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CONTENTS

Arbitration Award in Dispute over Shipbuilding Agreement for No.S Vessel by M Shipbuilding Company

Claimant/Respondent for Counter Claims
Attorney for the Claimant
Respondent/Claimant for Counter Claims
Representative for the Respondent: Representative director
Attorney for the Respondent

Regarding the dispute, between the above mentioned parties, over the shipbuilding contract for vessel No.S of the Respondent Company, the following arbitrators, appointed according to the Rules of Arbitration of The Japan Shipping Exchange, Inc., have carefully deliberated the dispute and hereby render the following arbitration award.

Main Text

1. It is affirmed that the vessel as described in the attached Catalog (omitted) is a possession of the Claimant/Respondent for Counter Claims (hereinafter "the Claimant").
2. The Respondent/Claimant for Counter Claims (hereinafter "the Respondent") shall deliver to the Claimant the vessel mentioned in the preceding Paragraph.
3. It is affirmed that the Claimant has no obligations to the Respondent regarding the vessel mentioned in the preceding Paragraph.
4. The Respondent shall pay to the Claimant the sum of ¥144,710,000 plus interest at 6% per annum. Interest shall begin to accrue on the ¥106,100,000 portion from March 1, 1991 and on the remaining ¥38,610,000 portion from November 10, 1992. In each case interest shall continue to accrue until payment is completed.
5. All other claims of the Claimant and counter claims of the Respondent are dismissed.
6. The entire ¥3,708,000 cost of arbitration shall be paid by the Respondent. Provided, however, that one half of said sum, or ¥1,854,000, shall be apportioned to the arbitration fees paid already by the Respondent and the remaining ¥1,854,000 to the sum already disbursed by the Claimant as arbitration fees on behalf of the Respondent. The Respondent shall reimburse the Claimant in the sum of ¥1,854,000 by December 10, 1992 for arbitration fees already paid.
7. The Kobe District Court shall have jurisdiction over this Arbitration Award.

Summary of Facts and Points of Dispute

I: Summary of Claims by the Parties

(The Claimant)

1. Same as Item 1 of the Main Text.
2. Same as Item 2 of the Main Text.
3. Same as Item 3 of the Main Text.
4. The Respondent shall pay to the Claimant the sum of ¥355,400,000. In addition, on ¥172,400,000 of the ¥355,400,000 the Respondent shall pay interest at 20% per annum beginning March 1, 1991 and accruing until such date as payment is completed. On the remaining ¥183,000,000 of the ¥355,400,000 the Respondent shall pay interest at 6% per annum beginning on the date that the arbitration award is rendered and accruing until such date as payment is completed.
5. The arbitration costs for the Claims and the Counter Claims shall both be paid by the Respondent (the Claimant for the Counter Claims).

(The Respondent)

1. Item 1 of the Claimant's Claims is affirmed.
2. The rest of the Claimant's Claims are dismissed.
3. The Claimant shall pay to the Respondent the sum of ¥38,771,425 and interest at 6% per annum on this amount for the period from December 11, 1991 until such date as payment is completed.
4. The arbitration costs for the Claims and the Counter Claims shall both be paid by the Claimant.

II: Assertions of the Parties

(The Claimant)

1. The Claimant operates a marine transportation business mainly between Japan and the Republic of Korea, and concluded a shipbuilding contract with the following major provisions for a vessel described in the attached catalog (omitted) (hereinafter referred to as "the Vessel") with the Respondent on June 15, 1990 (hereinafter referred to as "the Agreement").
   (1) Object of the Agreement: Building the Vessel
   (2) Construction cost: ¥390,000,000
   (3) Date of delivery: December 31, 1990
   (4) Method of payment:
   1st installment of ¥54,000,000;
   Upon conclusion of the Contract
   2nd installment of ¥78,000,000;
   On June 30, 1990

3rd installment of ¥78,000,000;

On July 30, 1990

4th installment of ¥78,000,000;

At the time of the launching of the Vessel (a date which was indefinite as at the time the Contract was concluded but which would enable delivery by the end of 1990).

5th installment of ¥102,000,000;

At the time the Vessel is completed and delivered.

(5) Arrears due to the delay in delivery (Price performance penalty)

A sum equivalent to 3/10,000 of the total construction cost per day beginning the day following the 30th day of delay from the agreed date of delivery.

(6) Conditions for termination of the Contract

If delivery is delayed by more than 120 days, the purchaser may either terminate the Contract or accept delivery of the Vessel less the deductions made to the construction price.

(7) Effects of termination of the Agreement

The contractor shall return to the purchaser the money received plus interest on the money at 20% per annum from the date of its receipt.

2. The Claimant paid the following amounts to the Respondent under the Agreement.

(1) June 15, 1990 ¥54,000,000
(¥39,000,000 of which was paid at the time the provisional Contract was concluded on May 30 of the same year.)

(2) June 29, 1990 ¥78,000,000

(3) July 31, 1990 ¥78,000,000

(4) A total of ¥169,100,000 in eight installments during the period from August 10, 1990 to February 15, 1991.

The reason the claimant paid the sum due only upon launching before the launching actually occurred is that the respondent requested same in connection with cash flow difficulties they were experiencing.

3. The Respondent did not observe the agreed delivery date, their construction work was extensively delayed, and they launched the Vessel on April 29, 1991 despite the Claimant's opposition. Even though the Claimant had paid the sum of ¥379,100,000, which is equivalent to over 97% of the construction cost, the Respondent failed to further proceed with the construction work. The Claimant therefore had the Vessel provisionally delivered on December 9, 1991 under the order for provisional disposition dated December 3, 1991, of the Kure Branch of the Hiroshima District Court, and holds the Vessel currently in possession.

4. Completion and delivery of the Vessel could have been made by the end of February,

1991 at the latest if not by the contract date of December 31, 1990. The Respondent thus became tardy in performance on March 1, 1991.

5. Since the Vessel was complete only for the portion equivalent to ¥206,700,000 (or 53% of the contract price) at the time of delivery under the said order for provisional disposition, the Respondent has received from the Claimant an excess payment of ¥172,400,000.
6. Counting from March 1, 1991, the Respondent was more then 120 days late, in delivery of the Vessel. Consequently, the Claimant terminated that portion of the Contract which had not been performed by indicating their intent to do so to the Respondent on or around September 22, 1992.
7. The remaining portion of the work for the Vessel was to be completed by June 30, 1992, and the Claimant would have earned the charter fee of ¥375,000 per day from March 1, 1991 had the Vessel been delivered without delay. Because of the above delay in performance by the Respondent, the Claimant suffered a loss of ¥183,000,000 or ¥375,000 per day of charter fees for 488 days.
8. The Claimant disputes the reasons given by the Respondent in support of the counter claims. The Claimant denies, in particular, the alleged existence of a special provision for reviewing the construction price. The Claimant clearly has no obligations in respect of the Vessel to the Respondent.
9. The Claimant therefore demands that the Respondent deliver the Vessel and affirm the Claimant's ownership of the Vessel and that the Claimant has no obligation regarding the Vessel; return the above mentioned excess payment of ¥172,400,000; pay arrears at 20% per annum, as stated in 1(7) of the assertions, for the period from March 1, 1991 until such date as the overpayment is completely returned; pay the lost profits as mentioned in 7 above; and pay arrears at 6% per annum (the interest rate as provided by Commercial Law) from the day on which the arbitration award for the present case is rendered until such time as payment is completed.

(The Respondent)

1. Items 1 and 2 of the Complaint are admitted. It is pointed out, however, that cancellation of the order by A, a purchaser not a party to this case, for the building of a gravel barge when the barge was partly constructed, led to the conclusion of this Contract between the parties in order to remodel said vessel as requested by the Claimant for registration under the Korean Classification (KR) after delivery; and that the Agreement contained a special provision that the construction price including the cost of remodeling and registration and the delivery date would be subject to revision upon review and consultation at a later date based on the actual costs of construction and the progress of the work.

2. With respect to item 3 of the Complaint, the Respondent admits that the Vessel was launched on April 29, 1991, that the Vessel was provisionally delivered on the date as alleged by the Claimant by the order for provisional disposition, and that the Vessel is currently in possession of the Claimant; the rest of item 3 is denied.
3. All of Items 4 and 5 of the Complaint are denied. The Respondent repeatedly requested consultation under the afore-mentioned special provision regarding construction costs and the delivery date, but the Claimant did not comply with these requests. Therefore, the construction price and the delivery date were not definite at the time the order for provisional disposition was executed for this case, and the Respondent has not ever lapsed into late performance under this Agreement.
4. The Respondent admits receiving an indication of the Claimants intent as mentioned in Item 6 of the Complaint but disputes the efficacy of same.
5. Items 7 and 8 of the Complaint are denied.
6. Prior to the provisional delivery of the Vessel to the Claimant under the order of provisional disposition, the Respondent had completed work on the vessel equivalent to a total of ¥417,871,425 (including the initial price and the cost of remodeling). The Respondent therefore submits as their counter claims a demand for the payment of ¥38,771,425, which is the difference between the construction price already paid and the amount due, and arrears on that amount at 6% per annum for the period from December 11, 1991, which is the day following the day when the possession of the Vessel passed to the Claimant, until such date when the payment is completed, and exercises their right of lien on the Vessel until such amount is paid.

(Points Disputed)

The main points of dispute in this case are as follows.

1. Whether or not the agreement for the construction of the Vessel contained a special provision for revision of the construction price upon review and consultation as alleged by the Respondent.
2. Whether or not the exact time of delivery of the Vessel was as alleged by the Claimant or as alleged by the Respondent.
3. What portions of the Vessel were completed at the time of provisional delivery under the order for provisional disposition.

(Evidence)

As documentary evidence, the Claimant submitted Exhibits A1 through A43 and the Respondents submitted Exhibits B1 through B43 respectively.

Grounds for Judgement

(Findings of Fact regarding Points Disputed and Judgement)

1. Regarding the construction costs

(1) On May 30, 1990, the Claimant and the Respondent prepared and executed a document entitled the Provisional Contract (Exhibit A1) under which it was agreed that for the price of ¥390,000,000 the Respondent would make necessary modifications to a vessel which was then being constructed. Since the general plan attached to the Provisional Agreement carried descriptions of the major items of the Vessel, we find that the overall image of the Vessel which was the object of the Contract had generally been agreed upon.

(2) On June 15, 1990, the Claimant and the Respondent prepared and executed the Shipbuilding Contract for building the Vessel (Exhibit A3 and Exhibit B3), and at the same time made necessary additions and deletions to the Vessel specifications which the Claimant had transmitted by facsimile to the Respondent (Exhibit B4 excepting handwritten notes), and both parties examined and affixed their seals to the said specifications page by page (Exhibit A2).

(3) According to (1) and (2) above, we find that a contract to construct the Vessel for the price of ¥390,000,000 was concluded on June 15, 1990, and that the specifications thereof were as described in Exhibit A2.

(4) Even taking into consideration the circumstances of this case (the remodeling of a gravel barge by adding 4.2m in length, changing the main engine and entering the Vessel into Korean registration) there is insufficient evidence to support the assertion of the Respondent regarding the construction price. It is therefore judged that the assertion of the Respondent concerning construction costs is without grounds and not valid.

2. Timing of delivery of the Vessel

(1) Exhibit A3, which is the Shipbuilding Contract for the Vessel provides in Article 6-1 the time of delivery as "the end of December, 1990", whereas Exhibit B3 which is the same Contract carries the year for the delivery as 1990 but not the date thereof.

(2) Considering the following facts, it is believed that the Vessel could have been completed and delivered at the end of February, 1991; that the contract envisaged at the time of its conclusion the start of construction to be June 26, 1990 and the launching to be the end of October of the same year (Exhibit A4); that construction was actually started as scheduled (the photo attached to Exhibit A35); that the order for the main engine was issued on July 27 of the same year; and that the period of time additionally required to remodel the barge into the cargo ship. Thus, even if the delivery date was not definitely fixed at the time the contract was concluded, it may be inferred that on July 27, 1990, when the order for the main engine was issued, the understanding and recognition of the parties regarding the delivery date was that the delivery would be made at the end

of February, 1991, at the latest. The Respondent's assertions contrary to the above are deemed as being without grounds.

(3) As it is clear that delivery of the Vessel did not take place before the end of February, 1991 as we found above in showing that the Respondent was late in performing the Contract, and that the Claimant had paid the construction price of ¥379,100,000 by February 15, 1991, we have by find that the said lateness in performance was due to a reason attributable to the Respondent. The Respondent is, therefore, obliged to pay the penalty mentioned below as provided by the Contract regarding the lateness in performance after March 1, 1991, the day following the date of delivery.

3. Work completed before execution of the order for provisional disposition and the excess payment

(1) The Claimant asserts that the construction work on the Vessel, completed at the time the delivery was made by execution of the order for provisional disposition on December 9, 1991 (as recognized by the description of Exhibit A19 despite the Respondent's assertion that the date of delivery was December 10 of the same year), was equivalent to ¥206,700,000, and submitted Exhibit A19 (Expert opinion as to the vessel in process) as evidence thereof. According to the personal history (Exhibit A27) of expert B who prepared said Exhibit A19, we find this expert to have had many years' experience in the construction, repair, etc. of vessels and that his expert opinion is reliable. At an ex parte hearing, however, it was revealed that the expert assumed the cost of constructing a new ship, of a class equivalent to that of the Vessel, as ¥600,000,000 and the cost of completing the work which remained unfinished at the above mentioned point in time as ¥183,300,000, and thereby calculated the cost of the completed portion by deducting the above mentioned cost for unfinished work from the agreed vessel price of ¥390,000,000. It then transpires that the ratio of the uncompleted portion to the cost of a newly built vessel would be 30.55% and the ratio of the completed portion 69.45%.

(2) The expert opinion submitted by the Respondent which had been prepared by the Japan Marine Surveyors & Sworn Measures' Association (Exhibit B16) assumed the price of building a new ship of a class equivalent to that of the Vessel as ¥600,000,000 as of September, 1991 and estimated that 70% of the construction work on the Vessel had been completed at that time.

(3) Since the opinions of these two parties are substantially similar, it is inferred that 70% of the construction work to the Vessel had been completed in September, 1991, and that the cost, in terms of the agreed Vessel price, would have been ¥273,000,000. Since hardly any further work was done between the above mentioned point in time and the delivery by the execution of the provisional disposition order, the completed portion of the work at that time can also be deemed reasonably to have been worth ¥273,000,000.

(4) Since there is no dispute between the parties over the payment by the Claimant of

¥379,100,000 as the construction price of the Vessel before February 15, 1991, the Claimant had clearly paid in excess the amount of ¥106,100,000, the difference between the agreed price (of ¥273,000,000) and the above mentioned amount for the completed portion as of December 9, 1991 at the latest.

4. Regarding the counter claims of the Respondent

As mentioned above, the construction price of the Vessel was ¥390,000,000, the delivery date was the end of February, 1991 and the Respondent received an excess payment of ¥106,100,000 for the completed portion of the Vessel at the time of provisional delivery. Thus, the assertions for the counter claims and that for the lien based thereon of the Respondent are all without grounds, and it is reasonable to dismiss all the counter claims of the Respondent.

5. Regarding the claims of the Claimant

(1) Regarding the Claimant's demands for confirmation of the ownership of the Vessel and for confirmation that there was no obligation, because the Respondent recognizes the Claimant's ownership and, as mentioned above, there are no obligations involved, the Claimant's demands would be treated as moot in ordinary civil proceedings. As the present case, however, concerns the request for an arbitration award of the court of last resort, the demand of the Claimant for confirmation of these points should be recognized to prevent any future disputes.

(2) The Claimant then seeks delivery of the Vessel based upon their ownership rights. To date, the Claimant has merely received provisional delivery of same in accordance with the order for provisional disposition from the case between the Claimant and the Respondent, No. (yo) 35 of 1991 of Onomichi Branch of the Hiroshima District Court, which corresponds to this application for the arbitration award. The demand for delivery of the Vessel under this claim is deemed valid and with reasons, and should therefore be recognized.

(3) As for the Claimant's claim for return of the excess payment, the request for the payment of ¥106,100,000 as mentioned above and of arrears at 6% per annum from March 1, 1991 until such date its payment is completed is deemed as being with grounds, but the rest of the demands are dismissed as without grounds.

(4) In addition to the return of the excess payment, the Claimant demands payment of arrears at 20% per annum. This case involves demands, not for the delivery of the Vessel and transfer of its ownership after completion of the contracted work, but for partial cancellation of the Agreement for the uncompleted portion of the work and for acquisition of the ownership of the Vessel citing lateness in performance as the reason therefor. Arrears to be paid additionally with the return of excess payment should reasonably be the amount equal to 3/10,000 per day of the construction price of ¥390,000,000 or ¥117,000 per day in this case as provided in Article 9-2-1 of the

Shipbuilding Agreement. Since the uncompleted portion of the work on the Vessel is 30% and it would normally take 2.5 months or 75 days to complete the work of this volume, according to the general empirical law in shipbuilding, the total amount that the Claimant can reasonably demand would be ¥38,610,000 which is the sum of the above mentioned ¥117,000 multiplied by the number of days or 330 days counting from March 31 of 1991, 30 days after March 1 of the same day to February 22, 1992, 75 days after the delivery was made under the provisional disposition under Article 9-2-1 (Penalty for Delay in Delivery) of the present Agreement and arrears at 6% per annum for the period starting on November 10, 1992, the day the arbitration award is rendered, until the date of complete payment. The additional demands made by the Claimant are allowed up to this limit, and the rest is dismissed.

(5) The Claimant asserts that they would have been able to earn charter fees of ¥375,000 per day from March 1, 1991 had the Respondent delivered the Vessel without delay, and demands compensation of ¥183,000,000 as the expected but lost profits for the period of 488 days from the said date to June 30, 1992 when the Vessel was expected to be completed. The demand and assertions of the Claimant are made in respect of losses suffered under extraordinary circumstances and not ordinary losses under a reasonable cause and effect relationship. Article 9-2-(1) of the Agreement provides that a sum equivalent to 3/10,000 of the construction price per day shall be the damages for lateness in performance. Since this sum was recognized, with limits to a specified period of time in Item (4) above, the Claimant's claim is of a duplicate nature and should be dismissed as not valid and without grounds.

6. Conclusion

As discussed above, the claims of the Claimant are recognized as valid to the extent described in the Main Text and the rest of their claims are dismissed. The claims of the Respondent are all dismissed as without grounds. Considering various facts, it is deemed reasonable that the costs of arbitration in this case should be paid entirely by the Respondent.

The award is rendered as per the Main Text.

Dated this 10th day of November, 1992

The Tokyo Maritime Arbitration Commission of The Japan Shipping Exchange, Inc.

Arbitrator: Masaru OSHIRO (seal)

Arbitrator: Hiroshi HARADA (seal)

Arbitrator: Saburo TONOMURA (seal) ■

I: Case Where A Judgement Allowed Execution in Japan of an Arbitration Award Rendered in China
II: With regard to the above execution judgement, whether it is necessary for the requirements of the Chinese Code of Civil Procedure to be sufficient.

[Case No. Hei 4 (Wa) 8 of the Okayama District Court Regarding Demand for Judgement of Enforcement; Decision dated July 14, 1993 of the Civil Section II; Affirmed (Appeal)]

< Legal Provisions Referred to: >

Regarding I and II

Article 802 of the Code of Civil Procedure

Article 3 of the New York Convention

Article 8-IV of Japan-China Trade Agreement

< Parties >

Plaintiff: 浙江省軽工業品進出口公司

Representative of the above: 周芳根

Attorney for the Plaintiff:

Shizuko SASAKI, Attorney at law

Defendant: Kabushiki Kaisha TAKEYARI

Representative of the above:

Kazuo TAKEYARI, Representative director

Attorney for the Defendant:

Yoshitaka TAKAGI, Attorney at law

[Main Text]

I: The Plaintiff is allowed to effect enforcement against the Defendant of the arbitration award described in the attached sheets rendered on January 30, 1991 by the China International Economic and Trade Arbitration Commission.

II: The Defendant shall pay the cost of proceedings.

III: This Decision may be enforced provisionally.

[Facts]

§I. Judgement sought by the parties

I: The intent of the demand

The same as the Main Text.

II: Response to the demand

1. The demand of the Plaintiff is dismissed.
2. The cost of proceedings shall be borne by the Plaintiff.

§II. Assertions of the Parties

I: The grounds of the demand

1. The Plaintiff is a corporation (business corporation) of the People's Republic of China (hereinafter referred to simply as "China") and the Defendant is a corporation (a stock company) of Japan.
2. On May 12, 1985, the Plaintiff entered into an contract with the Defendant to import the equipment for manufacturing the Defendant's knitted bags, and they agreed that any disputes arising from the above mentioned contract would be resolved by arbitration by the China International Economic and Trade Arbitration Commission (中国国際経済貿易仲裁委員会).
3. A dispute arose regarding performance of the above mentioned contract but an attempt to resolve the dispute by consultation between the parties failed. The Plaintiff therefore filed an application for arbitration with the China International Economic and Trade Arbitration Commission on March 22, 1990 (Case Number (91) Bochuji 貿仲字 No. 0375). On January 30, 1991 the Arbitration Commission rendered an arbitration decision as described on the attached sheets (hereinafter referred to as "the present Arbitration Award") establishing the present Arbitration Award.
4. In addition to the existance of the Agreement Regarding Trade between Japan and the People's Republic of China (the Convention No. 4 of June 15, 1974; hereinafter referred to as "Japan-China Trade Agreement"), the two states are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitration Awards (the Convention No. 10 of July 14, 1961; hereinafter referred to as "New York Convention").
5. The Plaintiff has submitted to this court an original copy of the present Arbitration Award duly legalized according to the New York Convention and a translation into Japanese thereof certified by the consul of the Chinese General Consulate in Osaka.

   The Plaintiff therefore seeks a judgement of enforcement of the present Arbitration Award against the Defendant under the said Agreement and the Convention.

II: Approval/Disapproval of the Grounds of the Demand

1. Ground 1 of the demand is recognized.

2. With respect to ground 3 of the demand, we recognize the fact that on January 30, 1991 the China International Economic and Trade Arbitration Commission rendered the present Arbitration Award in response to the application for arbitration by the parties (Case No. (91) Bochuji No. 0375) and that the same had been served on the Defendant.

III: Assertions of the Defendant

On the following grounds the Defendant asserts that Japan and China should follow the principle of reciprocity regarding the recognition and enforcement of foreign arbitration awards. Japan made a declaration under Article 1-3 of the New York Convention when she joined the same in 1961 limiting her commitment to recognize foreign arbitration awards to those rendered within the territory of Convention member states. China as well made similar reservations when she joined the Convention. Article 7 of the New York Convention provides that it does not affect multi-lateral or bi-lateral agreements regarding recognition and enforcement of foreign arbitration awards concluded between member states. Furthermore, Japan has concluded the Japan-China Trade Agreement with China, and, as clearly indicated in its preamble the Agreement is based on the principle of reciprocity. Viewed from the standpoint of the principle of reciprocity as characterized by the New York Convention and the Japan-China Trade Agreement, the requirements for enforcing a Japanese arbitration award in China and those for enforcing a Chinese arbitration award in Japan should be identical, and if China imposes any restrictions on recognition and enforcement of a Japanese award, then Japan may do the same regarding a Chinese award.

When a party wishes to have a Japanese arbitration award enforced in China, the party files an application therefor with the Chinese People's Court under Article 296 of the Chinese Code of Civil Procedure. Whereas the period for filing such application is six months under Article 219 of the said Code if the parties involved are corporations, the application for the present case was filed after six months had passed from the last day of the performance period and is therefore subject to dismissal under the Chinese Code of Civil Procedure. Viewed from the standpoint of the principle of reciprocity as characterized by the New York Convention and Japan-China Trade Agreement, this application should be dismissed because of the restriction on the period of application for enforcement under the Chinese Code of Civil Procedure.

IV: Counterarguments of the Plaintiff Against the Defendant's Assertions

The present application meets all the requirements of the New York Convention for seeking judgement for the enforcement of an arbitration award. Article 219 of the Chinese Code of Civil Procedure provides rules for enforcing an arbitration award rendered by a Chinese arbitration organ by a Chinese court, and is not applicable to cases where an award rendered by a Chinese arbitration organ is to be enforced by a foreign court or where an

award of a foreign arbitration organ is to be enforced in China. The assertions of the Defendant are thus without grounds.

§III. Evidence < omitted >

[Grounds]

1. There is no dispute between the parties regarding the fact cited in Ground 1 of the Demand, the fact that on January 30, 1991, the China International Economic and Trade Arbitration Commission rendered the present Arbitration Award for the application for arbitration between the Plaintiff and the Defendant (Case Number (91) Bochuji No. 0375), and that the same had been served on the Defendant. According to the evidence <omitted>, the Plaintiff and the Defendant were unable to agree about the facts contained in Grounds 2 and 4 of the Demand or the dispute regarding performance of the Agreement. On March 22, 1990, the Plaintiff applied for arbitration with the China International Economic and Trade Arbitration Commission (Case Number (91) Bochuji No. 0375), and the present decision was rendered establishing the arbitration award.
2. The fact(s) contained in Ground 5 of the Demand are clear to this court.
3. The assertions of the Defendant are now examined.

   As mentioned above, the Japan-China Trade Agreement and the New York Convention are applicable to the recognition and enforcement of the present Arbitration Award (except that, under Article 7-1 of the said Convention with regard to those portions to which the Japan-China Trade Agreement is understood to be applicable preferentially, the Japan-China Trade Agreement shall be applied preferentially over the said Convention, and it is understood that the Code of Civil Procedure shall not be applied to that extent.

   Article 3 of the New York Convention, on the other hand, defines the requirements that would give binding power to an arbitration award, and provides that an award meeting such requirements is to be enforced according to the rules of procedure for the region in which the award is being claimed. Article 8-4 of the Japan-China Trade Agreement provides that the two member countries shall cause a related organ to enforce the award according to the conditions of the law of the country in which the enforcement thereof is sought. In light of the above, it is sufficient that the procedures for recognition and enforcement of foreign arbitration awards comply with the laws of the country in which the award is being claimed under the New York Convention and the Japan-China Trade Agreement, and that these rules do not provide any further standards common to the countries concerned regarding the procedure for enforcing the arbitration award.

   Citing the fact that both Japan and China made declarations under Article 1-3 of the New York Convention and the preamble to the Japan-China Trade Agreement (more concretely the portion reading "trade between the two countries shall be further developed based

on the principles of equality and reciprocity), the Defendant asserts reciprocity of the sort which requires consideration of the rules of the Chinese Code of Civil Procedure related to enforcement of arbitration awards regarding recognition and enforcement of the present Arbitration Award because the requirements for a Japanese arbitration award to be enforced in China and for a Chinese award being enforced in Japan should be identical. However, reciprocity as defined by Article 1-3 of the said Convention is the principle that concerns the scope of arbitration awards to which the New York Convention is applied, and said Convention defines that as long as the New York Convention is applied, its enforcement should comply only with the procedural rules of the region in which the award is claimed. There are no other provisions which may constitute the grounds for reciprocity as asserted by the Defendant.

The preamble to the China-Japan Trade Agreement goes no further then establishing the doctrines of equality and reciprocity as the underlying principles of the Agreement. What is specifically meant by equality and reciprocity is defined in Article 1 et seq. thereof. Since Article 8-4 of the Agreement provides as per the above, it is clear that the Convention has not adopted the principle of reciprocity with regard to specific enforcement procedures. We cannot adopt the Defendant's unique assertions.

Thus, it is deemed reasonable to allow enforcement of the present Arbitration Award under the Japanese Law as the Award is valid in the light of the New York Convention and the Japan-China Trade Agreement.

4. As discussed above, we hereby acknowledge the grounds for the Plaintiff's demand. We adjudge, as per the main text, that with respect to the burden of litigation costs and the declaration of provisional execution, Article 89 of the Code of Civil Procedure applies to the former and Article 196-1 of said Code applies to the latter.

Presiding Judge : Yoshiko MASAZUMI
Judge : Kouichi IKEDA
Judge : Kunihiko ENDO ■

Attached Sheets:

Decision (91) Bochuji No. 0375

The China International Economic and Trade Arbitration Commission (hereinafter referred to as the Arbitration Commission) accepted this case in accordance with the arbitration clauses of the Contract dated May 12, 1985 for the importation of equipment for manufacturing knitted bags entered by the Claimant 浙江省工業品進出口公司 and the Respondents Kabushiki Kaisha Takeyari and the written application for arbitration over a dispute regarding the performance of the knitted bag manufacturing equipment filed on March 22, 1990 by the Claimant(s).

The Arbitration Commission organized a panel of arbitrators under the arbitration rules

by appointing 費宗禕 as a chief arbitrator and 唐厚志 and 王益英 as arbitrators, and examined this case. The Arbitration Panel examined the written application and the evidence filed by the Claimant and the written responses and evidence filed by the Respondent, and held a hearing on September 27 and 28, 1990 in Beijing. Both the Claimant and the Respondent appeared at the hearing, presented statements and arguments, and answered questions from the panel regarding the case. The Claimant and the Respondent thereafter submitted supplementary materials in compliance with the demand of the Panel.

The Panel acting as a collegiate court rendered this award.

The opinions and award of the Panel of Arbitrators are as follows.

1. Content of the case < omitted >
2. Opinion of the Panel
3. Award

(1) The Respondent shall pay ¥24,743,090 to the Claimant 浙江省工業品進出口公司 by March 31, 1991. The Respondent shall also pay interest of 8% per annum for the period from May 11, 1987 until the date when the payment is actually made.

(2) As compensation for the TOYOTA HIACE 12 seater microbus, which was not provided, the Respondent shall pay Chinese Yuan 200,000 to the Claimant by March 31, 1991. The said sum shall be paid by converting to Japanese yen at the rate of exchange prevailing on the date of payment.

(3) The Respondent shall supply the Claimant with 10 tons of PP material free of charge by March 31, 1991. Failing to do so, the Respondent shall pay ¥1,301,500 to the Claimant as compensation by March 31, 1991.

(4) All the other claims of the Claimant are dismissed.

(5) The cost of arbitration of Chinese Yuan 28,452.58 shall be paid by the Respondent. The Claimant has already paid Chinese Yuan 28,452.58 to the Arbitration Commission. The Respondent shall reimburse the Claimant's Chinese Yuan 28,452.58 expense by paying the Claimant Chinese Yuan 28,452.58 by March 31, 1991.

(6) For the sums mentioned in Items 2, 3 and 5 above, interest shall be paid at 0.7% per month if the Respondent defaults payment. ■

Conversion Dates and Interest Rates in Collision, Cargo Claims and Marine Insurance Cases

Robert MARGOLIS*

The English rules regarding conversion dates and interest rates in maritime and other cases have changed dramatically since the seminal decision of the House of Lords in *Miliangos* v. *George Frank (Textiles) Ltd.* [1976] 1 Lloyd's Rep. 201. The reasons for this change of approach are perhaps fivefold.

First, not only does a pound sterling buy less than it once did, whether it be gold, bread or fuel oil, but in the past four decades the value of the pound has often declined (or at least fluctuated) against other currencies over relatively short periods of time, such that, for example, a pound lost at the time of breach is often worth more in relation to a foreign currency than a pound awarded at the time of judgment.[1]

Second, international contracts for shipping services and commodities are nearly always expressed in dollars, not sterling.[2]

Third, the old English rule that an English court could only give judgment in sterling converted from the foreign currency at the rate prevailing at the date of the wrong made English jurisdiction increasingly unattractive to businessmen.[3]

Fourth, English courts evolved a procedure in which orders for payment of foreign currency debts in the foreign currency could be made.[4]

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1 According to Lord Wilberforce in the *Miliangos* case at 206-207: "The situation as regards currency stability has substantially changed even since 1961. Instead of the main world currencies being fixed and fairly stable in value, subject to the risk of periodic re- or de- valuations, many of them are now 'floating' i.e., they have no fixed exchange value even from day to day. This is true of sterling. This means that, instead of a situation in which changes of relative value occurring between the 'breach date' and the date of judgment or payment being the exception, so that a rule which did not provide for this case could be generally fair, this situation is now the rule. So the search for a formula to deal with it becomes urgent in the interest of justice".

2 See *The Texaco Melbourne* [1994] 1 Lloyd's Rep. 473 (H.L.) at 477.

3 *Ibid.* London Arbitrators had for some time before the judicial abandonment of the breach date conversion rule been making awards in foreign currencies, a practice which was upheld by the Court of Appeal in *Jugoslavenska Oceanska Plovidba* v. *Castle Investment Co. Inc.* [1973] 2 Lloyd's Rep. 1.

4 In *Schorsch Meier J.m.b.H.* v. *Hennin* [1975] 1 Lloyd's Rep. 1 (C.A.), Lord Denning at 4 gave his approval to the form: "It is adjudged ... that the defendant do pay to the plaintiff [the sum in foreign currency] or the sterling equivalent at the time of payment".

Fifth, the English courts have come to understand the connection between changes in the relative value of money and national interest rates.

In *Miliangos* v. *George Frank (Textiles) Ltd.* the House of Lords reversed its own earlier decisions and set the stage for the total abolition of the so-called breach date conversion rule which had governed the way foreign currency claims had been dealt with by the English courts for hundreds of years. The abandonment of the breach date conversion rule has significant consequences in collision, marine cargo and marine insurance claims.

ABOLITION OF THE BREACH DATE RULE

Prior to the *Miliangos* v. *George Frank (Textiles) Ltd.* decision, the rule in both tort[5] and contract[6] was that judgment in an English court could only be given in sterling converted from the foreign currency at the rate prevailing at the date of the breach, with pre-judgment interest on the resultant sum at the rate provided by English law.

The Volturna

In *The Volturna* (1921) 8 Ll. L. Rep. 449, the leading case on the breach date rule, the steamship "CELIA" collided with the steamship "VOLTURNA", then under charter to the Italian Ministry of Marine, and as a result of her detention during repairs the owners of "VOLTURNA" suffered loss of hire in the amount of Italian lire 304,418. The question arose as to what date the rate of exchange was to be fixed in order that damages which were originally assessed in lire should be converted into sterling.

The vessel had been detained for temporary repairs for the period 25 to 30 December, 1917 and 47,372 lire were deducted from hire for that period. The vessel was subsequently detained for permanent repairs from 25 January to 18 February 1918, and 257,046 lire were deducted from hire for this period.

The rate of exchange was 39.90 lire to the pound on 30 December 1917 and 41.30 lire to the pound on 18 February 1918. By the date of judgment the rate had fallen to 66.25 lire to the pound. Thus, if the correct date for conversion was the date of the breach (or rather, the date the loss was incurred) judgment would be in the amount of roughly £7,411 plus pre-judgment interest, whereas if conversion were at the date of judgment the award would be roughly £4,495 plus pre-judgment interest.

It was held by the House of Lords that the proper date for converting lire to sterling was the date of the breach. The rational for this rule was given by Lord Wrenbury at 119:

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5 *The Volturno* (1921) 8 Ll. L. Rep. 449 (H.L.)

6 *Di Ferdinando* v. *Simon, Smits & Company Ltd.* [1920] K.B. 409 (C.A.)

> There is no difference of principle arising from the fact that the loss is of lire as distinguished from, say, cows. If the plaintiff had been damaged by the defendant tortiously depriving him of 3 cows, the judgment would be: Declare that on Jan. 1 the plaintiff suffered by the defendant's tort a loss of 3 cows. Declare that on Jan. 1 the plaintiff would have been entitled to go into the market and buy three similar cows and charge the defendant with the price. Declare that the cost would have been £150. Adjudged that the plaintiff recover from the defendant £150. It would be *nihil ad rem* to say that in July similar cows would have cost in the market £300. The defendant is not bound to supply the plaintiff with the cows. He is liable to pay him damages for having on Jan. 1 deprived him of cows. The plaintiff may be going out of farming and may not want cows, or, when judgment is given he may have enough already. The plaintiff is not bound to take cows and the defendant is not bound to supply them. The defendant is liable to pay the plaintiff damages, that is to say, money to some amount for the loss of the cows; the only question is, how much? The answer is, such sum as represents the market value at the date of the tort of the goods of which the plaintiff was tortiously deprived.

Two remarks may be made regarding *The Volturna* decision. First, the decision benefited the plaintiff, who was awarded a sum in sterling (7,411[7]) which would buy him more lire (490,979) at current exchange rates (66.25:1) than he lost (304,418). That is, the breach date conversion rule favoured the foreign plaintiff whose currency was in a period of decline against sterling.

The second thing to note about *The Volturno* is that there was very little discussion about the award of pre-judgment interest. In particular, there was no consideration as to whether, had conversion been ordered at the rate prevailing at the date of judgment, pre-judgment interest at the rate appropriate to Italian lire might have been payable.

Miliangos v. *George Frank (Textiles) Ltd.*

The breach date conversion rule, confirmed in *The Volturno*, had been followed in England for 350 years[8] until the decision of the House of Lords in *Miliangos* v. *George*

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7 IL47,572 ÷ 39.90 + IL257,046 ÷ 41.30 = £1187.268 + £6223.874 = about £7,411.

8 The figure 350 years was adopted by the trial judge in *Miliangos* v. *George Frank (Textiles) Ltd.* and referred to by Lord Wilberforce in that case at [1976] 1 Lloyd's Rep. 201, 204. Most recently, the House of Lords in *In re United Railways of Havana* v. *Regla Warehouses* [1961] A.C. 1007, had reaffirmed the rule that on a foreign currency claim an English court can only give a judgment in sterling, to which the foreign currency must be converted as at the date the debt became due. Cf. *Schorsch Meier G.m.b.H.* v. Hennin [1975] 1 Lloyd's Rep. 1, where the Court of Appeal (Lord Denning giving the leading judgment) held that an English court could give a money judgment in a foreign currency when that currency was the currency of the contract.

Frank (Textiles) Ltd. The facts of the *Miliangos* case were straightforward. The Swiss plaintiff contracted to deliver in England a quantity of polyester yarn produced by him in Switzerland at the price of Sfr12.56 per kilogram. The buyer failed to pay under the contract and the seller brought an action, inter alia, for Sfr415,522.45 for the sale price. Between the date the payment should have been made in autumn 1971 and the date of the hearing of the action, sterling had fallen in value against the Swiss franc from Sfr9.90 to approximately Sfr6.00 to the pound. This meant that if the seller could obtain judgment in Swiss francs (415,522.45) he would recover, in terms of sterling (and the buyer would be liable for) some £69,000 whereas if the seller had to accept the sterling equivalent at the breach date rate he would recover (and the buyer would be liable to pay) only some £42,000.

The House of Lords re-examined the breach date rule from a variety of perspectives. Most importantly, their Lordships seemed impressed with the fact that: (1) arbitrators had been giving awards for foreign debts in foreign currencies;[9] and (2) the justice of the case demanded a change in the rule.[10]

Regarding the justice of the case, Lord Wilberforce said at 208:

> [The seller] bargained for 415,522.45 Swiss francs; whatever this means in (unstipulated) foreign currencies, whichever way the exchange into those currencies may go, he should get 415,522.45 Swiss francs or as nearly as can be brought about.

But the House of Lords in the *Miliangos* case was careful to limit their abandonment of the breach date rule to claims in respect of obligations to pay foreign currency arising under a contract whose proper law was that of a foreign country and where the money of account and payment was that of another country. Their Lordships expressly left open the issue of whether the new rule applying to money obligations should apply as well to claims for damages for a breach of contract or for a tort.[11] In particular, *The Volturno* was not criticized or over-ruled. Said Lord Wilberforce at 210:

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9 At 207 Lord Wilberforce said: "... if I am faced with the alternative of forcing commercial circles to fall in with a legal doctrine which has nothing but precedent to commend it or altering the doctrine so as to confirm with what commercial experience has worked out, I know where my choice lies. The law should be responsive as well as, at times enunciatory, and good doctrine can seldom be divorced from sound practice".

10 At 208 Lord Wilberforce said: "...I do not for myself think it doubtful that, in a case such as the present, justice demands that the creditor should not suffer from fluctuations in the value of sterling. His contract had nothing to do with sterling: his bargain for his own currency and only his own currency the substance of the debtors' obligations depends upon the proper law of the contract (here Swiss law): and though English law (lex fori) prevails as regards procedural matters, it must surely be wrong in principal to allow a procedure to effect, detrimentally, the substance of the creditor's rights".

11 At 209 – 210.

> Whereas in the case of the inevitable contract to supply a foreign cow, the intending purchaser has to be treated as going into the market to buy one as at the date of breach, this doctrine cannot be applied to a foreign money obligation, for the intending creditor has nothing to buy his own currency with – except his own currency.

A last point regarding the *Miliangos* case: their Lordships did not discuss in detail the issue of the appropriate pre-judgment interest to be awarded for the delay in payment of the Sfr415,522.45, although Lord Cross of Chelsea alluded to the possibility of the seller recovering in England that which he would have recovered in Switzerland (including pre-judgment interest) had he brought the action in Switzerland.[12]

COLLISION CASES

As we have seen, in *Miliangos* v. *George Frank (Textiles) Ltd.* the House of Lords expressly left open the issue whether the breach date conversion rule continued to apply in cases where the plaintiff sues for damages in contract or tort rather than for recovery of a debt.

The House of Lords was confronted with these issues in *The Despina R* and *The Folias* [1979] 1 Lloyd's Rep. 1, the appeals of which were heard together.

The Despina R

In *The Despina R*, two Greek vessels, "ELEFTHEROTRIA" and "DESPINA R", were involved in a collision off Shanghai in April, 1974. "DESPINA R" agreed to pay 85 per cent of the loss to "ELEFTHEROTRIA" but "ELEFTHEROTRIA" was not treated as being even partially responsible for the loss.[13]

After the collision "ELEFTHEROTRIA" was taken to Shanghai for temporary repairs, then to Yokohama and finally to Los Angeles for permanent repairs. Expenses were incurred under various headings in renminbi yuan, yen, U.S. dollars and sterling. The owners of "ELEFTHEROTRIA" were a Liberian company with its head office in Piraeus. The vessel was managed by managing agents having their principal place of business in New York. The bank account used for all payments in and out in respect of "ELEFTHEROTRIA" was a U.S. dollar account in New York. Thus, all the expenses incurred in the foreign currencies other than U.S. dollars were met by transferring U.S. dollars from this New York account.

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12 At 225.

13 For this reason the issues which arose in *The Lu Shan* [1993] 2 Lloyd's Rep. 259 (Q.B., Ad. Ct.), discussed below, did not arise in *The Despina R*.

The issue before their Lordships was whether an English court could give judgment in a currency other than sterling for a claim for damages in tort and, if so, in what currency the award should be given.

The House of Lords had no difficulty extending the *Miliangos* decision to hold that in respect of a claim in tort, an English court can give judgment in a foreign currency where that is the currency in which the loss complained of was sustained.

Lord Wilberforce stated at 5 the rationale for giving judgment in a foreign currency:

> To fix such a plaintiff [that is, a plaintiff such as the owner of 'ELEFTHEROTRIA'] with sterling commits him to the risk of changes in the value of the currency in which he has no connection: to award him a sum in the currency of the expenditure or loss, or that in which he bears the expenditure or loss, gives him exactly what he has lost and commits him only to the risk of changes in the value of that currency, or those currencies, which are either his currency or those which he has chosen to use."

On the issue whether the award should be made in the currency in which the expenditure was made or the currency in which the plaintiff conducts his business (the "plaintiff's currency"), their Lordships preferred that the award be made in the plaintiff's currency because such a rule was most consistent with the principles of *restitutio in integrum* and reasonable foreseeability of the damage sustained.[14]

The Lu Shan

As we have seen, the issue of the appropriate rate at which pre- judgment interest should be paid did not arise in either *Miliangos* v. *George Frank (Textiles) Ltd.* or *The Despina R.*[15]

The question as to the appropriate rate of interest arose directly in *The Lu Shan* [1993] 2 Lloyd's Rep. 259. In that case, the Admiralty Court unequivocally stated that pre-judgment interest is payable at the rate appropriate to the currency of the award.[16] *The Lu Shan* further clarified a number of issues regarding conversion dates and conversion rates which arise in collision cases.

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14 At 5–6. Regarding what is the plaintiff's currency, the burden of proving his claim in a particular currency is on the plaintiff as part of the general burden on the plaintiff to prove his damages (at 6).

15 In *The Folias*, discussed below, the courts seemed to order pre- judgment interest at 10% regardless of whether the currency of the award was Brazilian cruzeiros or French francs notwithstanding that the interest rates prevailing in Brazil and France over the relevant period undoubtedly differed.

16 See also *The Kefalonia Wind* [1986] 1 Lloyd's Rep. 292 (Q.B., Com. Ct.) where Bingham J. indicated at 292 that interest should be awarded at the rate appropriate the currency in which the loss was felt.

The facts of *The Lu Shan* were as follows. On 6 December 1985 (not 1986 as stated in the judgment) the two ships "BOTANY TRIAD" and "LU SHAN" collided. Each blamed the other and on 4 June 1992 the parties agreed that each vessel was 50% to blame. On 21 December 1992 damages were also agreed: the claim of "LU SHAN" was agreed at U.S. $340,391.02 exclusive of interest; the claim of "BOTANY TRIAD" was agreed at Australian $258,519.68 exclusive of interest.

In accordance with the decision of Sheen J., in *The Transoceanica Francesca* [1987] 2 Lloyd's Rep. 155, the trial judge in *The Lu Shan* held that the proper procedure for setting off the claims was to convert the smaller claim into the larger claim at the exchange rate prevailing on the date of agreement or judicial assessment - in this case, at the exchange rate prevailing on 21 December 1992.

The main issue in the case was how interest should be dealt with. Should each claim be assessed inclusive of interest, with subsequent conversion of the smaller claim into the currency of the larger claim prior to set-off, with judgment for the balance? Or, should each claim be assessed without regard to interest, with pre- judgment interest being payable on the balance after conversion and set-off?

The two procedures give different final sums because in general the interest rates appropriate to different currencies differ. In *The Lu Shan*, for example, the interest rate appropriate to the Australian dollar over the relevant period was 17% whereas the interest rate appropriate to U.S. dollars over the same period was 10%.[17]

Clark J. held that the loss of each party should be assessed as at the date on which the balance is struck. The loss of each party is the sum of the principal amount of the claim and pre-judgment interest (usually from the date of payment of the principal repair account to the date of assessment) calculated at the rate appropriate to the currency of that claim. The smaller claim, inclusive of interest, should be converted into the currency of the larger claim, inclusive of interest; a balance should then be struck with judgment given for the difference.

In coming to this conclusion Clark J. acknowledged the relationship between the relative strength of a currency in which a claim is calculated and the rate of interest appropriate to that currency. There are, of course, a number of reasons why a particular currency might fluctuate but Clark J. recognized that "weaker currencies often have partially compensating rates of interest".[18] Thus, if the value of a currency declines between the time of the collision and the date of conversion and set-off, the lower principal sum (in terms of the currency of

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17 A second reason that the two procedures give different final results is that the date from which interest is ordinarily awarded is the date of payment of the principle repair account which will invariably be different for the two vessels: at 261.

18 At 261.

the other claim) will be partially compensated by a higher interest figure over the period.

On the matter of the nature of admiralty interest, Clark J. observed that interest is awarded by the Admiralty Court as compensation for delay.[19] This being so, if the balance is to be struck at the date of final assessment, logic suggests, according to Clark J. at 264, that the loss of each party (including the loss of use of the principal sum claimed, as reflected by the interest foregone or paid on a loan) should be assessed at that date.

The Lisbon Rules

It may be noted that the Lisbon Rules on Compensation for Damages in Collision Cases, produced by an International Sub-committee of the Comité Maritime International in 1987[20] and which apply only by agreement of the parties, expressly provide in Rules IV and V for the payment of interest on a collision claim and the currency in which that claim is to be calculated, respectively.

Rule V provides:

> Unless the parties have agreed to apply a specific currency in the calculation of their damages the following procedure shall be adopted:
>
> – losses or expenses shall be converted from the currency in which they are incurred into Special Drawing Rights (SDR) at the rate of exchange prevailing on the day the losses or expenses were incurred.
>
> – the final amounts due shall be calculated in SDR and the balance due shall be paid to the Claimant in the currency of his choice at the rate of exchange prevailing on the date of payment.
>
> – where no official SDR exchange rate is quoted for the currency conversions to and from SDR shall be made by reference to U.S. dollars.

Regarding interest, Rule IV provides that interest on damages is recoverable in addition to the principal sum and that in the case of a total loss interest shall run from the date of the collision to the date of payment whereas in the case of all other claims interest shall run from the date the loss was sustained or the expense was incurred to the date of payment. As for the rate of interest payable, Rule IV stipulates in Sub-rule 3 that:

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19 It was held by the trial judge in *The Texaco Melbourne* [1992] 1 Lloyd's Rep. 319 that the court has a discretion to deprive a plaintiff of interest for the whole or any part of the period between breach and judgment, or to award interest at a rate lower than that which otherwise would be appropriate, if there has been delay attributable to the plaintiff in bringing the claim to trial. Compare, however, *The Nassau* [1965] 1 Lloyd's Rep. 236 at 242–43; *The La Pintanada* [1983] 1 Lloyd's Rep. 37 (Q.B., Com. Ct.).

20 The Lisbon Rules 1987 are reproduced in (1987) 18 Journal of Maritime Law and Commerce 577.

Where under Rule V the damages are to be calculated in special drawing rights (SDR) the rate of interest shall be the average London rate for three months SDR linked deposits in the period that interest runs; otherwise the rate of interest shall be 10% per annum.

Limitation of Liability in Collision Cases

The question of limitation of liability did not arise in *The Lu Shan*.

Under English law the rule is that where both vessels involved in the collision are each partly to blame, the smaller claim (inclusive of interest) is converted into the currency of the larger claim (inclusive of interest) and then the smaller claim is subtracted from the larger.[21] The paying vessel is entitled to limit liability in respect of the balance.[22]

Under the 1976 Convention on the Limitation of Liability for Maritime Claims as it applies in England,[23] unless the loss resulted from the shipowner's personal act or omission committed with the intent to cause such loss or recklessly and with knowledge that such loss would probably result, in respect of damage to property the shipowner is entitled to limit his liability to 167,000 SDRs for the first 500 tonnes of the vessel's tonnage, 167 SDRs for each tonne from 501 to 30,000, 125 SDRs for each tonne from 30,001 to 70,000 and 83 SDRs for each tonne in excess of 70,000.[24]

The date of conversion from SDRs to sterling is specifically provided in Article 8 of the 1976 Limitation Convention: the limitation amount shall be converted into the national currency of the State in which limitation is sought according to the value of that currency at the date the limitation fund is constituted.

Where no limitation fund is constituted, the English rule is that conversion is at the rate prevailing on the date of judgment.[25]

The Admiralty Court has always ordered interest on a limitation fund.[26] Interest is

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21 See *The Lu Shan*, discussed above.

22 *The Khedive* (1882) 7 App. Cas. 795 (H.L.).

23 Section 17 of the Merchant Shipping Act 1979, in force on 1 December 1986 by the Merchant Shipping Act 1979 (Commencement No. 10) Order 1986.

24 Articles 4 and 6 of the 1976 Limitation Convention, set out in Schedule 4 to the Merchant Shipping Act 1979.

25 *The Abadesa* [1968] 1 Lloyd's Rep. 493 (P.D.A.); *The Mecca* [1968] 2 Lloyd's Rep. 17 (P.D.A.).

26 For over 100 years the conventional figure for interest on a limitation fund was 4% per annum, 4% being the rate of interest on a common law judgment over that time: *The Theems* (1938) 61 Ll. L. Rep. 178. The rate of interest of 4% per annum stood until *The Abadesa* [1968] 1 Lloyd's Rep. 493 in which Karminski J. awarded interest at the rate of 5 1/2% per annum and opened the way for the award of interest which reflected current rates.

payable on the limitation amount from the date of the casualty[27] to the date of constitution of the limitation fund[28] or the date of judgment.[29]

The interest rate payable prior to constitution of the limitation fund is fixed by the Secretary of State from time to time.[30] If no limitation fund is constituted but limitation of liability is instead relied on by way of defence to a claim or counterclaim, the Court will allow interest in its own discretion at English rates.[31] It is the practice of the Commercial Court and the Admiralty Court to award simple interest at base rate (London and Scottish Clearing Banks' Lending Rate, commonly referred to as the UK Clearing Banks' Base Lending Rate) plus 1%.[32]

Arguably, however, the Court ought to award pre-judgment interest on the SDR limitation amount at the interest rate appropriate to SDRs.

The SDR is a weighted composite of the currencies of the U.S., the UK, France, Germany and Japan. The SDR has an associated interest rate, published regularly by the International Monetary Fund,[33] which is a weighted average of the market interest rates (usually the rate paid on three month treasury bills) of the SDR constituent currencies. It is inconsistent with economic theory and the case law, which recognizes that pre-judgment interest should be ordered at the rate appropriate to the relevant currency,[34] to award pre-judgment interest at the English rates on a limitation amount expressed in SDRs.

If the SDR is not converted into sterling (or the currency in which the plaintiff felt his loss) until the date of judgment, then properly the interest payable for the delay between the date of the collision and the date of judgment is the rate appropriate to SDRs. To do otherwise may be to double count for any decline in the value of the currency of the award relative to the SDR: the SDR limitation amount at the time of judgment will be worth more units of the currency in which the award is made at the time of judgment than at the time

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27 *The Funabashi* [1972] 1 Lloyd's Rep. 371 (Q.B., Ad. Ct.) at 372.

28 Any person wishing to constitute a limitation fund must pay into Court a fund constituted in accordance with Articles 6, 7 and 11 of Schedule 4 of the Merchant Shipping Act 1979, together with interest thereon from the date of the occurrence giving rise to his liability until the date of the constitution of the limitation fund.

29 See *The Abadesa* [1968] 1 Lloyd's Rep. 493 and *The Mecca* [1968] 2 Lloyd's Rep. 17.

30 Para. 8(1) of Part II of Schedule 4 to the Merchant Shipping Act 1979.

31 *The Funabashi* [1972] 1 Lloyd's Rep. 371.

32 *Shearson Lehman Hutton Inc.* v. *Maclaine Watson & Company Ltd. (No. 2)* [1990] 1 Lloyd's Rep. 441 (Q.B., Com. Ct.) at 451–52. In tort and contract cases the English court has power to award simple interest only: *Wentworth* v. *Wiltshire County Council* [1993] 2 All E.R. 256 (C.A.) at 269; s. 35A of the Supreme Court Act 1981.

33 *International Financial Statistics* (International Monetary Fund).

34 See, for example, *The Texaco Melbourne* [1994] 1 Lloyd's Rep. 473 and *The Lu Shan* [1993] 2 Lloyd's Rep. 259.

of loss and, as the interest rate appropriate to the currency of the award will in such circumstances usually be higher than the SDR interest rate, more SDRs would be converted at judgment if the award currency interest rate rather than the SDR rate is applied over the period between collision and judgment.

There does not seem to be an English case on this point. However, Lowry J. in a recent British Columbia Supreme Court case suggested that as the limitation figure was calculated in SDRs, the correct interest rate to be applied might be that appropriate to SDRs, not Canadian dollars (the currency of the award).[35]

CARRIAGE OF GOODS BY SEA CASES

Under the breach date conversion rule, if goods were delivered at destination short or in damaged condition, the loss in sterling terms was calculated as at the date of the loss and, if the loss could be proved, this amount was awarded at trial together with interest at the rate appropriate to sterling.

In *Miliangos* v. *George Frank (Textiles) Ltd.*, the House of Lords, as we have seen, left open the question whether the breach date conversion rule continued to apply to contract claims. In *The Folias* [1979] 1 Lloyd's Rep. 1 the House of Lords held that in carriage of goods by sea cases, and in contract cases generally, the breach date rule was abolished.

The Folias

In *The Folias* French charterers shipped a cargo of onions at Valencia for carriage to Brazilian ports. The charterparty, in the N.Y.P.E. form, provided for payment of hire in U.S. dollars. The charterparty contained a London arbitration clause and the proper law of the contract was English law. Bills of lading were issued in the charterers' own name.

There was a failure of the vessel's refrigeration system as a result of which the cargo was found to be damaged on discharge. The cargo receivers claimed against the charterers and, with the concurrence of the shipowners as to quantum, the claim was settled by the charterers in August 1972 for 456,250 Brazilian cruzeiros.

The charterers discharged the cargo claim by purchasing the necessary amount of cruzeiros (456,250) with French francs. The charterers then claimed in arbitration against the shipowners for the French francs they had expended to satisfy the claim.

The issue in *The Folias* was whether the charterers were entitled to an award of the number of cruzeiros paid to settle the claim or the number of French francs used to purchase

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35 *The Sea Imp VIII*, unrep, Vancouver Registry No. C931756 (28 March 1995). Copies of this case are available from the author, who appeared as counsel.

the cruzeiros. The value of cruzeiros had fallen relative to French francs in the interim.[36]

The House of Lords held that in respect of contractual claims (as in other cases) judgment can be given in a currency other than sterling. Regarding the currency in which judgment is to be given, there is a two-stage test:[37]

(1) If, from the terms of the contract, it appears that the parties have accepted a currency as the currency of account and payment in respect of all transactions arising under the contract, then it would be proper to give a judgment for damages in that currency.[38]

(2) However, there may be cases in which, although obligations under the contract are to be met in a specified currency, no intention is shown that damages for breach of the contract should be given in that currency. If the contract fails to provide a decisive stipulation, the damages should be calculated in the currency in which the loss was felt by the plaintiff or "which most truly expresses his loss".[39]

In the result, the loss of the charterers was held to have been suffered in French francs and therefore they were entitled to recover from the shipowners the number of French francs used by them to purchase the cruzeiros necessary to satisfy the claim of the cargo receivers.

The House of Lords in *The Folias* did not deal with the question of interest. The arbitrators, who made an award in French francs, awarded pre-judgment interest at 10%. The source of this rate is not indicated in the reasons for award.[40] The trial judge, who reversed the arbitrators and gave an award in cruzeiros, also ordered pre-judgment interest at 10%.[41] The Court of Appeal ordered pre-judgment interest, apparently at the rate of 10%, on its award of French francs, but gave no reason for using this particular rate.

The Texaco Melbourne

The breach date rule benefits the foreign plaintiff when the value of the currency in which he suffered his loss has declined against the pound.[42] On the other hand, the defendant

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36 Between the date of payment by the charterers to the cargo receivers and the date of the arbitration award three years later, the value of the cruzeiro had halved relative to the French franc, such that an award of 456,250 cruzeiros, worth Ff 406,545.72 at the time they were bought by the charterers, was worth only Ff 223,690 at the date of the award.

37 This test was approved by the House of Lords in *The Texaco Melbourne* [1994] 1 Lloyd's Rep. 473 at 477–78.

38 At 7.

39 At 8.

40 *The Folias* [1977] 1 Lloyd's Rep. 39 at 41.

41 *The Folias* [1978] 1 Lloyd's Rep. 525 (C.A.) at 537.

42 See, for example *Di Ferdinando* v. *Simon, Smits & Co. Ltd.* [1920] 3 K.B. 409 (C.A.).

is not penalized by the operation of the rule, provided he conducts his business in sterling; if he conducts his business in a currency other than sterling, and that currency has declined against the pound, the defendant will indeed suffer from the application of the breach date rule,[43] but if his currency has increased in value against the pound, he will benefit.

Conversely, judgment given in the currency in which the plaintiff suffered his loss in theory does not benefit or penalize the plaintiff, although it may result in windfall gains or losses to the defendant. This approach, it is said,[44] is more consistent with the contractual principle of *restitutio in integrum*, the doctrine of mitigation and the rule that only losses within the reasonable contemplation of the parties at the time the contract was made are recoverable as damages. But the consequence of giving judgment in the currency in which the plaintiff suffered his loss can on occasion seem harsh.

In *The Texaco Melbourne* [1994] 1 Lloyd's Rep. 473 the judgment for damages in the plaintiff's currency resulted in a windfall to the defendant of more than 99% of the value of the claim expressed in U.S. dollars, the defendant's currency.

The facts of *The Texaco Melbourne* are not unusual but their magnitudes are extreme. Under a bill of lading dated 16 November 1982, 14,010 tonnes of fuel oil was shipped on board the tanker "TEXACO MELBOURNE" at Tema in Ghana for carriage to Takoradi, also in Ghana. The cargo was not delivered at Takoradi and the shipowners conceded liability for the non-delivery. The only issue was the quantum of damages. This, in turn, depended on the currency in which the English court, where the action was brought, would give judgment.

Between November 1982, the time of the breach, and July 1991, the time of judgement, the Ghanaian cedi had depreciated in value from an exchange rate of 2.75 cedis to the U.S. dollar to 375 cedis to the U.S. dollar. The value of the lost cargo, had it been delivered at Takoradi, could have been sold locally for gc 11,642,551, which at that time was worth U.S. $4,233,655 but which by the time of judgment was worth only U.S. $31,046.

The plaintiffs, recognizing that a claim for the market value of the cargo at destination would certainly result in a judgment in cedis, sought to obtain a judgment in dollars by claiming the price of a replacement cargo purchased at the nearest source. On the date of the breach the cost of purchasing a similar cargo in Italy and shipping it to Takoradi was U.S. $2,886,187.10 (equivalent to gc 7,937,014 at that time).

The House of Lords was asked to chose between the two figures: the amount of U.S. $2,886,187.10 together with interest appropriate to U.S. dollars (as was awarded at trial);

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43 For example, if the defendant as well as the plaintiff conducts his business in lire and the lira is in decline against sterling, a judgment in sterling of an amount of lire converted at the time of the breach will result in a windfall gain to the plaintiff, who receives more lire than he lost, and a windfall loss to the defendant, who must use more lire than was originally lost to purchase sufficient sterling to satisfy the judgment.

44 See *The Texaco Melbourne* generally.

or the amount of gc 11,642,551 (equivalent to U.S. dollars $31,046) together with interest appropriate to Ghanaian cedis (as was awarded by the Court of Appeal).

Lord Goff, with whom the other Law Lords agreed, began by saying that despite the striking difference in dollar terms between the two alternative awards, it was important not to be mesmerized by such difference. No account, he said, was to be taken of fluctuations in the currency of the award as against other currencies between the date of the breach and the date of judgment.[45]

The House of Lords affirmed the decision of the Court of Appeal awarding damages of gc 11,642,551 plus interest. In reaching this conclusion their Lordships did not depart from what they considered to be well established principle: an award of damages is assessed as at the date of breach and the appropriate currency in which that award is to be made is identified; to the resulting figure is added interest appropriate to that currency to compensate for the delay between the date of breach and the date of judgment.[46]

The currency of the award is identified according the principles set out by Lord Wilberforce in *The Folias*, discussed earlier. In particular, in the absence of any intention derived from the terms of the contract, the award should be made in the currency in which the loss was felt by the plaintiff. Applying this test to the case at hand, the House of Lords had little difficulty concluding that the plaintiffs, who were a Ghanaian government department, felt their loss in cedis.

The Texaco Melbourne is important for perhaps only one proposition, that is that delay between the date of breach and the date of judgment is to be compensated by an award of interest at a rate appropriate to the rate of currency of the award but no account is to be taken of fluctuations in the currency of the award as against other currencies over that same period.

It will be noted that the award of interest appropriate to the currency of the award will, in the usual case and over the long run, compensate for domestic inflation[47] (the higher the inflation rate the higher the interest rate) but it will not necessarily compensate for the devaluations against foreign currencies notwithstanding that, as was recognized by Clarke J. in *The Lu* Shan, discussed earlier, "weaker currencies often have partially compensating rates of interest"[48].

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45 At 476.

46 At 476–77.

47 This is, however, only true over short periods in so far as the English court apparently has power only to award simple interest (see s. 35A of the Supreme Court Act 1981) whereas inflation operates in a compound fashion.

48 This statement of Clarke J. is perhaps more true when applied to hard currencies than to third world currencies subject to drastic devaluations. In *The Texaco Melbourne*, for example, the award of interest at Ghanaian rates in no way compensated for the cedi's devaluation against the US dollar.

The decision in *The Texaco Melbourne* resulted in a massive windfall gain to the shipowner's liability insurers who, we can assume, received their premiums in dollars but satisfied cargo's legitimate claim in virtually valueless cedis.

It is interesting to consider what the result would have been had this case arisen before the breach date conversion rule was abolished. In November 1982, the date of the breach, the relevant exchange rates were £1:gc4.43, £1:US$1.61 and US$1:gc2.75. At the time of the judgment the relevant exchange rates were £1:gc720, £1:US$1.92 and US$1:gc375.

According to the law as it stood prior to *Miliangos* v. *George Frank (Textiles) Ltd.*, damages would have been assessed as at the time of the breach (here gc 11,642,551) and converted into sterling at the same time (at the rate of £1:gc4.43). An award would thus have been made of £2,628,115.35 plus prejudgment interest at the rate appropriate to sterling. This amount, exclusive of interest, would have been equivalent to US $5,045,981.47 at the time of judgment. Compare this to the actual award in *The Texaco Melbourne* of the equivalent of US $31,046 exclusive of interest and to the US dollar value of the cargo at the time of the breach, which was US $4,233,654.91.

Thus, under the breach date rule, because the value of sterling had risen against the US dollar between the date of breach and the date of judgment and because the defendants conducted their business in US dollars, the defendants would have suffered a windfall loss from the delay in payment of the plaintiffs' claim since it would cost them US$5,045,981.47 to purchase sufficient pounds to satisfy the judgment, exclusive of interest, whereas the US dollar value of the cargo at the date of the loss was only $4,233,654.91.[49] On the other hand, in cedi terms, the plaintiffs would have made a windfall gain, as an award of £2,628,115.35, exclusive of interest would have purchased gc 1,892,243,052 at the date of judgment, more than 160 times the number of cedis the cargo would have fetched had it arrived at destination.

Limitation of Liability in Marine Cargo Cases

Under the Hague-Visby Rules as they apply in England,[50] by Art. IV, r.5 the carrier shall not be liable for any loss or damage to the goods in an amount exceeding 666.67 SDRs per package or 2 SDRs per kilogram of gross weight of the goods lost or damaged, whichever

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49 Note that the value of sterling in dollar terms peaked in July 1991. Two years later its dollar value was below what it had been in November 1982. Had judgment been given two years later, the defendant shipowner, as well as the plaintiff cargo owner, would have made a windfall gain under the breach date rule since it would have cost him fewer dollars to satisfy a sterling judgment in July 1993 than in November 1982 (assuming of course, that the decline in the value of the pound against the dollar was not compensated for by higher sterling interest rates).

50 Carriage of Goods by Sea Act 1971.

is the higher.

The Hague-Visby Rules specifically provide that the limitation amount expressed in SDRs is to be converted into the "national currency" on the basis of the value of that currency on a date to be determined by the law of the Court seized of the case. So far as England was concerned, at the time the Hague Rules were amended by the Brussels Protocol of 1968, the reference to national currency was consistent with English law, which at that time applied the breach date conversion rule in carriage of goods by sea and other cases.

The difficulty since the abolition of the breach date rule is determining what is meant by national currency, and what is the English rule for conversion into it. It is clear that no plaintiff suffers his loss in SDRs. Should an SDR limitation amount be converted into the currency in which the plaintiff felt his loss at the date the goods were delivered damaged or, if not delivered at all, the date they should have been delivered, with interest thereon from such date at the rate appropriate to that currency?[51] Or should the SDR limitation amount be converted, as in collision cases, into the currency in which the loss was felt at the date of judgment, with pre-judgment interest at the SDR rate or the rate appropriate to that currency?

There appear to be no English cases on the point. To convert at the date of judgment will generally benefit the plaintiff when his currency is falling against the SDR.[52] On the other hand, if his currency is appreciating significantly against the SDR over the period, an early conversion would be more favourable to the plaintiff.

There seems to be little to recommend one conversion date over the other. Conversion of the SDR limit into the currency in which the plaintiff suffered his loss at the rate prevailing on the date of the breach fixes the recovery to the plaintiff and protects him from fluctuations in the value of his currency against the SDR. On the other hand, conversion at the date of judgment is what is done in collision cases and, in any case, the limitation amount is artificial to the extent that it bears only some limited relation to the value of the cargo damaged.

More important, I suggest, than the date of conversion, at least from a theoretical point of view, is the interest rate to be applied to the limitation amount. It is suggested that if the conversion from SDRs to the plaintiff's currency is made at the date of the breach, the interest to be awarded is that appropriate to the plaintiff's currency. Conversely, as we have seen in the collision situation, if the conversion is at the rate prevailing on the date of judgment, interest should be awarded at the SDR rate.

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51 Note that in *Young, Glover & Company Ltd.* v. *Red Sea Development Corp.* [1968] 2 Lloyd's Rep. 489 Megaw J. awarded interest beginning five days after discharge of the goods, holding that to allow interest to run from the date of discharge was "a little bit premature" (at 90).

52 But this will only invariably be true if the rate of interest awarded is the same whether conversion is at the date of breach or the date of judgment.

MARINE INSURANCE CASES

The issue of the effect of changing exchange rates can arise in the context of policies of marine insurance when recoveries have been made by insurers under subrogated rights.

In *Yorkshire Insurance Company Ltd.* v. *Nisbet Shipping Company Ltd.* [1961] 2 All E.R. 487 (Q.B.D.) the assured's vessel "BLAIRNEVIS" was insured under a valued hull policy against loss by marine risks for £72,000. On 13 February 1945 "BLAIRNEVIS" collided with "ORKNEY", owned by the Canadian Government, and "BLAIRNEVIS" became a total loss. The insurer paid the assured £72,000 for the total loss. Subsequently, the assured, with the approval of the insurer, commenced proceedings in Canada against "ORKNEY". The claim was quantified in Canadian dollars. Indeed, at that time, as now, a Canadian Court could only give judgment in Canadian dollars.[53] The proceedings were protracted. Ultimately, the case went to the Judicial Committee of the Privy Council on appeal from the Supreme Court of Canada and on 25 July, 1955, the Privy Council restored the trial judgment of the Exchequer Court of Canada, given on 20 July 1951, which held that "ORKNEY" was entirely to blame for the collision without benefit of limitation.

The actual value of "BLAIRNEVIS" was afterwards agreed to be £75,514 9s. 11d. Applying the principle laid down by the House of Lords in *The Volturno* this sum was converted into Canadian dollars at the rate of 4.45 dollars to the pound, the rate prevailing at the date of the collision, giving a figure of Cdn $336,039.52. This sum was finally paid to the assured in May of 1958.

However, in 1949 the pound had been significantly devalued, and when the Cdn $336,039.52 were converted at the new rate applicable in May 1958, the sum realized was £126,921 14s. 11d; that is, nearly £55,000 more than the £72,000 which the insurer had paid for the total loss in April 1945, and some £51,000 more than the sterling value of "BLAIR-NEVIS" at the date of the loss.

The issue before the English court was who was entitled to the windfall. That is: Where an insurer pays for a total loss of a subject matter insured and the assured, in the exercise of his remedies in respect of that subject matter, recovers from a third party an amount which exceeds the sum so paid by the insurer, can the insurer recover from the assured the amount of such excess?

According to Diplock J., the case turned on what is meant by the term "subrogated" in the context of section 79(1) of the *Marine Insurance Act* 1906, in particular, that part of the

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53 Regarding the Canadian law as to the appropriate date for converting the currency in which the loss was suffered into the currency of the award, see *Salzberger Sparkasse* v. *Total Plastics Service Inc.* [1988] 27 B.C.L.R. (2d) 233 (B.C.S.C.); *MacMillan Bloedel Ltd.* v. *Youell* [1991] I.L.R. 1–2722 (B.C.S.C.) at 1261, reversed on appeal (1993) 79 B.C.L.R. (2d) 326 (B.C.C.A.) but this point was not in issue.

subsection which provides:

> Where the insurer pays for a total loss ... he is thereby subrogated to all the rights and remedies of the assured in and in respect of that subject matter as from the time of the casualty causing the loss.

This provision, said Diplock J. at 491–492, entitled the insurer, as against the assured, to the benefits of the assured's rights and remedies against the third party only to the extent of the indemnity paid by the insurer to the assured, but the insurer cannot recover more than he has in fact paid.

It will be noted that the dispute in *Yorkshire Insurance Company* v. *Nesbit Shipping Company* arose only because the parties agreed quantum according to the breach date rule. Under the rule prevailing since *Miliangos*, the award would have been made in sterling (the currency in which the loss was felt) with interest thereon at sterling rates. There would thus have been no windfall gained to the assured from the pound's devaluation, although discharge of the judgment would have cost the defendant significantly fewer Canadian dollars.

In *Yorkshire Insurance Company* v. *Nesbit Shipping Company* the assured brought an action in Canada and it was the insurer who claimed the excess. In the more usual case, it is the insurer who brings the action in the name of the assured under subrogated rights. Consistent with the decision in the *Yorkshire Insurance* case, if the insurer, because of a revaluation of relevant currencies, recovers more than he paid out to the assured, properly he should refund the difference, at least in the case where the currency in which the insurer and the assured conduct their business is the same.

In the case where the currencies in which the insurer and the assured conduct their business differ, new problems may arise.

Consider the situation where the vessel's insurers are English companies conducting their business in sterling and her owners are a Liberian company conducting its business in U.S. dollars. Assume the vessel is run down by another vessel which is held to be totally liable for the loss. Assume the vessel was insured under a valued policy for US$10,000,000, worth £5,882,353 at the time of the loss (when the exchange rate was US$1.70 to the pound), and $10,000,000 was paid to the assured immediately. The insurer subsequently brings an action in the United States under subrogated rights and four years later recovers US$10,000,000, the value of the vessel at the time of the loss, plus interest. In the interim the pound has depreciated against the dollar and is now worth US$1.40. The US$10,000,000 recovered (exclusive of interest) is now worth £7,142,857. It is suggested that in such circumstances the insurer is not obliged to pay to the assured the difference (£1,260,504) between the amount recovered (£7,142,857) and the amount paid out under the policy (£5,882,353) notwithstanding that the devaluation in the pound has resulted in a windfall recovery to the insurer. ■

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