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Backgrounder

LRC 65—Report on Foreign Money Liabilities

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This report begins by setting out the historical position regarding foreign currency claims in both England and Canada. In England the law was firmly settled and rested on two fundamental propositions. The first was that the courts have no authority to enter money judgments in terms of a foreign currency—that is a currency other than that of the court deciding the claim (called, the forum). The second is that in converting from a foreign currency to the currency of the forum, the court should have regard to the exchange rate that prevailed on the date of the breach—the date the loss was suffered by the plaintiff or when the obligation to it became payable. These rules were applied in a variety of circumstances in which a money judgment was sought, including claims based on tort, breach of contract, and simple contract debt.

The Canadian courts have largely followed the English authorities, but in addition there is also statutory authority in Canada that prohibits the entry of a judgment expressed in a foreign currency.

The report then moves on to examine recent legal developments in this area, primarily the radical change of position that has occurred in England. There is an examination of the trilogy of cases, *Miliangos*, *The Despina R*, and *The Folias*, which have swept away most of the preceding law on foreign currency claims in England to allow judgments to be entered in a currency other than the pound sterling and to permit conversion of the currency as at the time of payment rather than the date of breach. It is noted that these English decisions reignited interest in Canada and a number of Canadian decisions are discussed. What is evident from the Canadian decisions is that there is considerable dissatisfaction among the judiciary with the date of breach rule. The cases have, however, been confusing and contradictory.

Given the reaction of the courts in Canada to the date of breach rule, the report examines some of the principal arguments for abandonment of the rule, and then, for its retention. Arguments discussed for abandonment of the rule, are that it is based on an inappropriate analogy with commodity contracts, it can lead to unfair results, it is inconsistently applied and that it has been the subject of almost unanimous condemnation from academic lawyers

and commentators. Two arguments are considered for retaining the date of breach rule. The first is the dissenting judgment of Lord Simon in the *Miliangos* case and the second is a thorough and thought provoking submission received by the project committee from two English academics, Roger A. Bowles and Christopher J. Whelan.

The report then focuses on one of the main problems in fixing a time for conversion of the currency: the effect of a decline in the plaintiff's currency after the date of breach. This is the converse situation to the decline of the currency of the forum which prompted the introduction of the date of payment rule to achieve, what was viewed as a potentially a fairer result. The report looks at the role that payment of prejudgment interest could play and concludes that, if it were awarded on a rational basis, it would go a long way to restoring the plaintiff's position and achieve a fair result.

The latter part of the report looks at two constitutional questions in relation to foreign money claims. The first question raised is whether legislative power with respect to currency conversion is a matter reserved exclusively to the provinces or the federal government and if so, to which? Is it open to any provincial legislative to specify any conversion date rule? If the provinces do have power to prescribe a conversion rule, the second question arises. What is the status of section 11 of the *Currency and Exchange Act* (Canada),[1] which is widely regarded as prohibiting foreign currency judgments? The conclusion reached is that there are no basic constitutional barriers to the enactment by the province of legislation on the conversion date with respect to foreign money claims. Whether or not such legislation could take the form of a date of payment conversion rule is a slightly more difficult issue as it would conflict with the accepted view of section 11, but a number of arguments are offered in support of such a provision.

The report concludes by making several recommendations. First, the law should no longer adhere rigidly to the breach-date rule for currency conversion and legislation should be enacted which will permit the courts to adopt a date other than the date of breach. Second, the preferred conversion date is the date of payment rule despite some concerns on constitutional grounds. Third, a plaintiff should be able to receive judgment in a foreign currency rather than that of the forum where it would most fully and exactly compensate them.

Further Developments

See *Foreign Money Claims Act*, S.B.C. 1990, c. 18 (now *Foreign Money Claims Act*, R.S.B.C. 1996, c. 155).

1. Now *Currency Act*, R.S.C. 1985, c. C-52, s. 12.