Conversion Of Judgments Measured In Foreign Currencies

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlulr
Part of the Torts Commons

Recommended Citation
Conversion Of Judgments Measured In Foreign Currencies, 39 Wash. & Lee L. Rev. 165 (1982), https://scholarlycommons.law.wlu.edu/wlulr/vol39/iss1/10
CONVERSION OF JUDGMENTS MEASURED IN FOREIGN CURRENCIES

Courts in the United States express money judgments for damages in dollars. Generally, courts ignore fluctuations in the value of the dollar between the time of injury or breach and the time of judgment. When a plaintiff alleges damages that are measured in a particular foreign currency, however, the courts must translate those damages into United States dollars. The question thus arises of which exchange rate the court should use to convert damages into the equivalent value in dollars.

1 Shaw, Savill, Albion & Co. v. The Fredericksburg, 189 F.2d 952, 955 (2d Cir. 1951). United States courts express damages for torts as well as breach of contract in dollars. Id.; see Bronson v. Rodes, 74 U.S. (7 Wall.) 229, 251 (1868); Frontera Transp. Co. v. Abunza, 271 F. 199, 202 (5th Cir. 1921); accord, Coinage Act of April 2, 1792, 31 U.S.C. § 371 (1976). The rule in England was similar to the United States requirement of judgment only in the forum currency until the recent decision of Miliangos v. George Frank Textiles, Ltd. [1976] A.C. 443, 461. Prior to the Miliangos case, all English court judgments were in pounds. See Comment, The Currency of Suit in Actions For Foreign Debts, 24 McGill L. J. 422, 422 (1978) [hereinafter cited as Actions For Foreign Debts]; Knott, Foreign Currency Judgments in Tort: An Illustration of the Wealth-Time Continuum, 43 Mod. L. Rev. 18, 26-27 (1980). In Miliangos, however, the House of Lords held that an English court can grant a judgment in foreign currency under a contract governed by the law of a foreign country. [1976] A.C. at 443. The House of Lords has not decided whether courts will grant foreign currency judgments in tort cases. Actions For Foreign Debts, supra at 436. Australia, Brazil, Denmark, Egypt, Germany, Italy, Norway, Poland and Switzerland now allow judgments in currencies foreign to the forum in both tort and contract cases. F. MANN, THE LEGAL ASPECT OF MONEY 351 (3d ed. 1971) [hereinafter cited as MANN]. Austria, Italy and Germany even go so far as to dismiss a suit for damages valued in the currency of the forum if the contractual money of account was a foreign currency. Id. at 351; see Fraenkel, Foreign Moneys in Domestic Courts, 35 Colum. L. Rev. 360, 386 n.95 (1935) [hereinafter cited as Fraenkel].


3 See Note, Fluctuating Rates of Exchange and the Conflict of Laws, 40 Harvard L. Rev. 619, 620 (1927) [hereinafter cited as Fluctuating Rates]. Damages measured in terms of a foreign currency may result from contracts to deliver commodities, money of the forum, or money of a third country to a foreign country. Id. at 620.

4 Evan, Rationale of Valuation of Foreign Money Obligations, 54 Mich. L. Rev. 307, 309 (1956) [hereinafter cited as Evan]; see McCrindle & Son Ltd. v. Durant, 611 F.2d 89, 91 (6th Cir. 1980). In Durant, the Fifth Circuit hold that no conversion into dollars is necessary in cases when the contract expresses the obligation in both dollars and a foreign currency. Id. at 91. Americans using international contractual arrangements may avoid the valuation problem by drafting contractual obligations in terms of dollars and at least one other currency. Id.
Courts generally use either the conversion rate available as of the date of injury or the date of judgment.  

Most federal and state courts faced with the foreign currency conversion issue have adopted the two rule doctrine established by the Supreme Court in *Hicks v. Guinness* and *Die Deutsche Bank Filiale Nurnberg v. Humphrey*. The two rule doctrine dictates the proper use

---

* See Fraenkel, supra note 1, at 362. United States courts have considered a number of valuation dates, including the date of contracting, the date plaintiff instituted the suit, the date of the trial, and the date of payment of the judgment. *Id.* In most cases the date of judgment is the day the district court hands down a decision, even if another court subsequently modifies, affirms, or reverses the earlier judgment. *See* Reissner v. Rogers, 276 F.2d 506, 511 (D.C. Cir.), *cert. denied*, 364 U.S. 816 (1960).  

* Gutor Int'l AG. v. Raymond Packer Co., 493 F.2d 938, 943 (1st Cir. 1974). In the *Gutor* case, Gutor International filed suit to recover the purchase price of 500 dictaphones delivered to and accepted by Raymond Packer. *Id.* at 941-42. Gutor requested recovery in Swiss francs or the equivalent dollar amount as of the judgment date. *Id.* at 943. The First Circuit held that the proper conversion date was the judgment date because the debt was payable in a foreign currency in a foreign country. *See id.* *See also* Conte v. Flota Mercante Del Estado, 277 F.2d 664, 670-71 (2d Cir. 1960); Wichita Mill & Elevator Co. v. Naamloose etc. Industrie, 3 F.2d 931, 933 (6th Cir. 1925); Yeramex Int'l v. S. S. Tendo, 1977 A.M.C. 1807, 1838 (E.D. Va. 1977), *modified* 595 F.2d 943 (4th Cir. 1979). In *Conte*, an Argentine seaman sued his employer, an Argentine shipowner, for injuries sustained on a vessel in international waters. 277 F.2d at 670-71. The Second Circuit found that Argentine law applied and the proper conversion date was the date of final judgment. *Id.* *The Naamloose* case involved a claim against a shipper of flour for losses resulting from the untimely transportation of the goods. 3 F.2d at 933. The Fifth Circuit used the conversion rate available on the date of the breach because the cause of action arose in a foreign country. *Id.* *Yeramex* concerned a carrier's liability for damages incurred during shipment of goods to an overseas purchaser. 1977 A.M.C. at 1811. The district court held that when United States law governs a case involving foreign currency the proper conversion rate is that rate prevailing on the date of the breach. *Id.* at 1838.  

* 269 U.S. 71 (1925). In *Hicks*, the United States government, at the outbreak of World War I, seized property owned by hostile resident aliens. *Id.* at 79. Hicks, the Alien Property Custodian, administered the property and discharged outstanding debts with seized funds. *Id.* Certain American businessmen had a pre-war claim, valued in German marks, against a German company. *Id.* These Americans sought to satisfy the mark debt through an action against the German company's assets held by the Alien Property Custodian. *Id.* The Supreme Court converted the claim from marks to dollars by setting the exchange rate as of the date the mark debt was due to the American creditors. *Id.* at 80. Thus, the Court used the breach date rule instead of basing its decision solely on a mechanical commodity concept of currency. *See* text accompanying notes 31-38 infra. The Court indicated that choice of law considerations dictated the outcome. 269 U.S. at 80. The debt was due and payable in the United States. *Id.* Failure to pay created a dollar claim for damages under United States law. *Id.* Although payment of the dollar value of the mark debt as of the judgment date would have satisfied the claim had the laws of Germany governed, conversion at the breach date exchange rate was proper because the claim arose under United States law. *Id.*  

* 272 U.S. 517 (1926). In *Humphrey*, the Supreme Court further developed the two rule doctrine. The Court explicitly rejected an inflexible commodity approach in favor of a choice of law theory of conversion. *Id.* at 519; *see* text accompanying notes 31-38 infra. In *Humphrey*, a United States citizen held a demand deposit with a German bank. 272 U.S. at 518. The German bank refused payment upon demand and Humphrey went to the Alien Property Custodian for satisfaction of the debt. *Id.* The value of the German mark fell
of either the breach date or the judgment date for conversion of damages into United States dollars.\footnote{9} The breach date rule requires conversion of a foreign currency judgment at the exchange rate available on the date of the injury.\footnote{10} The judgment date rule sets the conversion rate as of the date of final judgment.\footnote{11} Use of either the judgment date rule or the breach date rule depends upon the function of money in the breached contract.\footnote{12}

The basis of the two rule doctrine is a dual function concept of money.\footnote{13} For purposes of the doctrine, currency can operate in two different ways.\footnote{14} Currency can function as a commodity or as a measure of

---

\footnote{9} Fluctuating Rates, supra note 3, at 620. Two notable exceptions to the adoption of the two rule doctrine are California and New York. See Compania Engraw Commercial E. Indus. S.A. v. Schenley Dist. Corp., 181 F.2d 876, 879 (9th Cir. 1950); De Sayve v. De La Valdene, 124 N.Y.S. 2d 143, 154-55 (1953) (holding that even though French law governed case, New York law dictated use of breach date rather than judgment date rule), aff'd 130 N.Y.S. 2d 865 (1954). Both New York and California employ the breach date rule regardless of choice of law considerations. 5 CORBIN ON CONTRACTS § 1005 at 55 (2d ed. 1964) [hereinafter cited as CORBIN]. Thus, in California and New York, breach of contract in either a foreign country or in the United States will result in application of the breach date rule. Id. at 55. But see Hughes Tool Co. v. United Artists Corp., 279 App. Div. 417, 424-25, 110 N.Y.S. 2d 383, 389 (1952) (breach date conversion proper where plaintiff's principal place of business was in United States and plaintiff would have immediately converted funds into United States currency). At least one New York decision has stated explicitly, however, that the correct New York rule is the two rule doctrine. United Shellac Corp. v. A.M. Jordan, Ltd., 277 App. Div. 147, 153, 97 N.Y.S. 2d 817, 822 (1950).

The Ninth Circuit and the New York courts have held that the conversion rules established by Hicks and Humphrey do not bind the states. Compania Engraw Commercial E. Indus. S.A. v. Schenley Dist. Corp., 181 F.2d 867, 876 (9th Cir. 1950); De Sayve v. De La Valdene, 124 N.Y.S. 2d 148, 154-55 (1953), aff'd 130 N.Y.S. 2d 865 (1954). The Ninth Circuit held in Schenley that the California courts could follow the so-called "New York" rule rather than the two rule doctrine. 181 F.2d at 876. The Ninth Circuit also found that the judgment date rule applied only to fields of purely federal concern, such as admiralty, Id. at 876.


\footnote{11} See Die Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 519 (1926); Wyse v. Pioneer-Cafeteria Feeds, Ltd., 340 F.2d 719, 725 (6th Cir. 1965); Paris v. Central Chiclera, 193 F.2d 960, 962-63 (5th Cir. 1952); Lamoinors, etc. v. Southwire Co., 484 F. Supp. 1063, 1070-71 (N.D. Ga. 1980) (Supplemental opinion); Dollar Damage Awards, supra note 2, at 760.

\footnote{12} Evan, supra note 4, at 319-23; see text accompanying notes 13-20 infra.


\footnote{14} See Evan, supra note 4, at 319-23; note 27 infra.
value. When a currency functions as a commodity its value fluctuates with the market. When a currency operates as a measure of value or money it has a constant fixed value. The currency is the standard against which purchasers measure the value of a given commodity. When foreign currency functions as a commodity, the two rule doctrine dictates that the breach date determines the conversion rate. When the foreign currency functions as money, however, the judgment date rule applies.

Courts use choice of law theories to determine the function of currency in a given transaction. The Supreme Court followed a nineteenth century "vested rights" choice of law theory in Hicks and Humphrey. Under the vested rights theory, the function of money in the country where the breach occurred is determinative. For example, the breach of a foreign money contract in the United States creates a claim for dollars as of the date of the breach. Courts would treat the foreign money as a commodity and apply the breach date rule. The breach of a contract in a foreign country, however, creates a claim for a fixed

---

15 Measurement of Foreign Money, supra note 13, at 220.
16 Id. at 220.
17 Id.
18 Id.
19 The Verdi, 268 F. 908, 909-10 (S.D.N.Y. 1920). In The Verdi, the court used the breach date rule to convert damages valued in pounds sterling into United States dollars. Id. at 909. The court determined that dollars functioned as money in the circumstances of the case. Id. at 909. Pounds operated as a commodity. Id. The court settled on breach date conversion to value the commodity in terms of the unit of measure, the dollar. Id.
20 Paris v. Central Chiclera, 193 F.2d 960, 962-63 (5th Cir. 1952). The Paris court determined that the parties entered into the contract in Mexico, intended to perform the contract in Mexico, and agreed to make payment in Mexican pesos. Id. at 962. The Fifth Circuit concluded that the pesos operated as money and the judgment date was the proper conversion date. Id. at 962-63. Bubble gum was the commodity sold under the contract. Id. at 961. The parties used pesos as a measure of value of the contracted commodity. Id. at 962.
21 Measurement of Foreign Money, supra note 13, at 222-23.
22 See Hicks v. Guinness, 269 U.S. 71, 80 (1925); Die Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 519 (1926); Reiblich, The Conflict of Laws Philosophy of Mr. Justice Holmes, 28 GEO. L. J. 1, 8 (1939) [hereinafter cited as Reiblich]; text accompanying notes 38-58 infra.
23 Fluctuating Rates, supra note 3, at 625; see text accompanying notes 38-58 infra. Courts have considered a variety of supplemental factors in determining the function of money. Fluctuating Rates, supra note 3, at 625. The place of contract, the money of contract, and the place of performance, as well as the situs of the breach, help determine the function of money. Paris v. Central Chiclera, 193 F.2d 960, 962 (5th Cir. 1952); Evan, supra note 4, at 319, n.51.
24 See Hicks v. Guinness, 269 U.S. 71, 80 (1925); Evan, supra note 4, at 322. At least one commentator's analysis of the proper valuation date depends on the place of performance rather than the place of breach. Id. at 320. In many situations the distinction creates no difference in result because contract breaches often occur at the place of performance. Id. The choice of law issue, however, still determines the function of currency. Measurement of Foreign Money, supra note 13, at 222-23.
number of units of that country's currency.\textsuperscript{26} Since foreign currency, like United States dollars, operates as money in the country of issuance,\textsuperscript{27} the claim for foreign money does not fluctuate with the exchange rate.\textsuperscript{28} The judgment date rule thus prevents recovery of losses or realization of gains resulting from exchange rate fluctuations.\textsuperscript{29} United States courts use the judgment date rule to limit the value of recovery to what a foreign court would have awarded the plaintiff.\textsuperscript{30}

Prior to Hicks and Humphrey, courts converted foreign money judgments at the rate of exchange on the date of the breach.\textsuperscript{31} Courts applied the breach date rule mechanically without determining the governing law or the actual function of the foreign currency.\textsuperscript{32} The rationale for a mechanical application of the breach date rule was a commodity concept of money.\textsuperscript{33} Courts viewed foreign currency as a commodity similar

\textsuperscript{26} Die Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 519 (1926); Paris v. Central Chieler, 199 F.2d 960, 963 (5th Cir. 1952); Shaw, Savill, Albion & Co. v. The Fredericksburg, 189 F.2d 952, 955-56 (2d Cir. 1952); CORBIN, supra note 9, at 52-3. The law of the foreign country determines the extent of the breaching party's liability. 272 U.S. at 520.

\textsuperscript{27} See Measurement of Foreign Money, supra note 13, at 219-23. The theory of nominalism is the basis of the money concept of currency. Id. at 219. Under nominalism, currency acts as a measure of value. Id. Each unit of the currency has a fixed and unchanging value. Id. A debtor satisfies a debt expressed in dollars by payment of that exact number of dollars without reference to the exchange rate. Id. at 220. The value of the dollar as a unit of measure never changes. Id. Two currencies cannot, however, both be units of measure in terms of the other currency. Id. The role of each currency as money or commodity depends upon the conflict of law theory followed by the court. Id. at 223. The law of the governing state dictates the function of the currencies. Id. at 220. The currency of a country acts as a measure of value in that country. See id.; see also Legal Tender Cases, 79 U.S. (12 Wall.) 457, 458 (1870).

\textsuperscript{28} See Evan, supra note 4, at 320-22. The nominalism theory requires a fixed unit of measure. See note 27 supra. Consequently, courts recognizing nominalism do not adjust judgments for changes in the value of the currency. Measurement of Foreign Money, supra note 13, at 219-23. Similarly, a party cannot receive damages for losses resulting from fluctuations in the value of a unit of measure. Id. The value of money does not change and no damages are recoverable. Courts do recognize, however, a change in the value of a commodity. The value of a commodity, such as steel, changes periodically and courts can grant damages for breach of a contract to deliver a commodity. Evan, supra note 4, at 320-22. The measure of damages is the difference between the contract value of the item and the market value at the time of the breach. See U.C.C. § 2-713(1); U.C.C. § 2-714(2) (1980 version). Therefore, when currency acts as commodity, damages are recoverable. CORBIN, supra note 9, at 58; Evan, supra note 4, at 322. When currency acts as money there are no damages, since there has been no change in the value of the money. Evan, supra note 4, at 322.

\textsuperscript{29} CORBIN, supra note 9, at 55.

\textsuperscript{30} Die Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 519 (1926).

\textsuperscript{31} Wichita Mill & Elevator Co. v. Naamlooze etc. Industrie, 3 F.2d 931, 933 (5th Cir. 1925); Guiness v. Miller, 299 F. 538, 540 (2d Cir. 1924); Wormser Bros. v. F. Marroguin & Co., 249 F. 428, 430 (5th Cir. 1918).

\textsuperscript{32} Wormser Bros. v. F. Marroguin & Co., 249 F. 428, 430 (5th Cir. 1918). The Fifth Circuit in Wormser Bros. automatically used the judgment date rate without reference to the proper governing law. Id. The court noted nothing more than that the Mexican peso was the currency of contract. Id. Even though the parties used the peso as a measure of value and not as a commodity, the court applied the breach date rule. Id.

\textsuperscript{33} See Evan, supra note 4, at 307-15.
to a bushel of corn or a ton of steel. Consequently, the rules for breach of contract to deliver a commodity applied to contractual dealings in a foreign currency. Courts, therefore, would determine damages by finding the difference between the contract price and the market price at the time of the breach. The breach date exchange rate determined the dollar value of the damages. The Hicks and Humphrey decisions destroyed this mechanical rule and established dual commodity and money concepts of foreign currency.

Under the two rule doctrine, the judgment date rule applies only when the foreign currency operates as money and the law of the foreign country governs the cause of action. The breach date rule applies when the currency functions as a commodity and the law of the forum governs.

The proper application of the two rule doctrine depends upon a correct determination of the function of money in a particular transaction. Since Hicks and Humphrey established the vested rights theory of conflict of law as the guide for determination of the true function of the currencies involved, the continued appropriateness of the two rule doctrine depends in part upon the viability of the vested rights theory.

The cornerstone of the vested rights theory of conflict of law is a strict interpretation of territorial sovereignty. The vested rights

34 See Die Deutsche Bank Filiale Nurnberg v. Humphrey, 272 U.S. 517, 521 (1926) (Sutherland, J., dissenting). Justice Sutherland's dissent in Humphrey reflects the state of case law prior to the emergence of the two rule doctrine. See Fluctuating Rates, supra note 3, at 620-21.
37 Id.
38 Humphrey, 272 U.S. at 519-23; Hicks, 269 U.S. at 80; see Evan, supra note 4, at 319-23; Measurement of Foreign Money, supra note 13, at 220; see notes 7 & 8 supra.
39 CORBIN, supra note 9, at 620.
40 Evan, supra note 4, at 322.
41 Measurement of Foreign Money, supra note 13, at 223.
42 See text accompanying note 22 supra.
43 See text accompanying notes 59-76 infra.
44 See Reiblich, supra note 22, at 5. The territorial theory maintains that the law of a state exists within its boundaries and nowhere else. Dodd, The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws, 39 HARV. L. REV. 533, 535-36 (1926); Reiblich, supra note 22, at 5. Commentators have criticized the territorial theory as being vague and subject to erroneous interpretation. See, e.g., Cook, The Jurisdiction of Sovereign States and the Conflict of Laws, 31 COLUM. L. REV. 368, 369-70 (1931); Cook, The Logical and Legal Bases of the Conflict of Laws, 33 YALE L. J. 457, 459 (1924); Lorenzen, Territoriality, Public Policy and the Conflict of Laws, 33 YALE L. J. 736, 743 (1924) [hereinafter cited as Lorenzen]. Professor Corbin has stated that wide criticism of the territorial theory prevents him from advocating continued application of the theory. CORBIN, supra note 9, at 61. The vested rights theory adopts the principles of territoriality through the assumption that only one country's law can govern a cause of action and all countries' courts should recognize the right created by the foreign law. See Reiblich, supra note 22, at 5.
theory requires a court to enforce a right created by the law of a foreign sovereign. Under the doctrine of territorial sovereignty, however, the law of a foreign nation does not operate directly outside of that country. Nor can a court of the United States apply United States law to a foreign right. Under the vested rights theory an act outside the United States that gives rise to a cause of action under a foreign law creates an obligation that United States courts should enforce. The foreign law determines the existence and extent of the obligation. Thus, United States courts would enforce, but not alter, the right created by the foreign law. Moreover, according to the theory, a United States court can refuse to enforce a vested foreign right only if enforcement is contrary to the public policy of the forum.

The vested rights theory requires a determination of which country’s law governs the cause of action. Criteria used to find the governing law in contract cases include the place of breach, the place of performance, the place of contracting, the currency of the contract, and the nationality of the contracting parties. The two rule doctrine incorporates the vested rights theory to determine which law governs a cause of action.

---

4 See, e.g., American Banana Co. v. United Fruit Co., 213 U.S. 347, 356-57 (1909); Slater v. Mexican Nat’l R.R. Co., 194 U.S. 120, 126 (1904). In Slater, United States citizens brought a wrongful death action arising out of a railroad accident in Mexico against a United States corporation. 194 U.S. at 124. The Supreme Court found that the law of the situs determines the existence and the extent of the obligation. Id. at 126. However, the law of the situs does not operate outside the sovereign territory that created the law. Id. Furthermore, the wrongful act is not subject to the laws of the forum state. Id. The Supreme Court held that, although the wrongful act was not subject to any law in force in the forum, the act created an obligation that United States courts should enforce. Id.

In American Banana, the plaintiff urged the Supreme Court to use United States antitrust statutes as the basis for defendant’s liability for activities occurring in Panama and Costa Rica. 213 U.S. at 354. The Court held that a United States statute has no effect on activities in another sovereign territory. Id. at 357. The Court stressed the conclusion that the character of an act as unlawful can only be determined by the law of the situs. Id. at 356. The operation of a statute is confined to the territorial limits over which the law maker has power. Id. at 357.

5 See note 44 supra.


7 See Reiblich, supra note 22, at 5-6.


9 See Reiblich, supra note 22, at 10.


11 Measurement of Foreign Money, supra note 13, at 222.

12 See Reiblich, supra note 22, at 16-17. Courts consider very few factors in analyzing choice of law questions. Fluctuating Rates, supra note 3, at 625. One or two facts, such as the place of the breach and the nationality of the parties, often form the basis of the choice of law decision. Evan, supra note 4, at 323. One commentator indicates that the factors used by courts in analyzing choice of law questions are arbitrary and without social justification. Reiblich, supra note 22, at 16-17.
involving foreign currency resulting from a breach of contract or tort.\(^5\) The governing law determines whether the foreign currency acts as a commodity or as money.\(^6\) If United States law governs, the courts assume that the foreign currency acts as a commodity.\(^5\) If the foreign law governs, United States courts assume that the currency functions as money.\(^7\) In both *Hicks* and *Humphrey*, the Supreme Court's application of the breach date rule or judgment date rule depended upon the choice of law determination, which in turn depended upon a vested rights analysis.\(^8\)

Since the *Hicks* and *Humphrey* decisions, commentators have questioned the vested rights theory of choice of law.\(^9\) The vested rights theory operates under a territorial concept of power.\(^6\) Territoriality assumes that one law governs any transaction, that no other law can be

---

\(^5\) See *Restatement (Second) of Conflict of Laws* § 144 (1971) (hereinafter cited as *Restatement*). The determination of governing law turns on choice of law considerations. The theory currently used by United States courts bases the choice of law finding on the country that has the most significant relationship or interest in the issue. *Id.* The state where the conduct or injury occurred is not necessarily the state most concerned with the judgment for damages resulting from a tort. *Id.* Absent unusual circumstances, however, it is likely that the local law will apply. *Id.* The factors considered in determining the relationship of a state to the action are the needs of the interstate and international systems, the policies of the forum, the policies of other interested states, a state's justifiable expectations, certainty, predictability, uniformity, and ease of application of the governing law. *Id.* § 6. The choice of law determination in contract disputes follows almost the same principles employed in tort cases. *Id.* § 188. Courts apply these principles in light of the contacts that the contracting parties had with the countries in question. *Id.* The contacts include the place of contracting, the place of negotiation, the place of performance, the location of the subject matter and the nationality of the parties. *Id.* In contrast, the vested rights theory examines only the contacts in order to determine the choice of law question. Note 53 *supra*; see note 64 *infra*.


\(^7\) See *Evan*, *supra* note 4, at 320-21.

\(^8\) See *Corbin*, *supra* note 9, at 54.

\(^9\) See *Reiblich*, *supra* note 22, at 8-10; *Jones, The Spurious Judgment Day Rule For Converting Foreign Currency into Dollars When Suit is Brought Upon an Obligation Governed By Foreign Law*, 3 INT'L LAWYER 277, 287-90 (1969) (hereinafter cited as *Jones*). See 2 *Holmes-Laski Letters* 886 (M. Howe, Ed., 1953); *Holmes-Pollock Letters* 190, 190-93 (1940). Justice Holmes' *Hicks* and *Humphrey* opinions reflect the notion that the law is not a "brooding omnipresence in the sky." 2 *Holmes-Laski Letters* 886 (M. Howe, Ed. 1953). A legal right must be created by the law of a particular country to be a concrete entity. *Id.* A claimant cannot assert mere fundamental concepts of morality as the basis of a claim. *Id.* A claimant must assert a concrete right created by the laws of a particular country, and once the governing law creates the right, the vested rights theory requires enforcement of that right by the forum court. See text accompanying notes 44-51 *supra*.

\(^10\) See *Reiblich*, *supra* note 22, at 16-17 (vested rights theory offers no social justification for results it dictates); see *Lorenzen*, *supra* note 44, at 743. Several commentators have indicated that the territorial theory is no longer a valid basis for any choice of law theory. *Id.*; *Corbin*, *supra* note 9, at 61.

\(^11\) *Reiblich*, *supra* note 22, at 1-2; see text accompanying notes 44-51 *supra*.
controlling, and that all courts must recognize a right arising from the one proper law. The flaw in the territorially assumption is its postulate that a particular-state’s law is the only appropriate governing law for a given transaction. A contract involving parties from two countries, performance in a third country, contracting in a fourth, and suit brought in a fifth would not be subject to the exclusive control of one country’s law. Moreover, the vested rights theory compounds the shortcomings of the territorial concept by using arbitrary criteria to determine the controlling law. The criteria include the place of breach, the place of performance, the place of contracting, the currency of contract, and the nationality of the contracting parties. Although these criteria allow an easy determination of the governing law, there is little other social justification for their use as the decisive factors in the choice of law decision. Decisions subsequent to Hicks and Humphrey have employed only one or two of the choice of law criteria along with a limited analysis of the facts in deciding upon the governing law. Having determined the governing law, United States courts proceeded to enforce the right created by that law. The vested rights theory does not adequately analyze and answer the difficult question of which country’s law is the most appropriate law to govern a particular transaction. The focus of the theory is on the enforcement of rights created under the foreign law rather than on a thoughtful analysis of the choice of law problem.

---

61 Reiblich, supra note 22, at 16.
62 Lorenzen, supra note 44, at 743.
63 See Reiblich, supra note 22, at 16-17.
64 See Evan, supra note 4, at 319 n.51; note 54 supra. The issue of the relative importance that courts should give to criteria such as the nationality of the contracting parties, the currency of the contract and the place of contracting in making the choice of law decision is uncertain. Reiblich, supra note 22, at 18. Courts frequently apply the criteria arbitrarily. Id. Current choice of law theories use similar choice of law criteria. Modern theories, however, use conflict of law principles to determine the relative importance of a specific factor. See note 54 supra. Use of the conflict of law principles yield a rational, socially justified choice of law conclusion. Id.
65 Reiblich, supra note 22, at 17.
66 Evan, supra note 4, at 323. In Laminoirs, etc. v. Southwire Co. 484 F. Supp. 1063, 1070 (N.D. Ga. 1980), French law governed the cause of action because the defendant owed a franc debt payable in France. 484 F. Supp. at 1070. Since French law governed, the court concluded that the judgment date determined the conversion rate. Id. In Bamberger v. Clark, 390 F.2d 485, 487 (D.C. Cir. 1968) (per curiam), the court indicated that the critical factor in determining the conversion date is the contracted place of payment. 390 F.2d at 487. The court found that since payment could occur in the United States, the breach date rule applied. Id. at 489. In Paris v. Central Chiclera, 193 F.2d 960, 962-63 (5th Cir. 1952), the Fifth Circuit found that Mexican law governed the cause of action because the place of performance, currency of contract, and place of contracting were in Mexico. Id. at 962-63.
67 See Reiblich, supra note 22, at 14-15.
68 Id.
Current choice of law theories ascertain the governing law by evaluating the facts of a case to determine the jurisdiction of most significant relationship. Modern theories apply a set of equitable principles that reflect the assumption that a number of states may have an interest in the issue before the court. The choice of law factors relevant to a determination of the governing law include the needs of an international legal system, the relevant policies of the forum and other interested states, the relative interests of other states in the particular issue, the protection of expectations, uniformity of result, ease of application of the governing law, and the basic policies underlying the particular field of law.

A basic policy of the law of damages is that any recovery should put the plaintiff in as good a position as if no breach had occurred. The vested rights theory ignores the principles of modern choice of law theories, and consequently, the two rule doctrine can yield results that over or under compensate the plaintiff. In Humphrey, for example, the Supreme Court's judgment date holding reduced the applicable conversion rate from 21 cents to 1.3 cents per mark. The vested rights theory dictated use of the judgment date rule simply because the debt arose in Germany. Judgment date conversion in this case prevented the granting of a fully compensatory judgment. Thus, the correct determination of the governing law is critical to the proper operation of the two rule doctrine. Nevertheless, the limited analysis and arbitrary criteria used by the vested rights theory can yield an improper choice of law conclusion. Continued use by United States courts of the vested rights theory as the basis of the two rule doctrine may be improper in light of the theoretical and equitable shortcomings of the theory.

The comity of nations and the local-law theories are alternatives to the vested rights theory that could support continued application of the current two rule doctrine. Under the comity of nations theory of choice of law, the courts of the forum nation voluntarily apply foreign law within the territory of the forum nation. Application of the foreign law

---

69 RESTATEMENT, supra note 54, § 144.
70 Id. § 6.
71 Id. The current choice of law theories reflect the complexities involved with the choice of law decisions. Id. at 13. The complex factual and policy considerations of the choice of law decision prevent the formulation of specific rules for easy determination of the governing law. Id. The complexity of the choice of law field allows only for use of general principles of guidance. Id. The RESTATEMENT provides flexible guidelines under the general theory of state of most significant relationship. Id.
72 CORBIN, supra note 9, at 63.
73 Jones, supra note 58, at 286; see 272 U.S. at 518.
74 272 U.S. at 519.
75 See text accompanying notes 39-43 supra.
76 See text accompanying notes 53 supra.
77 Reibich, supra note 22, at 11-15.
78 STORY, CONFLICT OF LAWS (8th ed. 1883) § 38 [hereinafter cited as STORY].
is inadmissible only when it is contrary to the policy of the forum state. Nevertheless, although the comity theory is more flexible than the vested rights theory, the comity theory has significant disadvantages as a base for the two rule doctrine. The comity theory is inadequate as an explanation of which law applies, when the forum court adopts the foreign law, or why the forum court adopts a foreign law. The comity theory and the vested rights theory both use arbitrary criteria to determine which law creates and governs a particular cause of action. These criteria, which are based on the discredited territorial concept of law, do not always yield a proper choice of law conclusion. Furthermore, the comity theory does not establish standards for determining whether a foreign law conflicts with a policy of the forum. A forum court could refuse to enforce a foreign claim if the forum court had a policy against foreign laws that are different but do not conflict with the law of the forum. Commentators have criticized the use of the comity theory because of perceived judicial opposition to the enforcement of foreign law.

The local-law theory is another alternative to the vested rights theory. The local-law theory indicates that the law of the forum creates

79 Id. Under the comity theory, the Humphrey judgment, See note 8 supra, would have been the same as that originally granted by the Supreme Court. The rationale behind the comity theory, however, differs from the vested rights reasoning. Reiblich, supra note 22, at 14-15. The vested rights analysis in Humphrey recognized a right created by a foreign law that vested in the plaintiff in Germany. 272 U.S. at 591. The comity theory would enforce German law because the governing law did not conflict with the public policy of the forum. STORY, supra § 38.

80 Reiblich, supra note 22, at 14-15.

81 Id.

82 Id. The comity theory employs the same arbitrary criteria used by the vested rights theory to determine the governing law. See note 53 supra.

83 Lorenzen, supra note 44, at 742-43.

84 STORY, supra note 134, § 38. The comity of nations theory derives completely from the voluntary application of foreign law by the forum. Id. Courts will not apply the foreign law if there is a policy restricting the operation of foreign law, or if the foreign law is contrary to public policy or prejudicial to the interests of the forum. Id. These guidelines are very broad and often allow a court to avoid the application of foreign law. Reiblich, supra note 22, at 14-15; see Bond v. Hume, 243 U.S. 15, 20-22 (1917). The Supreme Court indicated in Bond that an independent state will not enforce a contract under the comity theory where enforcement would offend good morals or lead to the disturbance of local law. Id. at 20. The law-making power of a state defines public policy, and courts will not enforce a contract that is a manifest violation of the legislatively determined public policy. Id. at 22.

85 See Davis v. Ruzicka, 170 Md. 112, 114, 183 A. 559, 570 (1938) (Maryland refused to enforce a claim arising in a state whose wrongful death statute differed from but did not conflict with Maryland's).

86 Reiblich, supra note 22, at 15-16 (arguing that judges have an understandable tendency not to enforce foreign law as readily as they would enforce domestic law). See Dodd, supra note 44, at 538 (indicating that comity means courtesy between sovereigns rather than between courts and rarely involves enforcement of purely private rights).

87 Reiblich, supra note 22, at 14.
the right and remedy in all cases. When an act occurs in another state the forum court may create a right identical to the right created by the foreign state's law. Under the local-law theory, a United States court would use the judgment date rule only when the court found it appropriate to fashion a remedy similar to the remedy created by the foreign law. The local-law theory has shortcomings similar to the vested rights and comity of nations theories. There are no standards for determining which state's law a court should use as a guide for fashioning relief. Furthermore, there is no indication of when it is appropriate to use the foreign law instead of the forum's law. Consequently, it appears doubtful that the local-law theory can support application of the two rule doctrine in its current form.

Although commentators have questioned the theoretical underpinnings of the two rule doctrine, several practical considerations support the doctrine. The first advantage of the two rule doctrine is its ease of application. The court does not have to determine the value of the foreign currency relative to the dollar, and need not inquire into the changes in relative purchasing power or the effect of inflation on the currencies. The court need only determine the proper exchange rate on

---

86 Id.
87 Id.; see The James McGee, 300 F. 93, 96 (S.D.N.Y. 1924). In McGee, the court held that a court cannot enforce an obligation created by a foreign law. Id. A United States court can merely recognize the original right and create a remedy that copies as closely as possible the remedy available in the foreign court. Id.
88 Reiblich, supra note 22, at 14.
89 Id.; see text accompanying notes 59-68 and 81-86 supra.
90 Reiblich, supra note 22, at 14-15.
91 Id. at 15.
92 Id. One commentator interprets the local-law theory as a more accurate description of the choice of law process than either the vested rights or comity theories. Id. The commentator reaches his conclusion because the local-law theory rejects any attempt to dictate when the forum must enforce a foreign law. Id. The local-law theory emphasizes that the court determines the controlling principles of law. Furthermore, the local-law theory allows a court to examine policy considerations behind the choice of law decision. Id. The vested rights theory and the comity theory mechanically apply a foreign nation's law. Id. The vested and comity approaches do not allow consideration of choice of law policy concerns. See text accompanying notes 59-72 supra.
93 See note 44 supra.
94 See RESTATEMENT, supra note 54, § 6, comment j (choice of law principles should be simple and easy for courts to apply).
95 CORBIN, supra note 9, at 60; see Dollar Damage Awards, supra note 2, at 762-63. Commentators have urged United States courts to adopt a procedural rule allowing adjustment of damage judgments for the effects of inflation. Id. A procedure designed to account for inflation would compensate the injured party for loss of purchasing power. Id. at 764. A court would determine the change in the relative purchasing power of the currencies involved. Id. at 762-63. The consumer price index is an available indicator of a country's general price level. Id. A court would increase or decrease a judgment depending upon the relative changes in the value of both currencies. Id. The adjustment process would be difficult and time consuming if a court considered economic factors other than purchasing power loss. Id. Nevertheless, the ready availability of the consumer price indexes for most countries makes
the valuation date. Conversely, a court need not undertake time consuming consideration of complex economic data concerning real value and inflation. In short, the two rule doctrine promotes judicial economy.

The two rule doctrine also produces consistency, continuity, and predictability. The established criteria that dictate determination of the proper conversion date do not change with varying policies favoring the plaintiff or the defendant. The place of the breach usually determines the exchange rate. Reliance on these objective choice of law factors permits the contracting parties to anticipate the consequences of a damage suit for breach of contract. Furthermore, the judgment date rule enables the forum court to maintain consistency with the foreign court whose law governs the case. Since the value of a judgment granted by the forum would equal that granted by a foreign court, the plaintiff has no monetary incentive to change jurisdictions. This uniformity prevents a plaintiff from forum shopping to find the most accommodating court.

The comity of nations theory or the local-law theory and practical considerations support continued use of the two rule doctrine. Nevertheless, the doctrine can yield disparate consequences and foster unsound policy. Inequities may result from the two rule doctrine’s failure to account for the effect of the breach date and judgment date rules, and

the procedure manageable. See, e.g., MONTHLY BULLETIN OF STATISTICS (United Nations); INTERNATIONAL FINANCIAL STATISTICS (International Monetary Fund) (sources of consumer price data).

\footnote{95 See text accompanying notes 9 & 10 supra.}

\footnote{96 Dollar Damage Awards, supra note 2, \textit{at} 782-83. The economic data considered by a court in an adjustment procedure can be simple or complex. \textit{Id.} The most accessible and usable data would be the consumer price indexes of the countries involved. \textit{Id.; see note 100 supra.}}

\footnote{97 \textit{Fluctuating Rates, supra} note 3, \textit{at} 625.}

\footnote{98 See text accompanying notes 77-86 supra. The conclusion on the proper law question in turn allows the court to apply either the breach or judgment day rules. See text accompanying notes 19-21 supra. The consistency concept does not address the choice of law question. Consistency of result eliminates the possibility of a plaintiff shopping for a forum that will grant him the largest judgment. Reiblich, supra note 22, \textit{at} 14-17.}

\footnote{99 CORBIN, supra note 9, \textit{at} 59.}

\footnote{100 RESTATEMENT, supra note 54, \textit{§} 6, \textit{at} 15-16, comment i. (consistency, predictability, and uniformity are important goals of choice of law analysis). See also McCrindle & Son, Ltd. v. Durant, 611 F.2d 89, 91 (5th Cir. 1980). The parties to a contract can make provisions in the contract to avoid application of the two rule doctrine. \textit{Id.} In Durant, the Fifth Circuit held that a court does not have to set a conversion rate if the parties have contracted in terms of more than one currency or have stipulated an exchange rate. RESTATEMENT, supra note 54, \textit{§} 188.}

\footnote{101 RESTATEMENT, supra note 54, \textit{§} 144, \textit{at} 405-407. Consistency with a foreign court differs from the comity of law theory advanced by Justice Story. The comity theory is a choice of law theory that dictates the law governing the case. See text accompanying notes 77-86 supra. The conclusion on the proper law question in turn allows the court to apply either the breach or judgment day rules. See text accompanying notes 19-21 supra. The consistency concept does not address the choice of law question. Consistency of result eliminates the possibility of a plaintiff shopping for a forum that will grant him the largest judgment. Reiblich, supra note 22, \textit{at} 14-17.}

\footnote{102 See Jamaica Nutrition Holdings, Ltd. v. United Shipping, 643 F.2d 376, 380-81 (5th Cir. 1981).}

\footnote{103 See RESTATEMENT, supra note 54, \textit{§} 6, \textit{at} 15, comment j.}
the doctrine can produce judgments that do not fully compensate the in-
jured party.\textsuperscript{106} The doctrine ignores the effects of inflation on the value of the currency of recovery. The breach date rule assumes that the real value of the dollar is constant. The judgment date rule enforces the fiction that the real value of foreign currency remains stable.\textsuperscript{107} For example, suppose two parties contracted in New York for the delivery on January 1, 1982 of 1,000 English pounds for trade in the United States market. On January 1 the English party breaches the contract and the Americans file suit shortly thereafter. According to the vested rights theory, United States law governs the action because the contract was entered into and performance was due in the United States. A United States court, therefore, would hold that the breach date rule applies. Assuming an exchange rate of two dollars per pound on January 1, the court would grant a judgment of $2,000. If, however, the United States experienced an inflation rate of 10% in the period between the breach and the payment of the judgment, the real value of the judgment granted would be only $1,800. The $1,800 in real value would not compensate the injured party for his loss. The English party would benefit from the court's failure to account for inflation. In contrast, if deflation of like magnitude had occurred, the plaintiff would receive a judgment of $2,200 in real value. Similarly, the devaluation of the currency of contract in terms of the forum currency has deleterious effects on one of the parties when a court strictly applies the breach date rule. The defendant has to pay more of the foreign currency to satisfy the fixed dollar judgment amount. The defendant's liability increases because of the devaluation. Likewise, if the dollar depreciates in terms of the foreign currency, the defendant has to pay fewer units of foreign currency to equal the dollar damage amount. Similar inequities occur with the judgment date rule.\textsuperscript{108}

The two rule doctrine's failure to consider the actual function of money in the contract further impedes the fair operation of the doctrine. The breach date rule assumes that the foreign currency is a commodity.\textsuperscript{109}

\textsuperscript{106} See text accompanying note 73 supra.

\textsuperscript{107} CORBIN, supra note 9, at 54, 64-65.

\textsuperscript{108} The judgment date rule creates inequitable remedies because there is no adjustment for inflation or devaluation. Dollar Damage Awards, supra note 2, at 761-62. The breaching party can benefit from inflation if a lag occurs in the exchange market's adjustment for inflation. If the judgment date exchange rate does not accurately reflect the rate of inflation, the breaching party can pay the judgment with a relatively less valuable currency. Similarly, an inflexible market would allow a judgment day valuation to increase the real costs of a judgment when there was a currency devaluation. Id.

\textsuperscript{109} Drake, The Proper Rule in Fluctuating Exchanges, 28 Mich. L. Rev. 229, 238 (1930); Measurement of Foreign Money, supra note 13, at 218, 223. The function of currency is determined by reference to choice of law theories. See text accompanying note 19 supra. The currency of the country whose law governs the transaction acts as money. See text accompanying note 19 supra. But see Evan, supra note 9, at 327-30. One commentator asserts that the intent of the parties should determine the function of currency. Id. The terms of the
The judgment date rule maintains that foreign currency functions as money. These assumptions are not valid in all circumstances. The American who obtains English pounds for payment of a debt valued in pounds is not dealing in a commodity. The pound acts as a measure of value rather than as a commodity. Under the two rule doctrine, United States courts would use the breach date rule to grant the plaintiff damages for the change in the value of the foreign commodity. Application of the breach date rule, however, would be improper. The intent of the parties was to trade in money, not commodities, and the injured party should not receive damages for breach of a contract to deliver commodities.

Finally, the two rule doctrine operates unfairly by allocating the risk of currency fluctuation without reference to the intent of the parties. United States law maintains that one who contracts for a specific performance assumes the risk of exchange rate fluctuation and inflation reducing the real value of the bargained-for consideration. The parties may have intended the debtor to accept the cost of inflation. The two rule doctrine, however, thrusts the cost of a subsequent exchange rate fluctuation on one of the parties. Use of the breach date or judgment date rule and the direction of the exchange rate fluctuation determines the final allocation of risk. Choice of law criteria determine which rule applies. The two rule doctrine, therefore, ignores the intent of the parties in allocating risk.

A flexible interpretation of the two rule doctrine is a more equitable alternative to the current application of the two rule doctrine. Inequitable judgments arise from the two rule doctrine's concern with contract reflect the intent of the parties. Id. For example, if the place of performance is in the United States a court would interpret the intent of the parties to use foreign currency as a commodity. Several decisions have followed a more thorough analysis of the parties' intent. In Richard v. American Union Bank, 241 N.Y. 163, 165, 149 N.E. 338, 339-40 (1925), the court determined the intended use of the currency after performance of the contract. The Richard court held that although the foreign currency acted as money in the foreign country, the currency was for use as a commodity in the market. Id. See also Metcalf Co. v. Mayer, 213 App. Div. 607, 613-14, 211 N.Y.S. 53, 56-58 (1925) (indicating that determination of date of conversion depends primarily upon intent of parties).

10 See text accompanying note 20 supra.
111 See text accompanying note 4 supra.
11 CORBIN, supra note 53, at 59, 63-67. The intent of the parties in the allocation of risk differs from the concept of the parties intent to determine the function of money. See note 14 supra. The two rule doctrine places the cost of a subsequent exchange rate fluctuation on one of the parties. See text accompanying notes 107 & 108 supra. A court allocates the risk by determining whether the breach of judgment date rule applies and the direction of the exchange rate fluctuation. The court might frustrate the intent of the parties by placing the cost of the fluctuation on the wrong party. One of the parties might have assumed the risk. See text accompanying note 151 infra. The two rule doctrine, however, would disregard this intent and place the cost on the other party. Id.
113 See text accompanying notes 106-108 supra.
114 See text accompanying notes 21-26 supra.
115 CORBIN, supra note 9, § 1005, at 60.
uniformity and judicial economy. Instead of achieving uniformity and judicial economy, courts should apply the doctrine to achieve results that place the injured party in as good a position as he would have enjoyed in the absence of the breach. The judgment should reflect the effects of inflation and exchange rate fluctuations, the actual function of money, and the intent of the parties in the assignment of risk.

The courts should adjust the final damage amount by the quantifiable effect that inflation and fluctuation of the exchange rates have had on the currencies. A court could increase a judgment by the relative change in the inflation rate of the currencies. In Humphrey, the super-inflationary period subsequent to World War I dramatically reduced the value of plaintiff's recovery. The plaintiff could have received a fully compensatory recovery if the Supreme Court had adjusted the recovery by the rate of inflation. Instead, the Court adopted the policy that the law takes no notice of currency fluctuations. By permitting adjustment for devaluation or inflation, a flexible approach would prevent the breaching party from benefitting from inflation or a devaluation.

A flexible approach would also account for the actual function of money. A contract requiring the payment of a foreign currency in the United States does not necessarily mean that the foreign currency functions as a commodity. The actual function of money depends on the facts of the case. Currently, the vested rights theory determines the role of money. To better account for the function of money, a court should also analyze the facts to determine the intent of the parties in allocating the risk of currency fluctuation. The parties may desire the foreign cur-

---

116 Id. at 64-65.
117 Id.
118 See text accompanying notes 109-115 supra.
119 Dollar Damage Awards, supra note 2, at 763-64.
120 Id.
121 See text accompanying note 73 supra.
122 272 U.S. at 518-19.
123 Dollar Damage Awards, supra note 2, at 761-64.
124 See text accompanying note 21 supra.
125 CORBIN, supra note 9, at 59-60; Evan, supra note 4, at 322. Parties to a foreign currency contract assume the risk of exchange rate fluctuations. CORBIN, supra note 9, at 60. No reason exists for a court to assume, without reference to the intent of the parties, that a particular party has accepted the risk of subsequent fluctuations. Id. The two rule doctrine requires such an assumption. Id. The categorization of the foreign currency as commodity or money determined which party bears the risk of currency fluctuation. Id. Several countries currently permit recovery for damages in foreign currencies. See note 1 supra. The courts of these countries do not assume the function of the currencies but enforce the intent of the parties. Id. The terms of the contract dictate which currency is the commodity and which the unit of measure. Id. No case involving a foreign currency rule country has come before a United States court. Consequently, precedent fails to indicate whether a United States court would apply the contractual intent of the parties according to the foreign law or apply the traditional assumptions of the two rule doctrine and the nominalism theory. Never-
Converting currency to act as a unit of measure in order to put the risk of exchange rate fluctuation on the United States party. A contract to deliver pounds to an American in order to pay a debt puts the risk of a decline in the value of the pounds on the American. The two rule doctrine automatically considers the pound a commodity and puts the risk on the English party. If the parties intend the currency to be a measure of value, American courts should not grant damage judgments for breach of contract. Courts should use the breach date rule only when the currency functions as a commodity. Consideration of the facts of the case and the allocation of risk, therefore, indicate the correct function of currency and enable the courts to fashion an equitable judgment.

The flexible approach would result in a fully compensable judgment, and would leave the plaintiff in as good a position as if there had been no breach. Application of such an approach, however, would not be without costs. Currently, courts do not make inflationary adjustments in purely national disputes. Adjustments for inflation in foreign currency disputes could carry over into local cases. Adjustment of all judgments could cause instability in the dollar. Moreover, consideration of all the equitable concerns involved in a dispute may create a burden on the court. The ease and efficiency of the choice of law approach would be lost. Examination of the effects of inflation, rate fluctuation, the intent of the parties and means of adequate compensation would consume time and money. While judicial economy, predictability, and possible economic consequences are important considerations, a major goal of the judicial system is fair and equitable relief for an injured party. Courts should not seek attainment of judicial economy, uniformity and predictability at the expense of fairness and equity. The courts should apply the two rule doctrine to achieve equitable results within reasonable limits dictated by practical considerations.

A recent Fifth Circuit decision, Jamaica Nutrition Holdings, Ltd. v. United Shipping Co., illustrates how a court may use the two rule doc-

The ease and efficiency of the choice of law approach would be lost. Examination of the effects of inflation, rate fluctuation, the intent of the parties and means of adequate compensation would consume time and money. While judicial economy, predictability, and possible economic consequences are important considerations, a major goal of the judicial system is fair and equitable relief for an injured party. Courts should not seek attainment of judicial economy, uniformity and predictability at the expense of fairness and equity. The courts should apply the two rule doctrine to achieve equitable results within reasonable limits dictated by practical considerations.

A recent Fifth Circuit decision, Jamaica Nutrition Holdings, Ltd. v. United Shipping Co., illustrates how a court may use the two rule doc-

theless, damages for depreciation of the dollar clearly are contrary to public policy and a United States court will not award such damages regardless of the requirements of foreign law. Evan, supra note 4, at 351.

Evan, supra note 4, at 320, 327-30. A party contracting to receive money accepts the risk of a fluctuation in the value of the currency. Id. The contract is for a fixed number of units that may decrease in real value before performance of the contract. The law of damages does not allow recovery for a reduction in the purchasing power of money subsequent to a breach. Id.

See note 111 supra.

Corbin, supra note 9, § 1005, at 60.

Fluctuating Rates, supra note 3, at 625.

643 F.2d 376 (5th Cir. 1981).
trine in an efficient yet equitable fashion. On November 12, 1977 Jamaica Nutrition Holdings purchased a quantity of soybean oil which United Shipping agreed to transport from Louisiana to Jamaica.\(^{133}\) The oil arrived in Jamaica contaminated by traces of molasses.\(^{134}\) Jamaica Nutrition paid 45,206 Jamaican dollars to refine the oil to remove the molasses.\(^{135}\)

Jamaica Nutrition claimed that United Shipping breached its contractual duty to exercise due diligence to make the vessel fit for the carriage of soybean oil.\(^{136}\) The Fifth Circuit concluded that the charter agreement between Jamaica Nutrition and United Shipping incorporated the responsibilities dictated by the Carriage of Goods by Sea Act (COGSA).\(^{137}\) Section 1303(1) of COGSA places a duty on the carrier to exercise due diligence to make the ship seaworthy.\(^{138}\) The court found that United Shipping's failure to clean the vessel properly after the previous voyage constituted a violation of section 1303(1) of COGSA.\(^{139}\) The Fifth Circuit confirmed the district court's conclusion that the cost of reprocessing was the proper measure of damages.\(^{140}\) The appellate court had to determine when to convert the Jamaican dollars into United States dollars.\(^{141}\)

\(^{133}\) Id. at 378. In *Jamaica Nutrition Holdings*, the plaintiff purchased soybean oil from Pasternak, Baum International, Inc. Pasternak in turn chartered the M/V El Zorro from United Shipping. Id.

\(^{134}\) Id.

\(^{135}\) Id.

\(^{136}\) Id.

\(^{137}\) 46 U.S.C. §§ 1300-1315 (1976). The Carriage of Goods by Sea Act (COGSA) is a comprehensive statute specifying the duties, rights, responsibilities, liabilities and immunities of a carrier and ship. *Id.* The carrier must exercise due diligence before the voyage to assure that the vessel is seaworthy, properly supplied and equipped, and the cargo holds safe. *Id.* § 1313. The carrier is also responsible for the proper storage and shipment of the cargo. *Id.* The carrier is liable for loss or damage only if the damage resulted from fault or neglect of the carrier. *Id.*


\(^{139}\) 643 F.2d at 381.

\(^{140}\) Id. at 379.

\(^{141}\) Id. COGSA does not require a specific conversion date for breaches of contract. 46 U.S.C. § 1300-1315 (1976). On March 31, 1978, a United Nations Conference on the Carriage of Goods by Sea adopted the United Nations Convention on the Carriage of Good by Sea. 9 M. Nordquist & K. Simmons, New Directions In The Law Of The Sea, 344, 361 (1980) [hereinafter cited as Nordquist & Simmons]. Twenty-nine nations, including the United States, have either signed, ratified or adhered to the Convention. Multilateral Treaties in Respect of Which the Secretary-General Performs Depository Functions 421 (1979). The Convention is similar to COGSA and establishes rules relating to the carriage of goods by sea. Nordquist & Simmons, supra at 362. It differs from COGSA, however, by requiring conversion rate set on the judgment date. *Id.* Art. 26 § 1. The Convention states that the courts of a country adhering to the Convention must convert foreign currency into the cur-
The Fifth Circuit reasoned that COGSA imposed a duty of care on United Shipping under United States law. United Shipping breached their duty to make the vessel seaworthy when the vessel “broke ground” in Louisiana. The breach in the United States created a cause of action governed by United States law. Since American law governed the case, the court applied the Hicks rule of valuation on the breach date.

In *Jamaica Nutrition*, the Fifth Circuit utilized the limited flexibility that has developed in the breach date rule to compensate the plaintiff for his losses. The court interpreted precedent as indicating that the date of loss and the date of repair cost payment qualified as breach dates under the two rule doctrine. The Fifth Circuit used the date of payment of the refining costs as the conversion date. Use of this breach date prevented United Shipping from bearing the full cost of inflation.

While the *Jamaica Nutrition* court did use a flexible breach date rule, the decision did not reflect use of a flexible interpretation of the

rency of the forum state at the date of judgment or a date agreed upon by the parties. *Id.* The convention is not yet in force. *Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions* 421 (1979); *see Nordquist & Simmons, supra* at 364.

...
two rule doctrine. The Fifth Circuit applied United States law because the breach of duty imposed by COGSA occurred in Louisiana. The court failed to consider where the parties contracted, the place of performance, the currency of contract or which country had the most significant relationship with the breach. The court used the rigid vested rights theory rather than a more flexible theory that considers a variety of factors in the choice of law determination. Furthermore, the court did not consider the intent of the parties. The opinion makes no mention of the parties' contractual provisions concerning risk, nor does the judgment include adjustments for inflation. The court merely indicates that the possible costs or profits from a devaluation should not fall on the injured party. Concern for the effect of devaluation, however, did not appear in the court's reasoning for application of the breach date rule. Finally, the Fifth Circuit did not consider the role of Jamaican currency as a measure of value rather than as a commodity. A flexible two rule doctrine would have evaluated these factors in the process of determining the appropriate exchange rate.

The current application of the two rule doctrine sacrifices consideration of equitable concerns for uniformity, judicial economy and ease of application. The vested rights theory ignores modern choice of law principles. Although the criteria used by the vested rights theory to determine the governing law are easy to apply, the criteria do not always yield a correct determination of the controlling law. The fair operation of the two rule doctrine requires a proper choice of law analysis. The rigidity of the two rule doctrine creates uniformity and judicial economy. These advantages arise from courts' reluctance to analyze the effects of inflation, devaluations, the intent of the parties, and the actual function of money. Courts must balance the advantages of uniformity and economy against the advantages of a fully compensatory judgment. A flexible two rule doctrine would provide a framework for the achievement of equitable judgments within limitations imposed by practical considerations.

THOMAS J. EGAN, JR.