain any empowering sections or limitations related to the actual payment of judgments or distributions in currencies other than the United States dollar. Therefore, the initial overview of the provisions of the Code which may impact upon currencies (or vice versa) begins with §§ 502(b)[102] and 541.[103] Section 541 provides the court with jurisdiction over "property of the estate" which includes "all

96. *Id.* § 7(e) & cmt.
97. *Id.* § 9.
98. *Id.* § 9 cmt. 1.
99. *Id.* § 9 cmt. 3.
100. *Id.* § 4(a).
101. *Id.* § 4(a)-(c).
102. 11 U.S.C. § 502(b) (1988).
103. 11 U.S.C. § 541 (1988).

legal or equitable interests of the debtor in property," "wherever located and by whomever held[.]"[104] The section thus purports to create extraterritorial jurisdiction in United States courts.

Section 502, Allowance of claims or interests, provides in relevant part as follows:

> (b) [T]he court, after notice and a hearing, shall determine the amount of such [objected-to] claim[105] in lawful currency of the United States[106] *as of the date of the filing of the petition,* and shall allow such claim in such amount[.][107]

In a classic "early" multinational bankruptcy case, *In re Axona International Credit and Commerce Ltd.,*[108] the court granted the foreign debtor's motion to suspend its involuntary case in the United States,[109] and ordered the turning over of the estate's assets to the Hong Kong liquidators of the debtor. In discussing the issue of comity under the Code, which largely justified the court's decision to abstain under § 305, the court chided Chemical Bank, which claimed that it would be treated unfairly in Hong Kong:

> Chemical has given no authority for its myopic reading of comity. Indeed, it has failed to refer to § 502(b) of the Code which, like Hong Kong law, refers to the date of the entry of the order for relief as the appropriate date for conversion of foreign currency claims . . . . In all instances, these [other foreign] claims have been converted into Hong Kong dollars by application of the appropriate March 4, 1983 exchange rate.[110]

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104. 11 U.S.C. § 541(a) (1988).

105. 28 U.S.C. § 157 (1988) provides that determining the value of a claim is a core proceeding.

106. The reference to the "lawful currency of the United States" was not added until the Bankruptcy Amendments and Federal Judgeship Act of 1984, which indicates a particular Congressional intent to emphasize and utilize United States dollars. *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 445(b)(2), 98 Stat. 333 (1984).

107. 11 U.S.C. § 502(b) (1988) (emphasis added).

108. 88 B.R. 597 (Bankr. S.D.N.Y. 1988), *aff'd,* 115 B.R. 442 (S.D.N.Y. 1990), *appeal dismissed on other grounds,* 924 F.2d 31 (2d Cir. 1991) (Circuit Court without jurisdiction to review order to dismiss under § 305(c)).

109. *See* 11 U.S.C. § 305 (1988).

110. 88 B.R. at 608 n.19.

The conversion of currencies as of the date of filing has long been taken for granted.[111] However, there is an argument that can be made that § 502 should not necessarily be determinative, based upon equitable arguments and statutory construction. For example, a debtor might time his filing to yield inequitable results. Assume a trial in the United States in which the *Hicks* breach date rule would be applied (i.e., the court is going to convert to dollars at the rate in existence on the date of the breach). If the currency has depreciated against the dollar and the debtor files his bankruptcy petition the day before the judgment is rendered, he will benefit from the change in the date of the conversion (as well as from the automatic stay of enforcement).[112] Conversely, if the currency has appreciated against the dollar since the time of the breach, he may elect to delay filing his petition until after the judgment has been set in dollars. As unlikely as this entire scenario might be, someone will take advantage of this opportunity for gamesmanship if the stakes are sufficiently large. While it is doubtful that a court would dismiss this as a bad faith filing (as debtors frequently file bankruptcy petitions to gain the benefits of the stay), the court might remedy this situation through its equitable powers under § 105(a).[113]

Although the cases and commentaries almost unanimously indicate otherwise, statutory construction also may yield a result that differs from the conversion at the date of filing. Section 502 mandates that the court "determine the amount of such claim in lawful currency of the United States as of the date of filing,"[114] but there is no language as to *how* the court is to determine that amount. Specifically, a federal court sitting with federal question jurisdiction should use the federal rule to determine the amount of the claim.[115] The *Die Deut-*

111. Even in cases under the Bankruptcy Act of 1898, the date for converting foreign debt frequently received no more than a footnote. *Compare In re* Equity Funding Corp. of America, 416 F. Supp. 132, 138 n.6 (C.D. Cal. 1975) (debt owed on Swiss franc bonds converted as of date of filing; footnote states that the obligation was converted as of date of filing) *and In re* Good Hope Chem. Corp., 747 F.2d 806, 808 n.4 (1st Cir. 1984) *with In re* Wyse, 340 F.2d 719, 725 (6th Cir. 1965) (because claim was contingent and unliquidated at time of bankruptcy, rate of exchange applied was that existing on date of referee's order allowing claim).

112. 11 U.S.C. § 362 (1988).

113. 11 U.S.C. § 105(a) (1988).

114. 11 U.S.C. § 502(b) (1988).

115. A case under Title 11 is a "classic federal question case," *In re* Axona Int'l

sche approach typically would yield identical results to the current interpretation of § 502. However, the *Hicks* branch of the federal rule, which says that whenever the conversion is actually done, the correct rate at which to convert is that existing at the breach date, could produce dramatically different results, depending on how much the currency fluctuates.

Even given the standard construction of § 502(b), it still is not always determinative. This principle is illustrated in *Good Hope*, in the context of rejecting an executory contract,[116] and in *In re National Paper & Type Company of Puerto Rico.*[117] In the latter case, a judgment creditor sought quantification of its claim based upon a foreign judgment,[118] and the court decided to convert the currency as of the judgment date. The parties acknowledged the propriety of this approach, but could not agree on which of three possible "judgment dates" was correct.[119] The bankruptcy court chose the date on which the foreign judgment was declared valid by the Superior Court of Puerto Rico, reasoning that the constant amount of foreign currency "*must be translated into the money of the forum at the rate of exchange prevailing at the date when the foreign right [to payment] is merged in a judgment of the forum.*"[120]

The precedential effect of *National Paper* is questionable. First, as noted, the parties agreed that the judgment date was the correct date, and therefore did not litigate the issue of breach versus judgment date (although there is no reason to believe that the court would have held differently). Second, the case may be seen as determining the effect on the value of a

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Credit & Commerce Ltd., 88 B.R. 597, 610 n.21 (Bankr. S.D.N.Y. 1988).

116. 747 F.2d 806. *See also supra* text accompanying notes 51-56.

117. 77 B.R. 355 (Bankr. D.P.R. 1987). *National Paper* also cites the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 144 with approval. *Id.* at 357. Puerto Rico is within First Circuit jurisdiction, where *Good Hope* is controlling law.

118. The initial complaint was filed in the Dominican Republic, where the court heard the case in default and awarded the creditor RD$420,000 (Dominican pesos). Six years later, the Superior Court of Puerto Rico declared the Dominican judgment valid and enforceable in Puerto Rico. When the Supreme Court of Puerto Rico refused to review this judgment, National Paper filed its petition. *Id.* at 356-57.

119. *Id.* at 357.

120. *Id.* at 358 (emphasis in original); *see also* Note, *Fluctuating Rates of Exchange and the Conflict of Laws*, 40 HARV. L. REV. 619, 624-25 (1926-27), *cited in National Paper*, 77 B.R. at 357 (suggesting that the place of the breach should dictate which rule to apply). The court in *In re* Good Hope Chem. Corp., 747 F.2d 806, 811 (1st Cir. 1984), expressly rejected this approach.

claim of a pre-petition enforcement judgment. If so, there was little reason to invoke the federal currency conversion rule; the court was valuing this *local-currency* judgment as it would any unsatisfied judgment.

2. § 508

There are few published cases concerning 508,[121] which limits payments to creditors who receive dividends on account of a claim allowed by a court in a foreign proceeding.[122] Such creditors may not receive any payments from the United States court until those of equal priority receive a payment of at least the same amount. Allowing unpaid creditors to "catch up" yields a more equitable distribution of the assets of the entire estate.

A United States bankruptcy court would have to consider Section 508 limitations on distributions in a situation like that found in *In re Maruko, Inc.*, where the court declined to exercise its Section 541 jurisdiction over estate assets located in Japan.[123] Assume a Japanese creditor with an unsecured claim in a United States case against assets in this country, who (after the Chapter 11 filing) receives payments for claims against Japanese assets in Japan through a previously initiated Japanese proceeding,[124] as would be possible in the case of

121. 11 U.S.C. § 508(a) (1988).

122. 11 U.S.C. § 101(23) (1988) provides that "foreign proceedings" are those conducted for the purpose of liquidating an estate, adjusting debts or effecting a reorganization, and include judicial or administrative, and bankruptcy or non-bankruptcy proceedings located in another country where the debtor's domicile, residence, or principal place of business or assets were located at the inception of the proceeding.

123. *See, e.g., In re* Maruko, Inc., 1993 WL 359801 at *1-3 (Bankr. S.D. Cal. Sept. 10, 1993); Order Granting Authority to Administer Only Non-Japanese Assets, Liabilities and Business Operations and Modifying or Deleting Certain Procedural Rules, *In re* Maruko (Bankr. S.D. Cal. 1991) (No. 91-12303-LM11), *reprinted in* DEVELOPING PRACTICAL STRATEGIES, *supra* note 2, at 385.

124. Article 4 of the Corporate Reorganization Law (Law No. 172 of 1952) of Japan gives Japanese courts jurisdiction only over assets located in Japan:

> Reorganization proceedings commenced in Japan shall be effective with respect to only the company's properties existing in Japan.
>
> 2. Reorganization proceedings commenced in a foreign country shall not be effective with respect to properties situated in Japan.
>
> 3. Obligations, of which demand may be made by way of judicial proceedings under the Code of Civil Procedure (Law No. 29 of 1980) shall be deemed to exist in Japan.

Corporate Reorganization Law, No. 172, art. 4 (June 7, 1952), *translated in* 2 a guarantor, for example. These payments will likely subject the creditor to § 508, and the amount received from United States courts will be limited by the value received in Japan. In determining the amount received for § 508 purposes, an important question is whether to convert the Japanese yen paid to the international creditor on the date of filing the petition in the United States, the date of the yen payment, or perhaps even the date that the Chapter 11 plan is confirmed. Of course one practical limitation of this scenario is the speed with which foreign jurisdictions such as Japan function—the frequency with which distributions from foreign cases reach creditors under the Code before such creditors receive payment on their American claims. Section 508 only covers already received distributions from a foreign proceeding; it does not appear to reach payments from a foreign proceeding which are anticipated in the near future.[125]

The potential for Section 508 issues was also present in *In re L J Hooker Corp., Inc.*[126] Hooker primarily was involved in operating, developing and managing real estate and department store chains (such as Bonwit Teller).[127] It was both a parent to its American subsidiaries and an indirect subsidiary of Halwood Corporation, Ltd. (HCL), an Australian corporation which had filed under Australian insolvency laws.[128] In the United States proceedings, Hooker discovered viable claims against its parent and affiliates.[129] Furthermore, if the legal distinction between Hooker and HCL was sufficiently blurred, under the "alter ego" doctrine HCL could be held liable in the United States for all debts incurred by Hooker.[130] Under applicable law, alter ego claims against HCL were property of the

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Japanese Laws in English Version 2 (EHS Law Bulletin Series No. 2350, 1988). This is an example of the territorial approach to recognizing claims and debtors.

125. *See* 3 L. KING, COLLIER ON BANKRUPTCY, ¶ 508.01-508.02 (15th ed. 1993).

126. *In re* L J Hooker Corp., Inc., Nos. 89 B 11986-12000, 12199, 12389, 12696, 12741, 13337, 13340; 90 B 10058, 10374-10395, 10675, 10733, 11869, 11879, 12284, 12841-52 (Bankr. S.D.N.Y. Nov. 15, 1990), *reprinted in* DEVELOPING PRACTICAL STRATEGIES, *supra* note 2, at 183.

127. Application for Order Authorizing and Directing the Debtors to Take Such Action As May Be Necessary or Appropriate to Preserve Claims Against Their Australian Parent and Affiliates at 9, *In re L J Hooker Corp., Inc.*, *reprinted in* DEVELOPING PRACTICAL STRATEGIES, *supra* note 2, at 183, 191.

128. *Id.*

129. *Id.* at 12.

130. *Id.* at 15.

Hooker estate.[131]

Assuming that HCL was the alter ego of Hooker, dual creditors of Hooker and HCL would have to wait until other creditors (those *pari passu* in priority in the American proceeding) received distributions equalling the amount that these dual creditors had already received in Australia. If, as one would expect, the Australian proceeding already had generated Australian dollar distributions, the United States court would have to convert the currency into United States dollars to equalize the payments, as mandated by § 508. Before the distributions from the American proceeding would become fixed, however, interest would accrue on the Australian distributions (held by the dual creditors). Under these circumstances, when the Hooker estate makes distributions, it would be more equitable to convert the Australian dollar distributions plus interest accrued at the date when the calculations are made and the United States dollar distributions become fixed. The exchange rate applicable in 1989, when the Hooker petitions were filed, would bear little relation to the funds in the possession of the dual creditors at this later date.

3. § 1126

Section 1126 of the Code[132] clearly requires consideration of currency conversion rates. In determining whether a class of creditors has accepted a plan by a vote of two-thirds in amount of the claims (and a one-half majority of creditors),[133] the voting power of creditors holding claims in foreign currencies (*viz.* the dollar amount of the claim) is determined as of the date of the filing.[134] These rights are fixed even though the conversion rate may shift during the proceedings.

Currency conversion rates do not affect the voting power within a class of interests,[135] as the equity is simply a function of the number of shares held. However, to the extent that there may be funds remaining to distribute to stockholders based on smaller claim amounts, stockholders are undoubtedly seeking a low conversion rate for the relevant foreign currency.

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131. *Id.* at 16.
132. 11 U.S.C. § 1126(c) (1988).
133. *Id.*
134. 11 U.S.C. § 502 (1988).
135. 11 U.S.C. § 1126(d) (1988).

This would be subject to change if a proponent of a plan that allows equity holders a distribution happens to hold a large foreign-currency-denominated claim.

Other countries' voting provisions roughly approximate § 1126.[136]

4. §§ 361 and 363

Code provisions that surprisingly may involve currency calculations include §§ 361 and 363.[137] To the extent that the dollar volume (in absolute terms or relative to the size of the estate) received by the debtor-in-possession (DIP) or trustee determines whether a § 363 transaction is in the "ordinary course of business," a lower conversion rate for funds received by a foreign buyer may eliminate the need to get court approval for the use, sale, or lease under § 363.[138] In addition, creditors' speculative views on currencies and interest rates may influence whether they will oppose or consent to dispositions of cash collateral (particularly negotiable instruments denominated in foreign currencies).[139]

The degree of adequate protection for secured claims under § 361 also may depend on the current rate of exchange. For example, creditors with security interests in collateral denominated in foreign currencies may also deem themselves inadequately protected as the value of that currency falls. If the value of the underlying currency increases, an undersecured creditor certainly will be better protected but perhaps unable to benefit via an increase in the amount of his secured claim, as determined under § 506.[140]

136. *See supra* text accompanying notes 132-35.

137. 11 U.S.C. §§ 361, 363 (1988).

138. 11 U.S.C. § 363(b), (c) (1988). A possible scenario is where a foreign buyer, without any interest in expanding his business internationally, purchases equipment or inventory from the estate located outside of the United States. If he is only willing to pay in his native currency, then the lower the rate, the less substantial and more ordinary the sale.

139. 11 U.S.C § 363(c)(2) (1988). One would assume that the court does not engage in this speculation, as opposed to speculation in determining whether a confirmation plan is feasible under 11 U.S.C. § 1129(a)(11) (1988).

140. 11 U.S.C. § 506(a) (1988).

5. §§ 547 and 548

The disgorgement of preferential[141] or fraudulent[142] payments denominated in foreign currencies is highly relevant, despite the paucity of caselaw on this aspect of avoidance law. If the DIP or trustee commences an adversary proceeding against a creditor for preferential or fraudulent currency payments to that creditor, it is uncertain what amount such creditor must pay to the estate before the creditor's claim will be allowed under § 502(d).[143] This scenario does not appear to fall within the language of § 502(a) or (b), and the date of filing therefore may not be determinative.

The proper solution requires consideration of the factors discussed in Section II, *supra*. The court may adjudicate that (1) the creditor must return a like amount of the foreign currency actually paid; or (2) the currency amount owed by the creditor will be converted into a dollar amount as of (a) the date of the debtor's improper payment; (b) the date of the bankruptcy petition; or (c) the date when the amount is paid back to the estate.

In light of the rare instances where United States courts have rendered judgments in foreign currencies,[144] disgorgement of dollars under option (2) would appear to be the likely choice. If so, at first glance disgorging the dollar equivalent of the payment *when made by the debtor* would "make the estate whole." Under this scenario, the creditor would return the dollars initially converted to make the currency payment. However, if the debtor originally made the payment from its account denominated in the foreign currency, this policy loses its justification, because such currency would have fluctuated relative to the dollar during the months prepetition. Here, making the (foreign-currency-owning) estate whole requires converting as of the *return-payment date*, a date endorsed in case law and restatements as yielding the economic equivalent of foreign currency payments.[145] Unless § 502(b)

141. 11 U.S.C. § 547 (1988).
142. 11 U.S.C. § 548 (1988).
143. 11 U.S.C. § 502(d) (1988).
144. *See In re* The Oil Spilled by the Amoco Cadiz Off the Coast of France on March 16, 1978, 954 F.2d 1279 (7th Cir. 1992); discussion of *Maxwell Communications Corp.*, (MCC) *infra* part IV.
145. *See* Competex, S.A. v. Labow, 783 F.2d 333, 338 (2d Cir. 1986).

is read expansively to include converting (disgorgement) claims of the estate against creditors, one cannot justify converting the debtor's payment at the date of the petition. The policy behind §§ 547 and 548, returning funds to the estate to ensure an equitable distribution, does not support such a result.

In the context of avoidable transfers, currency conversions can be analogized to the repayment by creditors of prejudgment interest earned on preferences and fraudulent conveyances. Both clearly relate to furthering the underlying goals of equitable distribution and making whole the estate.[146] Furthermore, the analogy holds up well when one examines the different approaches taken by the courts which have dealt with the interest issue. Given the discretionary nature of awards of prejudgment interest on avoidable transfers, it is not surprising that the date from which interest accrues has varied from the date of the avoidable transfer[147] to the date that the demand for repayment is made.[148] This parallels the different options enumerated above for dates for converting foreign currency amounts. What is clear is that a standard approach would save the time and expense of litigating these issues. A simple mechanical rule for avoidable transfers that furthers the goals of the Code would permit interest to accrue from the date of the transfer and utilize that same date for converting the currency when computing the amount to be disgorged.[149]

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146. *See In re* Chase & Sanborn Corp., 127 B.R. 903, 910-12 (Bankr. S.D. Fla. 1991).

147. *Id.* The court's decision was based on its interpretation of § 550(a), which provides that "the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the *value of such property*[.]" 11 U.S.C. § 550(a) (1988) (emphasis added). In an attempt to prevent a windfall of hundreds of thousands of dollars in interest which accrued during the years between the preferential payment and the demand for repayment (or the filing of the petition), the court determined that the value of the funds transferred included $1.75 million in accrued interest. *Id.*

148. *See In re* First Software Corp., 84 B.R. 278, 288 (Bankr. D. Mass. 1988), *aff'd*, 107 B.R. 417 (D. Mass. 1989) (listing cases so holding and noting that if no demand is made, then interest begins to accrue at the petition date); *In re* Independent Clearing House Co., 62 B.R. 118, 129-30 (D. Utah 1986) (also noting that preferences and fraudulent conveyances are treated the same in this context, and that Utah law only requires that the amount of damages be ascertainable from the date from which interest is granted).

149. See discussion *infra* part III.B of the risks associated with mismatching currency and interest rates. Using an improper time period for accruing interest can have a comparable effect.

6. §§ 109, 303 and 304

Sections 109,[150] 303,[151] and 304[152] describe who may be a debtor under the Code, the filing of a full involuntary case by the foreign representative of an estate in a foreign proceeding, and the limitations on cases ancillary to foreign proceedings, respectively. *Axona* and *MCC* are examples of full bankruptcy cases filed under § 303 in the Southern District of New York. In § 304 cases, the United States court is being asked to assist a foreign court, and the remedy is limited to those attainable[153] without resort to the powers granted to trustees in "full-blown" Chapter 11 cases.[154]

Recent events involving insolvent British insurance companies[155] provide an interesting illustration of the interplay be-

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150. 11 U.S.C. § 109 (1988).

151. 11 U.S.C § 303(b)(4) (1988).

152. 11 U.S.C. § 304 (1988). For excerpts of foreign parallels of § 304 dealing with ancillary proceedings and cooperation between courts in different jurisdictions, see Leonard & Marantz, *supra* note 3, at 477-80.

153. 11 U.S.C. § 304(b) (1988) provides that, subject to the great discretion permitted by § 304(c), the court may:

> (1) enjoin the commencement or continuation of-
> (A) any action against-
> (i) a debtor with respect to property involved in [a] foreign proceeding; or
> (ii) such property; or
> (B) the enforcement of any judgment against the debtor with respect to such property, or any act or the commencement or continuation of any judicial proceeding to create or enforce a lien against the property of such estate;
> (2) order turnover of the property of such estate, or the proceeds of such property, to such foreign representative; or
> (3) order other appropriate relief.

154. *See In re* A. Tarricone, Inc., 80 B.R. 21 (Bankr. S.D.N.Y. 1988); *In re* Metzeler, 78 B.R. 674 (Bankr. S.D.N.Y. 1987); Westbrook, *supra* note 7, at 524 n.99.

155. In particular, the 1990 insolvencies of the "Kwelm" group of British insurance companies, consisting of five subsidiaries of London United Investments plc, left $4 billion of assets to be distributed among the holders of $9 billion in insurance claims and debts. United States policyholders account for over eighty percent of the 100,000 creditors. The reorganization plan recently approved by the creditors (still subject to court approval as of this writing) provides for payment of up to forty cents on the dollar, with the final distribution coming at least twenty years in the future. *Reorganization Plan For Kwelm Insurers Is Cleared by Creditors*, WALL ST. J., Nov. 18, 1993, at A18; *see also In re* Kingscroft Ins. Co., 150 B.R. 77, 79 (Bankr. S.D. Fla. 1992) (noting creditor lack of support for various schemes of arrangement and lack of confidence that a scheme ultimately would be consummated, and that over 200 separate lawsuits were pending against the insurers in 43 districts in the United States when the original § 304 petition was granted); Ackman v. The Policyholders Protection Board, [1993] 2 W.L.R. 479;

tween foreign currencies and §§ 109 and 304,[156] and indicate that the requirements of the Code can influence even United Kingdom insolvencies. Foreign-based insurers are not eligible to be Chapter 11 debtors,[157] and must seek protection from United States creditors as limited in § 304(b).[158] If they could file as Chapter 11 debtors, presumably their confirmation plans would all but require dollar-denominated payment of debts in the United States. One can assume that the insurers would prefer to make such payments, thereby avoiding a currency mismatch between claims and distributions.[159] Furthermore, these insurance companies are not eligible for administration, as in *MCC* for example, and liquidation proceedings in the United Kingdom require that all claims be converted to sterling.[160] The combination of these factors yields the conclusion that British insurers who wish to incur the least risk when settling their United States debts are likely to put forward a scheme of arrangement under § 425 of the Companies Act of 1985.[161]

A better known, and in fact the largest case filed under § 304 in United States bankruptcy courts centered around the failure of BCCI.[162] On July 5, 1991, BCCI collapsed and was closed down by regulators in Luxembourg and the Cayman Islands, where the principal BCCI entities were incorporated, as well as in Great Britain and other nations.[163] With branches in approximately seventy countries, BCCI owed debts

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Kingscroft Ins. Co. v. HS Weavers (Underwriting) Agencies, Ltd., [1993] 1 Lloyd's Rep. 187.

156. *See* Paul Evans, *A better deal for creditors?; Scheme of arrangement may offer advantages over insurer liquidation*, BUS. INS., Apr. 12, 1993, at 19, *available in* LEXIS, NEXIS library, CURNWS file.

157. 11 U.S.C. § 109(b)(3) (1988).

158. 11 U.S.C. § 304(b) (1988).

159. Evans, *supra* note 156.

160. *Id.*

161. In addition to more accurately matched currency exposures, a scheme of arrangement also provides creditors with earlier payments than they would have received in a liquidation, lower administrative costs, and potentially greater safety by controlling the diminishing of funds for payment. *Id.*

162. *In re* Smouha, 136 B.R. 921 (Bankr. S.D.N.Y. 1992). Brian Smouha is a court-appointed BCCI representative, charged with "locating and protecting BCCI assets, wherever they are found, for ultimate distribution to all BCCI depositors and creditors" by the courts governing the insolvency proceedings in Luxembourg and the Cayman Islands. *Id.* at 924.

163. *Id.* at 923.

to over a million creditors (largely depositors located exclusively outside the United States) which far exceeded its $20 billion in assets.[164] In early August, the court-appointed BCCI representatives filed a petition in the Bankruptcy Court of the Southern District of New York pursuant to § 304 seeking to shelter over $550 million worth of BCCI assets in the United States for later distribution to BCCI creditors worldwide. The bankruptcy court issued a temporary restraining order enjoining the disposition of the assets and further litigation against BCCI. Three months later, four BCCI entities and several individuals were indicted in the United States District Court for the District of Columbia for "massive" violations of the RICO statutes.[165] Prior to the § 304 petition, New York State also had filed an indictment against BCCI.

The BCCI representatives entered into negotiations with prosecutors to prevent the United States from seizing all BCCI assets as punishment for the RICO violations, thereby ensuring that other creditors would get at least some of these assets. The resulting plea bargain provided for an even division of the assets between the creditors and various governmental entities in the United States.[166] The plea bargain was opposed on the grounds that it "eviscerate[d] the [§ 304 proceeding] and destroys any semblance of equitable distributions to . . . unsecured creditors,"[167] and that the bankruptcy court had the power under § 105 to prevent the consummation of the plea bargain.[168] In affirming Bankruptcy Judge Garrity's Order denying this petition to enjoin the plea bargain and the resulting forfeiture, District Court Judge Keenan noted that § 304 does not provide jurisdiction to enjoin the federal government from entering into such a plea bargain, that the RICO proceed-

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164. *Id.*; Peter Truell, *BCCI Proposal For Settlement Fails Luxembourg Ruling Says Plan Favors Abu Dhabi Over Other Creditors*, WALL ST. J., Oct. 28, 1993, at B5.

165. *Smouha*, 136 B.R. at 923.

166. *Id.*

167. Appellant's Brief at 16, *Smouha*, 136 B.R. at 925.

168. *Id.* Opponents of the plea bargain included the Republic of Panama, the Bank of India, insurer Lloyd's of London, and Nicholas Sturge, the named appellant who had originally filed a RICO petition in Florida. *Id.*; *see also* Sharon Walsh, *Liquidators Enter Guilty Plea for BCCI, Judge Delays Ruling On Accepting Accord*, WASH. POST, Jan. 10, 1992, at C1; Sharon Walsh, *Panama, Bank of India Protest BCCI Plea Challenge to $550 Million Agreement Could Slow Criminal Case*, WASH. POST, Jan. 7, 1992, at C3.

ing was not subject to the temporary restraining order, and that the appellants were not entitled to an injunction preventing the forfeiture.[169] One day after Judge Keenan's decision, the District of Columbia court accepted the guilty pleas of the four corporate defendants and the plea agreement between the United States and BCCI.[170]

After repatriation of one-half of the BCCI assets located in the United States, the court-appointed liquidators still had to negotiate a plan to pay back creditors. Despite a promising start, such a plan recently has hit a major impediment. A British High Court judge approved a plan on June 12, 1992, that gave creditors at least thirty percent of their money back.[171] Despite the opposition of a 7-1 majority of the BCCI U.K. Creditors Committee, the judge approved the plan upon findng it to be the "best option" for creditors. The plan included a $1.5 billion cash infusion from Abu Dhabi, whose government is the majority shareholder of BCCI.[172] The plan was subseqently approved in the Cayman Islands and a lower court in Luxembourg. In late October of 1993, however, a Luxembourg court of appeal suprised the international community by rejecting the proposed settlement, finding that it favored Abu Dhabi, which was to garner fifty percent of the funds intended to compensate creditors worldwide.[173]

Those opposing the decision claim that it will undoubtedly lead to much more time-consuming litigation. They have substantial doubts about whether the creditors will be able to negotiate the same thirty percent agreement or a similar cash infusion from Abu Dhabi.[174] Even if these doubts are removed, it will be extremely difficult to recover the same amount in present value terms.

Although currency issues are not of paramount importance

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169. *Smouha*, 136 B.R. at 926-28.

170. United States v. BCCI Holdings (Lux.), S.A., No. 91-0655, 1992 WL 44321 at *1 (D.D.C. Feb. 10, 1992). Judge Joyce Hens Green continues to preside over disputes regarding property subject to the forfeiture agreement. *See* United States v. BCCI Holdings (Lux.), 833 F. Supp. 32 (D.D.C. 1993); United States v. BCCI Holdings (Lux.), 795 F. Supp. 477 (D.D.C. 1992).

171. *British Court OKs BCCI Settlement Depositors Would Get Back 30% to 40%*, S.F. CHRON., June 13, 1992, at B3.

172. *Id.*

173. Truell, *supra* note 164.

174. *Id.*

in the BCCI case, such issues have an impact on the logistics of the repayment of creditors. One would expect that an equitable BCCI plan would allow for payment to creditors in the currency in which the debt was incurred. This is especially true in the case of the smaller depositors scattered around the globe who were "left holding the bag."[175] These individuals are likely to have no access to the institutional trading markets which will convert funds for them at current market rates; nor do they have any interest in going through such a process. This is in contrast to creditors like the Canadian Deposit Insurance Corporation ("CDIC"), which became a creditor when it made payments to those with deposits at Bank of Credit and Commerce Canada ("BCCC"),[176] and can convert funds for itself.[177]

The liquidator of BCCC announced in late 1991 that prior to an anticipated initial ten-percent distribution to BCCI depositors, foreign currency savings and checking accounts held by Canadians were to be converted into Canadian dollars.[178] From a practical standpoint this makes sense; converting currencies at rates existing on a date close to the payout date is not likely to cause additional injury. Furthermore, forcing a liquidator to make payments in each of the currencies has the potential to be a logistical nightmare. On the other hand, why should same-currency distributions be any more difficult than converting at the appropriate rate each account denominated in a foreign currency? The BCCI collapse certainly illustrates why the court in *Cadiz*[179] singled out multi-currency cases as an exception to its same-currency rule.

175. *Id.* Depositor losses worldwide have been estimated at more than $15 billion. Robert L. Jackson, *BCCI Enters Guilty Plea but Judge Delays Accepting It*, L.A. TIMES, Jan. 10, 1992, at A19.

176. Susan Yellin, *Creditors, Depositors of BCC Canada to Get 10 Cents on the Dollar*, THE GAZETTE (Montreal), Dec. 19, 1991, at F5, *available in* WESTLAW, PAPERSMJ File. The Canadian subsidiary was not found guilty of any wrongdoing, and depositors there were expected to receive up to seventy to eighty percent of their deposits back as a result of CDIC payments and their share of BCCI's distributions. *Id.*

177. Time will indicate whether the cost of converting these funds will be felt later by Canadian depositors in the form of lower interest rates paid (as insurance costs to institutions rise).

178. The CDIC does not insure foreign currency accounts, and Canadian holders of such accounts are at a great disadvantage compared to those holding accounts denominated in Canadian dollars. *Id.*

179. *See supra* part I.E.

An example of a § 304 case involving foreign currency trading is *In re Koreag, Controle et Revision S.A.*[180] In *Koreag*, a Swiss debtor, Mebco Bank, S.A., had been declared insolvent, and the Swiss official liquidator brought an ancillary proceeding to recover dollar payments made by Mebco as part of a currency trade and to obtain an order of attachment against Mebco's dollar account at Swiss Bank-NY. The Second Circuit, reversing the bankruptcy and district courts, held that local law determines whether particular property is part of a debtor's estate for purposes of § 304(b)(2),[181] and that based on both state and federal conflict of laws rules, New York had the superior interest in the case. Therefore, the lower courts should have applied New York State substantive law, namely the Uniform Commercial Code ("UCC"), because foreign currencies are "goods" when they are the *object* and not the *medium* of exchange.[182] The court further held that each party was a buyer and seller in any one trade, that the creditor's timely written demand for the dollars it sold in one trade enabled it to reclaim those dollars,[183] and that the creditor was not entitled to specific performance for delivery of the dollars owed it in a second trade.[184] The creditor was left with an unsecured claim for the unpaid dollars, which it would be required to litigate in the Swiss insolvency proceeding.[185]

Claims resulting from the failure of United States banks and thrifts, whether or not related to currency transactions, are governed primarily by 12 U.S.C. §§ 1441(a) and 1821, which enumerate the powers of the Resolutions Trust Corporation and the Federal Deposit Insurance Corporation, respectively.

7. Currency Trading and § 362

In the case of a Chapter 11 petition, commodity and currency trading partners of the insolvent institution are treated somewhat more favorably than other creditors. The Code ex-

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180. 961 F.2d 341 (2d Cir. 1992).

181. *Id.* at 348-50.

182. *Id.* at 351, 355.

183. *See* 11 U.S.C. § 546(c) (1988); U.C.C. § 2-207 (1993).

184. *See* U.C.C. § 2-711 (1993). The courts found the goods—the unpaid dollars—to be neither "identified" nor "unique." *Koreag*, 961 F.2d at 358.

185. *Id.* at 359.

cepts from the stay provisions the setoff of forward exchange contracts by commodity brokers, forward contract merchants, stockbrokers, financial institutions or securities clearing agencies.[186] In the case of futures contracts or unmatched outright forward contracts (single interbank trades which parallel futures on the exchanges), the opportunity to set off—"close out"—a trade allows the creditor to either permanently fix the loss on the trade or to manage a position in the market. If this choice creates any additional certainty or enables the (knowledgeable) trading partner to mitigate its damages, the provision legitimately can be said to facilitate the functioning of commodity exchanges or the interbank currency market. Factors determining the trading partner's decision to setoff in this case might include the effect on a trader's portfolio of other trades related to or hedged against the trade with the debtor and the profits and losses generated by the particular trade with the debtor. Where there are matched trades (trades having the same currencies and maturity), setoff here is as though out of the currency context: a netting of amounts and recognition of profits or losses which eliminates the need to *and risk of* multiple currency payments.

As seen in *Koreag*, in the case of a "spot" transaction, where the money is a "good" and the UCC applicable, § 546 provides the exclusive remedy. The currency trader has the same right as any other merchant to reclaim the goods sold to the debtor if, within ten days of the debtor's receipt of the goods, the creditor (seller) writes to the debtor demanding the return of the goods.[187]

186. 11 U.S.C. § 362(a), (b)(6) (1988). A forward contract typically is an interest rate speculation, consisting of currency trades in which parties agree to trade the same two currencies against each other at two separate times. The two exchange rates differ by an amount computed to represent then-existing interest rates on the currencies for the duration of the longer trade. The first of these two trades is typically a spot transaction, as in *Koreag*, which has a two-day settlement period and does not fall within § 362(b)(6). The second transaction, standing alone, is a forward outright, which is an obligation to trade at a fixed rate at a fixed date in the future. (Trading partners can execute forward outrights and spot transactions independently.) Exchange futures, like forward contracts, fall within § 362(b)(6).

187. 11 U.S.C. § 546(c) (1988). Under certain conditions, the court has discretion to deny reclamation to a seller of goods. 11 U.S.C. § 546(c)(2) (1988).

B. Foreign Insolvency Codes

Most countries currently have an insolvency provision similar to § 541 of the Code, asserting that its law govern the insolvency.[188] As noted, Japan is a glaring exception to this general rule.[189] Before examining the specific plans and arrangements in *MCC*, where two countries' bankruptcy codes claim jurisdiction over assets "wherever located," it is worthwhile to indicate where the various foreign provisions and their Code parallels differ.

1. Canadian Law

Canadian reorganization law, which governs portions of the Olympia and York case (*O&Y*), is codified in two primary sources, the Companies' Creditors Arrangement Act (CCAA)[190] and the Bankruptcy and Insolvency Act (BIA).[191] As a threshold issue, Canadian law statutorily requires judgments to be rendered in Canadian dollars.[192] Under the BIA,

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188. *See* Westbrook, *supra* note 7, at 520 n.84 (noting Canada, Australia, Sweden, and Germany, to a questionable extent); English Insolvency Act, 1986, ch. 45, § 436 (Eng.) ("property wherever situated"); *see also In re* Brierley, 145 B.R. 151 (Bankr. S.D.N.Y. 1992) (granting § 304 motion of administrator in United Kingdom proceedings related to *Maxwell Communications Corp.*, allowing discovery of individuals in United States in order to help locate assets of debtor in United States belonging to estate).

189. Corporate Reorganization Law, No. 172, art. 4 (June 7, 1952), *translated in* 2 Japanese Laws in English Version 2 (EHS Law Bulletin Series No. 2350, 1988).

190. Companies' Creditors Arrangement Act (CCAA), R.S.C., ch. C-36, (1985), *amended by* ch. 27, § 10 (2d Supp. 1985) (Can.). In February 1993 a Canadian court sanctioned the Plan of Arrangement of the Olympia & York real estate empire of Toronto's Reichmann family, which owned prime holdings in commercial centers in Canada, the United States, England and continental Europe. This is the largest reorganization to date under the CCAA (and perhaps any other code). *See In re* Companies' Creditors Arrangement Act R.S.C. 1985, C. 36 v. Plan of Arrangement of Olympia & York Developments, Ltd., No. 125/92, 1993 Ont. C.J. LEXIS 599 (Ont. Ct.J., Gen. Div. Feb. 24, 1993) (analyzing the Plan of Arrangement under the CCAA criteria for confirmation).

191. Bankruptcy and Insolvency Act (BIA), R.S.C., ch. B-3, (1985) (Can.), *amended by* chs. 1, 27 (1992) (Can.). The new amendments went into effect November 30, 1992. The two acts differ primarily in areas not relating to currencies, *see* Leonard & Marantz, *supra* note 3, at 444-45, among which is that the company filing under the CCAA must have an outstanding issue of secured or unsecured bonds issued under a trust deed. A third source of Canadian law is the Winding Up Act, R.S.C., ch. W-11 (1985).

192. Canada Currency and Exchange Act, R.S.C., ch. C-39, § 11 (1970) (Can.) provides that "any statement as to money or money value in any indictment or

values of claims are fixed at the time of filing a notice of intention to file a proposal. If no notice is filed, then the value is fixed upon the filing of the actual proposal.[193] (Proposals are Canadian parallels to Chapter 11 plans.) The CCAA refers to the BIA's definition of "claim,"[194] and the CCAA claim amount similarly corresponds to that of the BIA.[195] The trustee and superintendent under the BIA serve many of the functions of the trustee in the United States, including the power to summarily dispose of property which is likely to depreciate rapidly.[196]

Voting requirements under both legislative acts are comparable to those seen earlier. Under the CCAA, a plan of arrangement must be accepted by all of the classes of creditors and sanctioned by the court, and within classes by one-half of the creditors present and voting who hold over three-quarters in value of the claims represented.[197] Acceptance under the BIA requires the votes of all classes of unsecured creditors by majority in number voting who hold two-thirds in value of the unsecured claims represented.[198] The recent amendments give secured creditors more of a voice in the voting[199] by providing that they are not bound if the relevant secured class has not accepted by the majorities noted for unsecured creditors. However, secured creditors' votes apparently are still not counted for acceptance purposes.[200] In order to facilitate establishing contingent voting rights for a creditor, the CCAA allows a debtor to admit the amount of a claim without admitting actual liability on the claim.[201]

The CCAA in particular is extremely vague[202] and neces-

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legal proceeding shall be stated in the currency of Canada." For a thorough discussion of Canadian common law relating to foreign currency damages outside of the bankruptcy context, see Salzburger Sparkasse v. Total Plastics Service Inc., [1988] 6 W.W.R. 408.

193. BIA § 62(1.1). BIA § 121 parallels § 502(c) of the Code, providing that provable claims include those that, at the time the bankrupt actually became bankrupt, were contingent or unliquidated and to which the bankrupt may become subject prior to discharge from bankruptcy.

194. CCAA § 12(1).

195. *Id.* § 12(2).

196. BIA § 18.

197. CCAA § 6; *see also* Leonard & Marantz, *supra* note 3, at 445.

198. BIA § 54(2)(d).

199. Leonard & Marantz, *supra* note 3, at 449.

200. BIA § 54(2)(c).

201. CCAA § 12(3).

202. The CCAA contains a grand total of twenty sections and one general rule,

sarily allows the court great discretion in determining whether to sanction the plan. Given the court's discretion, the parties are likely to push harder for a fast, equitable resolution of the debtor's situation.[203]

2. United Kingdom

The main United Kingdom legislation is found in the Insolvency Act 1986, which originally introduced the process of administration.[204] Because *MCC* is under joint administration in the United States and England, the discussion that follows will relate to schemes of arrangement arrived at under this process, pursuant to § 425 of the Companies Act 1985. Administration in the United Kingdom is much like receivership, but provides additional protection for the insolvent company because court supervision makes the suspension of payments more or less absolute.[205]

Under the United Kingdom Insolvency Rules, debts in foreign currencies are converted into sterling at the official exchange rate published by the Bank of England for the date when the company went into liquidation, not the date of the initial filing.[206] However, "the voluntary arrangement and the scheme of arrangement are essentially procedures for a deal with the creditors[,]"[207] and there is no requirement that dividends be paid in sterling.[208] Acceptance of a scheme of arrangement requires a majority in excess of three-quarters in

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while the BIA has over two-hundred-fifty sections and well over one-hundred accompanying rules. *See* CCIA (Table of Contents); BIA.

203. It has been said that:

> The very ambiguity in the CCAA which makes it maddeningly imprecise may actually be its strongest virtue. Faced with the prospect of a court with a virtually unlimited range of powers available to handle a reorganization, a reorganizing business and its major creditors have a real incentive to negotiate a commercially reasonable basis for the reorganization in order to avoid the all-or-nothing choice that is often presented by contested reorganizational proceedings.

Leonard & Marantz, *supra* note 3, at 446.

204. MARK HOMAN, UK INSOLVENCY—A TEN MINUTE SUMMARY FOR AMERICANS (July, 1992) (Adapted from a speech given by Mark Holman of Price Waterhouse, London to a gathering of New York Bankruptcy and Workout specialists.) The author is one of the joint administrators in *MCC*.

205. *Id.*

206. Insolvency Rules, S.I. 1986, No. 1925, Rule 4.91.

207. Homan, *supra* note 204, at 5.

208. *See* Evans, *supra* note 156.

value of the creditors voting at meetings of each class of creditors;[209] this small percentage difference from the Code requirements[210] is relatively insignificant in the currency context. In the extreme, however, these differences, in addition to those associated with claim priority and avoidance rules, could lead to jurisdictions differing "as to what claims will be allowed, what the amount of those claims will be, whether those claims will be allowed to stand and if so, in what order those claims will be paid."[211]

Generally, where a debt in a British proceeding bears interest, the provable debt includes that interest which accrues prior to the date of liquidation.[212] However, the fact that an allowed claim can include accrued interest—in and of itself—does not guarantee that the scheme ultimately approved will not provide for inappropriate interest rates.[213]

Outside of the insolvency setting, the inequitable results caused by a misapplication of interest rates was noted in a comment which followed on the heels of *Miliangos*.[214] It was observed that Miliangos received a £15,000 windfall (*double* the interest) because the Court of Appeals, whose opinion the House of Lords affirmed, applied the British Minimum Lending Rate to the judgment of SF 416,144.20, instead of the interest rate applicable to Swiss francs.[215] The comment also discusses the question of damages in the context of the inverse relation[216] between interest and exchange rates:

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209. Insolvency Rules, S.I. 1986, No. 1925, Rule 1.19.

210. 11 U.S.C. § 1126(c) (1988).

211. Gitlin & Silverman, *supra* note 2, at 11.

212. Insolvency Rules, S.I. 1986, No. 1925, Rule 4.93.

213. THE RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 823 cmt. e (1987), suggests that forum law—including choice of law—determines the date for commencement of interest on an obligation. Where the forum has a statutory rate of interest, the court must apply that rate regardless of the currency in which judgment is rendered. Where no statutory rate exists, the court in its discretion may base the rate on that applicable in the foreign state issuing the currency in which the judgment is rendered. Under this reasoning, a claim based on a judgment in dollars will accrue interest in a British proceeding at the local statutory rate, giving the creditor a windfall relative to the other creditors and the debtor. *Id.*

214. Roger Bowles & Jenny Phillips, Note, *Judgments in Foreign Currencies: An Economist's View*, 39 MOD. L. REV. 196 (1976).

215. *Id.* at 198.

216. Two recent events (or, in one case, non-event) involving the Bundesbank demonstrate the inverse relationship. On October 21, 1993, Germany lowered by one-half percent two key lending rates, the discount rate and the Lombard rate,

> [T]he central banks of countries with depreciating currencies generally use increases in interest rates to attract foreign investment by offsetting to some extent, the expected devaluation on the capital. If devaluation were fully offset by the change in interest rates, the application of the old rules [such as a breach-date rule] would amount to full compensation, since the effect of sterling's depreciation on the value of the debt in a foreign creditor's own currency would then be associated with a (higher) rate of interest payable on it; but in practice the relationship between the exchange rates and interest rates is not so straightforward[.][217]

The comment concluded as follows:

> [J]ustice should be equally concerned to avoid overcompensating the creditor, which appears to be a possible result of the decision, unless the interest rate fixed by the court is that appropriate to the currency in which judgment is given.[218] On remand for the computation of the interest, the Queen's Bench Division remedied the gap in the law by holding that English courts should award interest at the rate at which the currency of judgment could have been borrowed at simple interest in the country issuing it, during the relevant period.[219]

In the context of a bankruptcy proceeding, where post-petition interest accrues on debts incurred and adjudicated payable in a foreign currency, the allowable interest portion of the claim should be determined in light of the rate with the most relevance to that currency's actual value and the harm suffered by the claimant. This rate remains a function of short-

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prompting a two percent decline in the German mark exchange rate against the United States dollar. The Swiss franc declined a similar amount as Switzerland (and other countries) responded by reducing their interest rates to trigger economic growth. Just three months earlier, a Bundesbank declaration of intent *not* to lower German interest rates caused a sharp decline in the rate of exchange of the other European currencies against the mark (as these currencies then were sold to buy marks). Audrey Choi, *Germany Trims Its Key Lending Rates, Triggering Cuts Elsewhere in Europe*, WALL ST. J., Oct. 22, 1993, at A2.

217. Bowles & Phillips, *supra* note 214, at 197-98.

218. *Id.* at 201.

219. Miliangos v. George Frank (Textiles) Ltd. (No. 2), [1976] 3 W.L.R. 477; *see also* THE UNIFORM FOREIGN-MONEY CLAIMS ACT § 9 cmt. 1, 13 U.L.A. 25 (Supp. 1991), *reprinted in* Brand, *Exchange Loss Damages*, *supra* note 14, at 60 (opting instead to follow the United States' rules based on conflict of laws principles).

term interest rates paid on the currency in the country that issues it, or the contractual rate paid pursuant to the financial instrument. Applying this rate to foreign currency debts ensures that these claims accrue interest at rates reflecting market realities. Assuming the inverse relation above, one creditor's accruing of interest on a low-interest/high-value currency obligation at the same rate as another with a claim in a weak currency (perhaps supported by high domestic interest rates) unfairly compounds the distribution to the first creditor. Therefore, if claims accrue interest "across the board" at a local statutory interest rate or some arbitrarily chosen rate, an equitable distribution is merely a fortuitous result.[220]

Two caveats to this idea of "inequitable distributions" should be mentioned at this point. First, if the case is one of short duration and the court renders all judgments in the forum currency, then the exchange rate exposure warrants more concern than the interest rate risk. Second, it is difficult to find inequitable a flat interest rate structure, negotiated by the creditors and used as a means of computing the values of their respective claims, because those harmed have approved it as fair. However, this interest rate analysis should at least be considered by those creditors before approving such a plan or scheme.

IV. Resolving Conflicting Systems and Provisions in a Mega Case

The Maxwell Communications Corporation (*MCC*) proceedings in the United States and the United Kingdom provide a clear example of two courts applying—and creating—a current procedural approach to a multinational proceeding which had the potential for courtroom chaos.[221] When future commentators look back upon the case, it may well replace *Axona* as the "state-of-the-art [international] case in the United States and

220. Statutory interest rates clearly have their place; one should not infer that a forum should be prevented from using its own laws regarding remedies. In the context of foreign-currency obligations, however, the use of such rates is inappropriate.

221. *See In re* Brierley, 145 B.R. 151, 154 (Bankr. S.D.N.Y. 1992) ("Perhaps it is an understatement to label the business holdings of the late Robert Maxwell an international labyrinth.").

perhaps in the world . . . ."[222]

The financial cause of MCC's debt and demise was the rapid expansion between 1986 and 1989,[223] during which time MCC spent $4.2 billion and £0.9 billion on acquisitions, primarily publishing interests in the United States.[224] Bond issues denominated in German marks, Swiss francs, and European Currency Units accounted for a portion of the £0.2 billion of this financing; other foreign-currency denominated debts included the guarantee of debentures issued by a Canadian subsidiary in the amount of C$100 million.[225] Approximately one-third of the total financing came from loans.[226] Over the period, MCC reported a four-fold increase in operating profits, from £67 million to £280 million.[227]

MCC could not service and repay the debt it had incurred, largely due to the acquisition of Macmillan, Inc. in late 1988 for approximately $2.6 billion.[228] From 1989 forward until its failure, MCC divested itself of $1.3 billion and £1.1 billion to cover the debt. This amount includes sales of £400 million to what has become known as the private side,[229] which consists of those companies owned by the Maxwell family.[230] Despite such large divestitures, a "Jumbo Bank Facility" to consolidate the many outstanding loans (in an amount of over $2 billion), and cash raised through a subordinated Swiss franc convertible bond issue, MCC still required further dispositions of its component corporations to meet its debt service.[231]

Prior to Robert Maxwell's death, there were plans to remove him from the chairmanship of MCC.[232] After his death was confirmed on November 6, 1991, the share price fell dramatically; his sons resigned from their directorships; and re-

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222. Westbrook, *supra* note 7, at 523.

223. Debtor's Disclosure Statement, *supra* note 13, at 13.

224. *Id.* at 13-14.

225. *Id.* at 14. Dollar denominated unsecured claims accounted for sixty-six percent of the class; British pound obligations twenty-four percent; German mark and Canadian dollar obligations three percent each; and ECU and Swiss franc obligations two percent each. *Id.* at 91.

226. *Id.* at 13.

227. *Id.* at 13.

228. *Id.* at 14-15.

229. *Id.* at 15.

230. *In re* Brierley, 145 B.R. 151, 154 (Bankr. S.D.N.Y. 1992).

231. Debtor's Disclosure Statement, *supra* note 13, at 15-16, 20.

232. *Id.* at 16.

ports circulated indicating commingling (or at least indiscrete shifting) of private and public side funds, as well as the diversion of money from the pension funds.[233] On December 16 and 17, 1991, respectively, MCC caused a petition for relief to be filed in the United States and petitioned the English Court for an administration order under the Insolvency Act 1986.[234] By that time, unsecured claims against MCC totalled $3.5 billion.[235] Additionally, there were over four hundred subsidiary companies on the petition date, fifty of which were incorporated in the United States and many of which were investment holding companies.[236]

The Joint Administrators[237] (Administrators) submitted the following documents to the respective courts in 1993:[238] the Debtor's Disclosure Statement, Scheme of Arrangement (Scheme), and Plan of Reorganization (Plan) which contain a number of provisions relating to currencies. The most unusual and important concept contained in the documents was the agreement among creditors to integrate a plan of reorganization and a scheme of arrangement as an attempt to "harmonize" the differences between the two bankruptcy systems.[239] The threshold decision regarding currencies was to pay claims

233. *See* Bishopsgate Inv. Management Ltd. (in provisional liquidation) v. Maxwell, [1992] 2 W.L.R 991.

234. Debtor's Disclosure Statement, *supra* note 13, at 17.

235. *Id.* at 20.

236. *Id.* at 17.

237. See the following documents for descriptions of the roles played by the Joint Administrators and Examiner: The Final Supplemental Order Appointing Examiner and Approving Agreement Between Examiner and Joint Administrators, *In re* Maxwell Communication Corp., No. 91 B 15741 (Bankr. S.D.N.Y Jan. 15, 1992), *reprinted in* DEVELOPING PRACTICAL STRATEGIES, *supra* note 2, at 21-27; The Protocol of January 15, 1992, signed by MCC Examiner Richard Gitlin and Joint Administrator Andrew Mark Homan *reprinted in* DEVELOPING PRACTICAL STRATEGIES, *supra* note 2, at 35-44; Order for Joint Administrators (High Court of Justice, Chancery Division, Companies Court, Dec. 20, 1991), *reprinted in* DEVELOPING PRACTICAL STRATEGIES, *supra* note 2, at 29-34.

238. The Scheme of Arrangement between Maxwell Communications Corporation plc and Its Scheme Creditors [hereinafter Scheme], Exhibit A in the Debtor's Chapter 11 Plan of Reorganization for Maxwell Communication plc as Amended July 13, 1993, *In re* Maxwell Communication Corp. (Bankr. S.D.N.Y. 91 B 15741), [hereinafter Plan].

239. Debtor's Disclosure Statement, *supra* note 13, at 70. The Administrators believed such harmonization preferable to any alternative available under United States or British law. The harmonization "minimiz[ed] duplication and conflict between proceedings in the two jurisdictions and the resulting risk of delay, additional expense and losses in realizations." *Id.* at 7.

in the currencies in which originally denominated, which eliminated the problem of two different dates of conversion mandated by the British and American bankruptcy systems.[240] The Administrators noted that converting claims at two different dates would be particularly difficult because, as of the time of the Debtor's Disclosure Statement, there still was no established date of liquidation or winding-up of the estate.[241] Given this policy of not changing the currency, the Scheme can represent a creditor's distribution as a percentage of MCC's obligation to it.[242] Furthermore, an agreement to leave the currency obligations unchanged is philosophically compatible with the two courts' successful efforts to make the proceedings cohesive.

The decision to make proportional payments without changing the currency follows the wise policies enumerated by the Seventh Circuit in *Cadiz* emphasizing predictability, certainty, and acceptance of risk in commerce.[243] The MCC creditors, who certainly assumed a risk of insolvency, cannot also be said to have intended to take on the risk of exchange rate depreciation caused by this insolvency. The Plan and Scheme, which took 1½ years to generate, still provide some certainty and predictability by allaying fears about damages caused by currency fluctuations during the liquidation period. Hopefully, this predictability will be further enhanced in future cases involving foreign currencies by encouraging agreements among the creditors regarding the currency of payment as soon as the creditors have a general idea about the magnitude of the claims in the various currencies. (Perhaps the success of the *MCC* court with such an agreement can be emphasized to future creditors' committees.) Hedging against currency fluctuations can be costly in absolute amounts, although there are large potential gains from risking only five percent of one's expected distribution on a foreign currency option.[244] It obvious-

240. Scheme, *supra* note 238, at 5. Allowed United States priority claims are still payable in dollars only.

241. Debtor's Disclosure Statement, *supra* note 13, at 71.

242. Scheme, *supra* note 238, at 5.

243. *See In re* The Oil Spilled by the Amoco Cadiz Off the Coast of France on March 16, 1978, 954 F.2d 1279 (7th Cir. 1992).

244. The following are approximations of foreign exchange option prices for at-the-money spot options (i.e., options with a strike price equal to the current exchange rate) based upon market interbank market prices existing on Sept. 24,

ly is in the creditors' own interest to know whether they need to pursue an appropriate foreign exchange transaction to protect against an exchange-rate-generated depreciation in the value of the projected distribution.

The *MCC* Plan and Scheme force the debtor to move cash into various accounts to maintain sufficient balances in the appropriate foreign currencies. Theoretically at least, this conforms with the recommendations of the Uniform Foreign-Money Claims Act and those cases putting the risk of currency fluctuations on the judgment debtor.[245] If MCC had insufficient funds in francs, for example, it would have to sell dollars or British pounds to purchase them. Outside of bankruptcy, MCC would be the party at risk of currency fluctuations; in the bankruptcy context, of course, everything that places risk on the estate does likewise to creditors. (There may also be a risk of increased taxes payable by the estate, because of potential

1993. Volatility indices ("Vol.") are the means by which prices are quoted in the interbank market, and represent traders' current expectations of the movement of the exchange rate around the strike price over the duration of the option. Forward points ("Fwds") represent the interest rate differentials on deposits in the currencies over the duration of the option. The 1½ years taken to complete the Plan and Scheme were determinative in choosing option maturities.

Creditors would buy currency calls because a call option provides the right to buy the currency at a pre-specified price against some other base. If creditors are not entitled to payment in the currency of the obligation and instead are paid in the forum currency (in this example, dollars), they would have to sell these dollars back to buy currency. A call option therefore "locks in" the rate at which the creditor can sell back the dollars and receive the currency which was the medium of exchange.

It is assumed that the creditor will pay for the option in the currency in which its obligation is due.

German Mark Calls:

Spot rate 1.6475 DM/US $.

Maturity	*Fwds*	*Vol.*	*Price*	*Cost per DM 1,000,000 hedged*
6 mo.	252	12.8	2.82%	(DM) 28,200
12 mo.	395	12.75	3.82%	38,200
24 mo.	540	12.5	5.07%	50,700

British Pound Calls:

Spot rate 1.5050 US $/£

Maturity	*Fwds*	*Vol.*	*Price*	*Cost per £ 1,000,000 hedged*
6 mo.	-177	13.95	3.28%	(£) 32,800
12 mo.	-308	13.5	4.23%	42,300
24 mo.	-545	13.25	5.255%	52,550

Telephone Interview with JScott Kerbel, Broker, Foreign Exchange Options Department, Tullets and Tokyo Forex (Sept. 24, 1993). Options priced on the Foreign Exchange Nuclear Interplanetary Computer System, ©1985-1991, Astrogamma, Inc.

245. *See supra* text accompanying notes 89-98.

tax ramifications of the required currency transactions and the interest received on the currency holdings.)[246] The Administrators are to be commended for stipulating that they intend to hold cash balances in currencies in proportions approximating projected payments to creditors (including disputed claims) at a particular time; they also retained the right to manage and re-balance the cash reserves of MCC to respond to future developments (including asset realizations).[247]

For voting purposes only, the foreign-currency-denominated debts were converted into dollars at the exchange rates of December 17, 1991 (the day after the petition date). Use of the United States law for this reason is more convenient and appropriate because the vast majority of the claims against MCC were denominated in dollars.[248]

The Administrators did recognize British law in providing that the amount of each Scheme liability includes exclusively interest accruing at fifteen percent (15%) per year between the Petition and Effective Dates.[249] (The Plan provides that distributions to creditors in the United States are to be made as described in the Scheme.)[250] If there was a subordinated class of creditors which was entitled to a distribution, allowing the higher class this rate of interest on unsecured obligations of MCC would provide a windfall, as such a rate was unattainable on their respective currencies.[251] Moreover, Scheme creditors within the class holding claims which bear high interest rates (such as the Canadian dollar guarantee accruing interest at 11¼%) should be wary of accepting a flat post-petition interest rate of 15%, which somewhat erases the benefits of holding rights in a currency bearing a higher interest rate. These creditors may be undercompensated relative to creditors who hold lower interest obligations. Mismatching the interest rates in

246. Debtor's Disclosure Statement, *supra* note 13, at 103.

247. *Id.* at 78; Scheme, *supra* note 238, at 12.

248. Debtor's Disclosure Statement, *supra* note 13, at 10, 91.

249. Scheme, *supra* note 238, at 7. The effective date is when the British court's order sanctioning the Scheme is delivered to the Registrar of Companies in England and Wales, *id.* at 24, and the United States Court enters its confirmation order, Plan, *supra* note 238, at 17.

250. Plan, *supra* note 238, at 10.

251. It has been noted that the existence of only one class of unsecured creditors entitled to distributions greatly facilitated negotiating the Scheme and Plan. *See The Maxwell Model When Multinational Firms Go Bust*, ECONOMIST, July 24, 1993, at 13.

this way carries the potential of offsetting much of the good achieved by not converting to a base currency.

The Administrators note that "[t]he economic effect of this provision, as between holders of [allowed Scheme claims] who may have different contractual rights to interest, is as if interest had ceased to accrue after the Petition Date."[252] In other words, the claims of these creditors are being increased equally to compensate for opportunity costs lost; what is interest to those outside the class is equal compensation to those within it. Where there is a pretense of paying interest, however, a more equitable distribution scheme would not alter the applicable interest rates on currencies on either an absolute or a relative scale. As noted above and subject to the caveats listed in Section III.B.,[253] a creditor being paid in a foreign currency should seek interest rates related to the currency in which the debt is payable.

In *MCC*, there is no issue about the proper rate to convert the amounts paid by MCC and determined to be preference payments or fraudulent conveyances, for purposes of establishing the amount recoverable from a particular creditor. The importance of correctly computing these funds in a case of this size cannot be overestimated; the Administrators here have gone through thousands of documents to determine the potential recoveries for the estate, finding hundreds of millions in both pounds and dollars to be recovered by the estate.[254] (To indicate the size of these transactions in the Disclosure Statement, the Administrators chose to convert the amounts at issue at £1=$1.4550,[255] but warned that the resulting figures were not damage or recovery estimates.)[256] MCC's fraudulent conveyances to the Private Side alone, the subject of much of the investigation by the Administrators and their staff, yielded a *net* indebtedness of £50 million.[257] Creditors such as Berlitz entered into agreements with the Administrators to lower the amount of their original claim, a result the Administrators

252. Debtor's Disclosure Statement, *supra* note 13, at 71.
253. *See supra* part III.B.
254. Debtor's Disclosure Statement, *supra* note 13, at 43, 50, 53.
255. This was the middle market rate on February 22, 1993, the date chosen as a basis for calculating the indicative amounts in the Debtor's Disclosure Statement. *Id.* at 91.
256. *Id.* at 52-53.
257. *Id.* at 48.

favor,[258] but other actions undertaken here (or by a trustee in future multi-national bankruptcy cases) may require payment back to the estate of amounts denominated in a foreign currency. Hypothetically, if the claims and distributions are to be converted into one currency, there is likely to be a conflict regarding the value initially received from the debtor. Again, such conflict resolution requires the selection of a conversion date for the currency and the problems which normally accompany such selection.[259]

Wisely, the set-off provisions of the Scheme and Plan contain a mechanism for determining set-off amounts for mutual obligations incurred in more than one currency prior to the Effective Date.[260] The general set-off provision is that where mutual debts or credits exist between MCC and a creditor, only the balance shall be treated as allowed for purposes of the Scheme.[261] In the case of claims denominated in different currencies, the mechanism by which the Administrators are to calculate the amount of the set-off is by reference to the middle-market price to buy dollars in the relevant currencies.[262] Interestingly, the Administrators determine these middle-market rates as of the Effective Date, not the date of filing the petition.[263] This is inconsistent with provisions governing voting rights, which fix such rights as of the date of the filing of the petition; however, this inconsistency is unavoidable from a practical standpoint. Without first establishing voting rights, there never will be an Effective Date. Furthermore, setting off at the Effective Date yields benefits identical to those of converting obligations as of the payment date: one achieves equality (between creditors) in the extrinsic value of a currency received on the Effective Date (or a later date of distribution) only when the set-off occurs on the same date that the distri-

258. *Id.* at 50. Berlitz's claim of $129 million was reduced by $58 million (45%).

259. Conversion date options for fraudulent or preference payments are enumerated *supra* in part III.A. p. 21.

260. Scheme, *supra* note 238, at 5-6, 74. The Scheme and Plan do not impair Class 2B of the Plan (allowed set-off claims), who are not affected by the Scheme, and such creditors—with claims approximating $6 million—are conclusively presumed to have accepted the Plan under 11 U.S.C. § 1126(f). *Id.* at 74.

261. *Id.*

262. *Id.* at 6. In the case where one of the claims is denominated in dollars, presumably the price for dollars is 1.00.

263. *Id.*

bution amount becomes fixed. Setting off earlier, at the Petition Date for example, fixes the extrinsic value of the currency of payment at a much earlier date, and is incompatible with leaving unchanged the currency of the obligation.

Notwithstanding any similarities that the Berlitz settlement may have with a set-off of debts, the Scheme establishes that avoidable transfers under either bankruptcy system are *not* to be included within those claims subject to set-off.[264] Avoidable transfers shall be payable to MCC in full.[265]

MCC also had large foreign exchange exposures, real and imaginary.[266] The real trades were unmatched forward contracts with Goldman Sachs and Salomon Forex Inc., maturing shortly after the Petition date, in which MCC exchanged dollars against marks and pounds. Although the investment houses did have the benefit of deciding when to set off, they were left with unsecured claims for the balance against MCC once the contracts matured in January of 1991.[267] (Both creditors' claims were filed in dollars, the currency in which profits on these trades would be recognized.)

Exchange rates may come into play where the activities of the Administrators would normally be governed by § 363 of the Code and require court approval.[268] As a practical matter, there is a small likelihood that a sale by or loan from the Administrators in dollars or another currency is going to be so close in value to a sterling amount which triggers different procedures that the exchange rate becomes an issue. Nevertheless, it would be prudent to set the triggering levels in both British pounds and United States dollars. Alternatively, the Administrators could also determine the date to convert non-sterling payments. One would assume that non-sterling trans-

264. *Id.*

265. *Id.*

266. Debtor's Disclosure Statement, *supra* note 13, at 22. Apparently, the falsified currency transactions were on MCC's books to hide a £36.9 million intercompany transfer from private side funds to repay MCC. *Id.* at 47-48.

267. *Id.*

268. *Id.* at 29; *See also supra* note 237 for listed documents. The Administrators must obtain court approval when they are going to borrow, lend to a subsidiary, or sell shares or an asset in an amount over £25 million. While the Administrators must attempt to get consent from the Examiner for these acts, for amounts between £7 and £25 million, the Examiner is entitled only to prior notice. For sales of assets or shares in amounts under £7 million, the Examiner is entitled to periodic notice.

actions would be converted (to see whose consent is necessary, for example) at the rate existing on the date of the sale or loan; however, the parties should specify beforehand how to handle any uncertainty about conversion dates or sterling equivalents in this § 363 context.

V. CONCLUSION

Prior to *Miliangos*, the legal profession's views regarding judgments in foreign currencies had remained largely unchanged for hundreds of years. In *MCC*, this change in thinking converged with the similarly-recent development of international cooperation in bankruptcy courts. The resulting Scheme and Plan together indicate the dramatic changes over this nineteen-year period.

This paper is only intended as a preliminary overview of currency-related issues in multinational insolvency cases, a starting point for discussion. While resolution of most issues in insolvency proceedings ultimately is the result of compromise, there is an opportunity to decrease this time consuming case-by- case negotiation among creditors themselves and with the debtor. A court can expedite resolution of cross-border insolvencies by determining early in the process whether a plan requiring conversion of all funds into one currency is equitable and feasible, especially where the insolvency involves more than one bankruptcy code and court. Because of the number of potential variations within these complex cases, such determinations will give creditors some semblance of direction, certainty and predictability in a setting where the case law can be of limited assistance.

It appears obvious that same-currency distributions to creditors provide the "most equal" treatment of claims. If there are no currency restrictions involved, the only thing preventing a multi-currency distribution is the ease with which the debtor can move the funds between accounts. Furthermore, the identified provisions within the Code (and their parallels within the respective insolvency codes which interface with currency issues) can be handled more easily when the currency-of-distribution issue is resolved as in *MCC*. Further experience with these cases will lead to a consensus about applicable interest rates.

The willingness to work with creditors and courts across an ocean shown by the *MCC* courts, Administrators, and Examiner have resulted in an agreement that harmonizes systems of law and handles difficult economic issues relatively well. The flexibility of the systems and obvious innovativeness of the courts are a positive change from the regimented rules established under the common law when dealing with foreign currencies.

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