LLOYD'S LAW REPORTS

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[1979] VOL. 1 | **The "Despina R." and "Folias"** | PART 1

HOUSE OF LORDS

July 17, 18, 19 and 20, 1978

THE "DESPINA R.",

SERVICES EUROPE ATLANTIQUE SUD (SEAS)
v.
STOCKHOLMS REDERIAKTIEBOLAG SVEA

(THE "FOLIAS")

Before Lord WILBERFORCE, Lord DIPLOCK, Lord SALMON, Lord RUSSELL OF KILLOWEN and Lord KEITH OF KINKEL

Practice — Foreign currency — Judgments and arbitration awards — Whether Judges and arbitrators entitled to give judgments and awards in foreign currency in cases of tort and breaches of contract.

In the first appeal, *The Despina R.*, in April, 1974, a collision took place off Shanghai between two Greek ships, the *Eleftherotria*, owned by the plaintiffs, and the *Despina R.*, owned by the defendants, as a result of which the plaintiffs started an action against the defendants alleging negligence of the defendants, their servants or agents. The action was settled, the parties agreeing that the defendants were 85 per cent. to blame, the defendants' counterclaim be dismissed, and that the defendants would pay 85 per cent. of the loss to the plaintiffs. Expenses for repairs, &c., were incurred in Chinese renmimbi or yuan (R.M.B.); Japanese yen and U.S. dollars. On the question whether, where plaintiffs suffered damage or sustained loss in a currency other than sterling, they were entitled to recover damages expressed in that other currency:

_____*Held*, by Q.B. (Adm. Ct.) (BRANDON, J.), that (1) where a plaintiff suffered damage in consequence of a tort, the first matter which the Court was concerned with was the valuation of that damage; and the effect of the *Miliangos* case was that the Court was relieved of the obligation to convert into sterling the amount of damages arrived at in the initial valuation in the foreign currency in which the expenditure or loss was immediately and directly incurred;

(2) the currency of expenditure or loss solution (i.e., awarding damages in respect of any item of expenditure or loss in whatever currency, sterling or foreign it was directly or immediately incurred) was to be preferred; and a requirement that a plaintiff should receive restitutio in integrum was in most cases more likely to be satisfied, so far as that was possible, by awarding damages in that currency rather than converting that currency into sterling at the date of incurrence;

(3) the currency of expenditure and loss solution would be adopted and judgment would be given in accordance with that solution following the *Miliangos* form of order for payment of a certain sum in foreign currency or its sterling equivalent at the date of payment.

On appeal by the defendants, the owners of *Despina R.* and the plaintiffs, the owners of *Eleftherotria:*

_____*Held*, by C.A. (STEPHENSON, ORR and CUMMING-BRUCE, L.JJ.), that (1) an English Court was free to choose the plaintiff's currency solution if it worked better justice than the solution of the currency of expenditure and loss.

(2) the solution of the plaintiff's currency reduced the risk of changes in currency values by subjecting the plaintiff to changes in the internal value of his own currency only and not to changes in the rate of exchange between his own currency and the currency in which damages were awarded; and further support for the plaintiff's currency could be derived from the general principle that a tortfeasor took his victim as he found him, currency strong or weak;

(3) there was nothing in the facts of this case to prevent the application of the plaintiff's currency solution and U.S. dollars was the appropriate foreign currency for the plaintiffs' claim;

(4) the plaintiffs were therefore entitled to be awarded as damages the amount of reasonable expenditure and loss expressed in U.S. dollars or the sterling equivalent of such amounts at the date

of payment; and that when the expenditure and loss suffered by the plaintiffs were directly and immediately incurred in any other currency other than U.S. dollars, the sums representing such expenditure and loss should be converted into U.S. dollars at the date when the expenditure or loss was incurred.

Appeal allowed.

On appeal by the defendants, the owners of *Despina R.*:

_____*Held,* by H.L. (Lord WILBERFORCE, Lord DIPLOCK, Lord SALMON, Lord RUSSELL OF KILLOWEN and Lord KEITH OF KINKEL), that (1) there was no doubt that, given the ability of an English Court (and of arbitrators sitting in this country) to give judgments or to make an award in a foreign currency, to give a judgment in the currency in which the loss was sustained produced a juster result than one which fixed the plaintiff with a sum in sterling taken at the date of the breach or loss (*see* p. 5, cols. 1 and 2; p. 9, col. 2);

(2) the decision in *The Canadian Transport,* did not preclude a decision in favour of the plaintiff's currency or the currency of the loss once the possibility of giving judgments in a foreign currency existed (*see* p. 5, col. 2);

_____*The Canadian Transport,* (1932) 43 Ll.L. Rep. 409 distinguished.

(3) a plaintiff who normally conducted his business through a particular currency and who, when other currencies were involved used his own currency to obtain those currencies, could reasonably say that the loss he sustained was to be measured, not by the immediate currency in which the loss first emerged but by the amount of his own currency, which in the normal course of operations he had used to obtain those currencies (*see* p. 5, col. 2; p. 6, col. 1; p. 10, col. 1); this was the currency in which his loss was felt and was the currency which it was reasonably foreseeable he would have to spend (*see* p. 6, cols. 1 and 2; p. 7, col. 1); and the normal principles of restitutio in integrum and that of reasonable foreseeability of the damage sustained, which governed the assessment of damage in tort applied (*see* p. 5, col. 2).

Appeal dismissed.

Per Lord WILBERFORCE (at p. 6): I wish to make it clear that I would not approve of a hard and fast rule that in all cases where a plaintiff suffers a loss or damage in a foreign currency the right currency to take for the purpose of his claim is "the plaintiffs' currency". I should refer to the definition I have used of this expression the currency in which the loss was effectively felt or borne by the plaintiff having regard to the currency in which he generally operates or with which he has the closest connection and emphasise that it does not suggest the use of a personal currency attached like nationality to a plaintiff but a currency which he is able to show is that in which he normally conducts trading operations . . .

In the second appeal, *The Folias,* on July 5, 1971, the owners let their vessel *Folias* to the charterers under a time charter in the New York Produce Exchange form for one round voyage Mediterranean-East Coast South America. Various clauses in the charter provided for payment in U.S. dollars which was the currency of account. The charter contained a London arbitration clause and the proper law of the charter was English law.

A cargo of onions was shipped from Valencia to Rio de Janeiro and Santos under bills of lading dated July 19, 1971, but on discharge was found to be damaged owing to the failure of the refrigeration machinery. The charterers, whose place of business was Paris, settled the cargo-receivers' claims by exchanging French francs for Brazilian cruzeiros. The owners accepted liability for the claims but the charterers contended that they were entitled to a larger sum since they had suffered a loss due to the subsequent fluctuations of French francs and Brazilian cruzeiros.

The dispute was referred to arbitration, and the arbitrators held that the owners should pay to the charterers the sum of 418,012.17 French frs. but stated their award in the form of a special case, the question of law for decision of the Court being:

> Whether upon the facts found and upon the true construction of the charter-party:
>
> (1) the charterers are entitled to an award in French francs;
>
> (2) if the answer to par. 1 above is "No" (a) what currency is to be used for the award, Brazilian Cruzeiros or United States dollars or pounds sterling? (b) what is the appropriate date for rate of exchange purposes?

_____*Held,* by Q.B. (Com. Ct.) (ROBERT GOFF, J.), that (1) the arbitrators were not inhibited from making an award in a foreign currency because the claim was one for damages;

(2) since the proper law of the charter was English, damages for its breach had to be calculated in the currency in which the loss was incurred;

(3) the measure of damages was the amount by which the sound arrived value of the goods at the port of discharge exceeded their damaged value at that port and since the charterers' loss was incurred in the currency of the country in which the discharging ports were situated the charterers' loss was incurred in Brazilian cruzeiros;

(4) since the loss was incurred by the charterers in cruzeiros it was irrelevant that the charterers exchanged French francs into cruzeiros to satisfy the cargo-receivers' claim;

(5) there was no express agreement, and no agreement could be implied to the effect that because the parties had agreed upon the U.S. dollar as the currency of the charter, they had agreed that damages for breach of any obligation under the contract should be calculated and paid in U.S. dollars regardless of the currency in which the loss was incurred;

(6) the currency in which the arbitrators should have made their award was Brazilian cruzeiros as the currency in which the loss was incurred and the currency of account of the damages claimed by the charterers and the answers to the question of law were (1) No; (2) (a) Brazilian cruzeiros; (b) Did not arise.

On appeal by the charterers:

Held, by C.A. (Lord DENNING, M.R., ORMROD and GEOFFREY LANE, L.JJ.), that (1) there was no authority which was binding upon the Court; and in each case it would be for the plaintiff to claim his damage in such currency as he thought appropriate the onus being on him not only to prove the quantum of his loss but also the currency in which he claimed to have sustained it.

(2) damages should be awarded to the plaintiff in the currency which most truly expressed his loss; if the expenditure or loss was incurred in a foreign currency, but in order to meet it the plaintiff had to use his own currency in the ordinary course of his business, then the award should be in his own currency.

(3) the currency which most truly expressed the loss of the charterers was French francs not Brazilian cruzeiros since the charterers had to use French francs in order to settle the claim of the cargo-receivers, and they should be compensated for that expenditure in French francs by an award of that sum (at the date on which they paid it) with interest thereafter.

Appeal allowed.

On appeal by the owners:

Held, by H.L. (Lord WILBERFORCE, Lord DIPLOCK, Lord SALMON, Lord RUSSELL OF KILLOWEN and Lord KEITH OF KINKEL), that (1) the effect of the decision in *Miliangos v. George Frank (Textiles) Ltd.*, was that in contractual as in other cases a judgment (and an award) could be given in a currency other than sterling (*see* p. 7, col. 2);

Miliangos v. George Frank (Textiles) Ltd., [1976] 1 Lloyd's Rep. 201, applied.

(2) although the proper law of the contract was accepted to be English by virtue of a London arbitration clause, neither the parties to the contract nor the contract itself nor the claims which arose had any connection with sterling so that prima facie this would have been a case for giving judgment in foreign currency (*see* p. 8, col. 2);

(3) the essential question was which was the loss suffered by the charterers, and the loss which they (the charterers) claimed as damages was the discharge of the receivers' claim together with legal and other expenses incurred which they had discharged by providing francs (*see* p. 8, col. 2; p. 9, col. 1; p. 10, col. 2); until they had provided francs to meet the receivers' claim, they had suffered no loss (*see* p. 9, col. 1); and it was reasonable for the parties to have contemplated that the charterers being a French corporation and having a place of business in Paris would have to use French francs to purchase other currencies to settle cargo claims arising under the bills of lading (*see* p. 9, col. 1);

(4) according to the normal principle of restitutio in integrum, the charterers' recoverable loss was the sum of French francs which they had paid (*see* p. 9, col. 1; p. 10, col. 2).

Appeal dismissed.

Per Lord WILBERFORCE (at p. 9): . . . a decision in what currency the loss was borne or felt can be expressed as equivalent to finding which currency sum appropriately or justly reflects the recoverable loss. This is essentially a matter for arbitrators to determine. A rule that arbitrators may make their award in the currency best suited to achieve an appropriate and just result should be a flexible rule in which account must be taken of the circumstances in which the loss arose, in which the loss was converted into a money sum, and in which it was felt by the plaintiff . . . Awards of arbitrators based upon their appreciation of the circumstances in which the foreign currency came to be provided should not be set aside for, as such, they involve no error in law.

The following cases were referred to in both appeals:

Canadian Transport, The, (C.A.) (1932) 43 Ll.L. Rep. 409;

Di Ferdinando v. Simon, Smits & Co. Ltd., (C.A.) [1920] 3 K.B. 409;

Federal Commerce and Navigation Co. Ltd. v. Tradax Export S.A., (C.A.) [1977] 1 Lloyd's Rep. 217; [1977] Q.B. 324;

Jugoslavenska Oceanska Plovidba v. Castle Investment Co. Inc. (The *Kozara),* (C.A.) [1973] 2 Lloyd's Rep. 1; [1974] Q.B. 292;

Kraut (Jean) A.G. v. Albany Fabrics Ltd., [1976] 2 Lloyd's Rep. 350; [1977] Q.B. 182;

Miliangos v. George Frank (Textiles) Ltd., (H.L.) [1976] 1 Lloyd's Rep. 201;

United Railways of Havana and Regla Warehouses Ltd., in re, (H.L.) [1961] A.C. 1007;

Volturno, The, (H.L.) (1921) 8 Ll.L. Rep. 449; [1921] 2 A.C. 544.

These were two appeals brought by shipowners. In the first appeal, the defendant owners of the vessel *Despina R.* appealed against the decision of the Court of Appeal (Stephenson, Orr and Cumming-Bruce, L.JJ.), ([1977] 2 Lloyd's Rep. 319) allowing the appeal of the defendants from the decision of Mr. Justice Brandon ([1977] 1 Lloyd's Rep. 618) given in favour of the plaintiffs the owners of the vessel *Eleftherotria* and holding in effect that the plaintiffs were entitled to be awarded damages in the foreign currency of expenditure or loss. The Court of Appeal held that the plaintiffs were entitled to be awarded damages in the plaintiffs' currency, and the defendants argued that the damages ought to have been awarded in sterling at the rate of exchange prevailing at the date of loss or damage.

In the second appeal, the owners, Stockholms Rederiaktiebolag SVEA appealed against the decision of the Court of Appeal (Lord Denning, M.R., Ormrod and Geoffrey Lane, L.JJ.) ([1978] 1 Lloyd's Rep. 535), allowing the appeal of the charterers, Services Europe Atlantique Sud (SEAS) from the decision of Mr. Justice Robert Goff ([1977] 1 Lloyd's Rep. 39), given in favour of the owners and holding in effect that the arbitrators' award, that the owners should pay to the charterers the sum of 418,012.17 francs, should have been expressed in Brazilian cruzeiros, as the currency in which the loss was incurred.

Mr. Nicholas A. Phillips, Q.C., and Mr. John Reeder (instructed by Messrs. Holman Fenwick & Willan) for the defendant appellant, the owners of *Despina R.;* Mr. C. S. Staughton, Q.C., Mr. M. N. Howard and Miss Sarah Miller (instructed by Messrs. Hill Dickinson & Co.) for the plaintiff respondent, the owners of *Eleftherotria.*

Mr. A. G. S. Pollock (instructed by Messrs. Holman Fenwick & Willan) for the respondent charterers; Mr. Nicholas Merriman and Mr. Timothy Young (instructed by Messrs. William A. Crump & Son) for the appellant owners.

The further facts are stated in the judgment of Lord Wilberforce.

Judgment was reserved.

Thursday, Oct. 19, 1978

JUDGMENT

Lord WILBERFORCE: My Lords, in *Miliangos v. George Frank (Textiles) Ltd.,* [1976] 1 Lloyd's Rep. 201; [1976] A.C. 443, this House decided that a plaintiff suing for a debt payable in Swiss francs under a contract governed by Swiss law could claim and recover judgment in this country in Swiss francs. Whether the same, or a similar, rule could be applied to cases where (i) a plaintiff sues for damages in tort, or (ii) a plaintiff sues for damages for breach of contract, were questions expressly left open for later decision. These questions were regulated before *Miliangos* as to tort by the *S.S. Celia (Owners) v. S.S. Volturno (Owners) (The Volturno),* (1921) 8 Ll.L. Rep. 449; [1921] 2 A.C. 544 and as to contract by *Di Ferdinando v. Simon, Smits & Co. Ltd.,* [1920] 3 K.B. 409, which decided that judgment in an English Court could only be given in sterling converted from any foreign currency as at the date of the wrong. Now these questions are directly raised in the present appeals in each of which your Lordships have the advantage of judgments of the Court of Appeal and of judgments of high quality at first instance. These enable the House, as it could not have done in *Miliangos,* to consider some of the problems which may exist in the varied cases of torts and breaches of contract.

I. OWNERS OF M.V. "ELEFTHEROTRIA" v. OWNERS OF M.V. "DESPINA R."

These are two Greek vessels which collided in April, 1974, off Shanghai. On July 7, 1976, a settlement was arrived at under which it was agreed that the appellants should pay to the respondents 85 per cent. of the loss and damage caused to the respondents by the collision. This is therefore a tort case based upon negligence.

After the collision *Eleftherotria* was taken to Shanghai where temporary repairs were carried out. She then went to Yokohama for permanent repairs, but it turned out that these could not be carried out for some time. She was therefore ordered to Los Angeles, California, U.S.A., for permanent repairs. Expenses were incurred under various headings (particularised in the judgment of Mr. Justice Brandon, [1977] 1 Lloyd's Rep. 618) in foreign currencies, namely, renmimbi yuan ("R.M.B."), Japanese yen, U.S. dollars, and as to a small amount in sterling. The owners of the ship are a Liberian company with head office in Piraeus (Greece). She was managed by managing agents with their principal place of business in the state of New York, U.S.A. The bank account used for all payments in and out on behalf of the respondents in respect of the ship was a U.S. dollar account in New York—so all the expenses incurred in the foreign currencies other than U.S. dollars were met by transferring U.S. dollars from this account. The expenses incurred in U.S. dollars were met directly by payment in that currency from New York.

The Judge ordered that the following questions be tried separately, namely: *(a)* whether, where the plaintiffs have suffered damage or sustained loss in a currency other than sterling, they are entitled to recover damages in respect of such damage or loss expressed in such other currency, *(b)* if, in such a case, the plaintiffs are only entitled to recover damages expressed in sterling, at what date the conversion into sterling should be made. Under question *(a)* there are two alternatives. The first is to take the currency in which the expense or loss was immediately sustained. This I shall call "the expenditure currency". The second is to take the currency in which the loss was effectively felt or borne by the plaintiff, having