
# The Law Commission and The Scottish Law Commission

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## PRIVATE INTERNATIONAL LAW

## COUNCIL OF EUROPE CONVENTIONS ON FOREIGN MONEY LIABILITIES (1967) AND ON THE PLACE OF PAYMENT OF MONEY LIABILITIES (1972)

REPORT ON A REFERENCE UNDER SECTION 3(1)(*e*) OF THE LAW COMMISSIONS ACT 1965

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*by Command of Her Majesty*
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# COUNCIL OF EUROPE CONVENTIONS ON FOREIGN MONEY LIABILITIES (1967) AND ON THE PLACE OF PAYMENT OF MONEY LIABILITIES (1972)

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# THE LAW COMMISSION

**and**

# THE SCOTTISH LAW COMMISSION

*Item XXI of the Third Programme of the Law Commission*

*Item 15 of the Third Programme of the Scottish Law Commission*

## PRIVATE INTERNATIONAL LAW

## COUNCIL OF EUROPE CONVENTIONS ON FOREIGN MONEY LIABILITIES (1967) AND ON THE PLACE OF PAYMENT OF MONEY LIABILITIES (1972)

*To the Right Honourable the Lord Hailsham of St. Marylebone, C.H., Lord High Chancellor of Great Britain, and the Right Honourable the Lord Mackay of Clashfern, Q.C., Her Majesty's Advocate*

## PART I

## INTRODUCTION

1 On 25 February 1972 the Law Commission and the Scottish Law Commission were asked by the Foreign and Commonwealth Office:

> "To advise on the problems which may arise if a sum of money is due in a currency other than that of the place of payment or the place where payment is sought."

2 This request for advice, which falls within the Commissions' general responsibilities in the field of Private International Law,[1] covered two issues, namely advice on whether the United Kingdom should become a party to the Council of Europe Convention on Foreign Money Liabilities (1967) and whether any other reform should be recommended in the field of foreign money liabilities.

3 Early in 1972, the two Law Commissions also agreed with the Foreign and Commonwealth Office that the Commissions would advise on the question whether the United Kingdom should become a party to the Council of Europe Convention on the Place of Payment of Money Liabilities (1972).

4 It should be borne in mind that both the Conventions discussed in this Report are in their final form. The issue for consideration in this Report is whether they are acceptable as they stand, without possibility of amendment.

[1] See Item XXI of the Third Programme of the Law Commission and Item 15 of the Third Programme of the Scottish Law Commission.

5 The two Law Commissions have acted together in their consideration of these areas of the law. In order to assist the Commissions in their work, a Joint Working Party on Foreign Money Liabilities was established which comprised representatives of both Commissions, of interested Government Departments and a banker.[2] We are grateful for all the assistance which has been given to the Commissions by this body.

6 The Joint Working Party has provided assistance generally in the field of foreign money liabilities. This has covered not only the Council of Europe Convention on Foreign Money Liabilities (1967) but also the general law relating to foreign money. However, the Joint Working Party has not examined the Council of Europe Convention on the Place of Payment of Money Liabilities (1972). Although this latter Convention has links with the 1967 Convention, it is not concerned with the law of foreign money liabilities and thus did not fall within the purview of the Joint Working Party. Examination of the 1972 Convention has been undertaken exclusively within the two Commissions.

7 This Report is concerned only with the two Council of Europe Conventions. It does not deal with the other matters falling within the original terms of reference and the work of the Joint Working Party, namely examination of the general law relating to foreign money liabilities. This has been a fruitful field of judicial activity during the last few years in England with a large number of reported cases, in particular the decisions of the House of Lords in *Miliangos* v. *George Frank (Textiles) Ltd.*[3] and *The Despina R.*[4] The Court of Session has also had the opportunity to consider this area of the law in *Commerzbank A.G.* v. *Large.*[5] The House of Lords in *Miliangos* abrogated, in relation to sums of money due under contracts governed by foreign law, the long-standing rule that the court could give judgment only in sterling; and they specifically left it for future decisions to determine the manner in which this new power of the court to give judgment in foreign currency should be applied to other categories of claim. There has now been a significant number of decisions in England developing the scope of this new rule and extending it to money due under all contracts, whether or not governed by foreign law, and to claims for damages. In view of this background of substantial judicial development against which the work of the Law Commissions has proceeded since *Miliangos*, we thought it sensible to defer formulating and publishing our views on any aspect of foreign money liabilities, including the two Council of Europe Conventions, until at least the main lines of judicial development had become clear. In our opinion this stage has now been reached, and we are accordingly in a position to submit this Report on the two Conventions. The Law Commission also intends to publish a Working Paper during 1981 on the general state of the law on foreign money liabilities in England and Wales. There has been no similar opportunity for the judicial development of the law

[2] A list of the membership of the Joint Working Party as at the time of its last meeting in 1980 is to be found in Appendix C.
[3] [1976] A.C. 443.
[4] [1979] A.C. 685.
[5] 1977 S.L.T. 219.

in Scotland and, as at present advised, the Scottish Law Commission does not intend to publish a corresponding Memorandum. It proposes, however, in the context of its examination of a particular branch of the law (for example, in its forthcoming Report on the Law of Bankruptcy) to take into account questions relating to foreign money liabilities.

8 We have divided this Report into two further parts. In Part II we discuss the Convention on Foreign Money Liabilities (1967) and consider whether, in our view, it is acceptable to the United Kingdom. In Part III we go on to discuss the content and acceptability of the Convention on the Place of Payment of Money Liabilities (1972). The texts of the two Conventions are set out in Appendices A and B.

## PART II

## THE 1967 EUROPEAN CONVENTION ON FOREIGN MONEY LIABILITIES

### A THE BACKGROUND TO THE 1967 CONVENTION

9 The origin of the 1967 European Convention on Foreign Money Liabilities lies in a Draft Convention on the payment of foreign money liabilities, which was prepared by the Committee on Monetary Law of the International Law Association and approved by the Association at its forty-seventh conference in 1956. The Private International Law Committee was invited in 1957 by the Lord Chancellor of the day to consider the Draft Convention and to recommend what action should be taken on it by the United Kingdom. The Committee reported in 1961[6] and a substantial majority of the Committee strongly opposed acceptance of the Draft Convention.[7]

10 In 1965 the Committee of Ministers of the Council of Europe set up a committee of experts on foreign money liabilities with instructions to study the Draft Convention and to advise whether a similar Convention should be adopted within the Council of Europe. Subsequently that committee expressed itself in favour of such action and was directed by the Committee of Ministers to prepare the draft of a Convention. This was done, and the resulting European Convention on Foreign Money Liabilities[8] was opened for signature in 1967. It has been signed by three Member States, namely Austria, France, and the

[6]Sixth Report of the Private International Law Committee (1962), Cmnd. 1648.

[7]Dr. F. A. Mann dissented, pp. 7–19, urging that the United Kingdom should support the principles laid down in both Parts of the Draft Convention (though he pointed out that those principles would have to be reformulated for the purpose of drafting the requisite legislation). His dissent as to Part I reflected a disagreement with the majority as to the state of English law on the issue whether a foreign money debt may be paid in sterling. We support Dr. Mann's analysis of the law: see paras. 14 and 15, below. His dissent as to Part II of the Convention must be viewed against the background of the then unsatisfactory state of the law relating to the giving of judgments in cases involving foreign money liabilities. The present state of the law in England and Scotland is discussed below, paras. 16–25. Another member of the Committee, Colin McFadyean, supported Dr. Mann's views in regard only to Part II of the Draft Convention.

[8]Referred to hereafter in this Part as "the Convention".

Federal Republic of Germany; and ratified by one, namely Luxembourg. The United Kingdom did not participate in the deliberations which led to it.

11 The committee of experts who prepared the Convention also prepared an Explanatory Report[9] which was amended and completed by the European Committee on Legal Co-operation (C.C.J.). The Explanatory Report was published by the Council of Europe in 1968. We have had regard to the Explanatory Report wherever possible in order to assist us to determine the intended meaning and effect of the Convention.

## B THE PRESENT LAW IN OUTLINE

### 1 Introduction

12 Before we turn to a detailed examination of the Convention, we consider that it would be helpful to provide a brief outline of the present state of our law on foreign money liabilities. In that way, we hope that it may be easier to draw comparisons between the rather different approaches of the Convention and of our own law.

13 The Convention deals with four main issues. These are as follows:

(i) the currencies in which, prior to proceedings, a debtor may pay his debt and thereby discharge his obligation;

(ii) the provision of a remedy to the creditor for loss suffered from currency fluctuations as a result of the late payment of a debt or other foreign money obligation that has fallen due;

(iii) the question of the currency or currencies in which a creditor may demand payment in proceedings to enforce payment;

(iv) the question whether the creditor is entitled to compensation for any loss suffered from currency fluctuations that occur between the date of judgment and satisfaction of his judgment debt.

We consider the present law on the first issue in the next two paragraphs. However, the present law concerning the three remaining issues may best be understood against the general background of the recent judicial development in the field of the enforcement of foreign money liabilities in this country, and, in particular, in the light of the form in which judgment is now given by the courts where a foreign money obligation is involved. Accordingly, we consider the relevant law on this topic in outline in paragraphs 16–22, and in paragraphs 23–25 we examine the way in which those three specific issues are treated in the present law.

### 2 The currency in which a foreign money debt may be paid

14 The general rule is that a debt expressed in a foreign currency and payable in England may be paid, at the debtor's option, either in the relevant

[9] Referred to hereafter in this Part as "the Explanatory Report".

foreign currency[10] or in sterling.[11] If the debtor chooses to make payment in sterling, the necessary conversion into that currency is calculated as at the date of payment.[12]

15 It would seem, although there is little authority on the point,[13] that the parties to a contract may exclude the normal right of a debtor to discharge in sterling a debt expressed in a foreign currency.[14]

## 3 Recent judicial development of the law relating to enforcement of foreign money obligations

### (a) *General*

16 The former rule of English law was that judgment in respect of a foreign currency claim could be given only in sterling converted as at the date when, in the case of a debt, it had become due or, in other cases, the cause of action had accrued.[15] We refer hereafter to that principle as "the sterling-breach-date rule".

17 In Scotland the law was less clear. *Hyslop* v. *Gordon*[16] was an action for accounting in relation to trading transactions of which the money of account was United States dollars. Though the Court of Session gave judgment in dollars, the House of Lords held that the judgment ought to have been for the sterling equivalent, converted at the date of raising the action. This decision was followed in subsequent cases.[17]

18 In *The Teh Hu*[18] the majority of the Court of Appeal affirmed the sterling-breach-date rule; but Lord Denning M.R. dissented, explaining that

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[10] *George Veflings Rederi A/S* v. *President of India* [1978] 1 W.L.R. 982, 984 (*per* Donaldson J., whose decision was affirmed by the Court of Appeal: [1979] 1 W.L.R. 59).

[11] *Adelaide Electric Supply Co. Ltd.* v. *Prudential Assurance Co. Ltd.* [1934] A.C. 122, 148, 151; *Mount Albert Borough Council* v. *Australasian Temperance and General Mutual Life Assurance Society Ltd.* [1938] A.C. 224, 240–241. The majority in the Sixth Report of the Private International Law Committee (1962) Cmnd. 1648 doubted whether the law gave a debtor the option to pay in sterling: see paras. 8–11.

[12] *Barclays Bank International Ltd.* v. *Levin Brothers (Bradford) Ltd.* [1977] Q.B. 270; *George Veflings Rederi A/S* v. *President of India* [1979] 1 W.L.R. 59.

[13] In *Anderson* v. *Equitable Assurance Society of the United States* (1926) 134 L.T. 557, Bankes L. J. stated (at p. 562) that an obligation to pay in England a sum in foreign currency was, *on its true construction*, one to pay in sterling; and in *Heisler* v. *Anglo-Dal Ld.* [1954] 1 W.L.R. 1273, the rule was explained as being "primarily" one of construction that might require reconsideration at a time when foreign exchange was no longer freely available, since it might defeat the intention of the parties (*ibid.*, p. 1278, *per* Somervell L.J.).

[14] There seems to be no reason of principle whereby the rule referred to in this paragraph and the general rule stated in para. 14 should be limited to contracts whose proper law is English or Scottish, as the case may be, but there appears to be no direct authority on the matter. So far as the question of the rate of exchange, referred to in para. 14, is concerned, it would seem that this is a matter to be governed by the proper law; see Dicey and Morris, *The Conflict of Laws*, 10th ed., (1980), pp. 1013–1014.

[15] *In re United Railways of Havana and Regla Warehouses Ltd.* [1961] A.C. 1007.

[16] (1824) 2 Sh. App. 451.

[17] *Cf. Macfie's Judicial Factor* v. *Macfie*, 1932 S.L.T. 460; *Ibbetson–Petitioner* 1957 S.L.T. (Notes) 15; L/F *Føroya Fiskasola* v. *Charles Mauritzen Ltd.* 1977 S.L.T. (Sh. Ct.) 76.

[18] [1970] P. 106.

the sterling-breach-date rule was fixed at a time when sterling was the most stable currency in the world, a situation which (he pointed out) no longer obtained. This dissenting judgment attracted wide notice since the decision of the majority of the Court of Appeal, though in strict conformity with precedent, led to unjust results where the value of sterling had diminished between the time when the cause of action accrued and the date of the judgment.[19] There was general agreement that the injustice of the then subsisting law should be remedied, but different solutions were canvassed, such as that conversion into sterling should be effected at the date when judgment was given, or that the sterling sum for which judgment should be given ought to be increased to allow for devaluation.[20]

19 In the *Jugoslavenska* case it was confirmed by the Court of Appeal that in appropriate cases English arbitrators had jurisdiction to make awards expressed in a foreign currency in accordance with the regular practice of experienced commercial arbitrators in the City of London;[21] and in relation to judgments Lord Denning M.R. again urged that the sterling-breach-date rule should be re-considered.[22]

20 Subsequently the law was reviewed in England and Scotland respectively in the cases of *Miliangos* v. *George Frank (Textiles) Ltd.*[23] and *Commerzbank Aktiengesellschaft* v. *Large*.[24] In both it was declared that the courts were entitled, in a claim properly formulated in foreign currency, to give judgment for a sum of money expressed in that currency. The judgment debtor was to have the option of satisfying the judgment by payment either of the sum in foreign currency or of its sterling equivalent. Where it was necessary, for the purpose of enforcing a judgment, to convert the foreign currency into sterling, the House of Lords in *Miliangos* held that conversion should be at the date when the court authorised enforcement of the judgment in terms of sterling.[25] Lord Fraser remarked:

> "The question is what the conversion date should be. Theoretically, it should, in my opinion, be the date of actual payment of the debt. That would give exactly the cost in sterling of buying the foreign currency. But theory must yield to practical necessity to this extent that, if the judgment has to be enforced in this country, it must be converted before enforcement. Accordingly, I agree . . . that conversion should be at the date when the court authorises enforcement of the judgment in sterling."[26]

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[19] It is understood that, in part at least, the reference by the Foreign and Commonwealth Office to the two Commissions was prompted by the affirmation of the sterling-breach-date rule by the majority of the Court of Appeal in that case.

[20] The second suggested answer was given by Lord Denning M.R. as an alternative, if the solution of giving judgment in a foreign currency should prove unacceptable: [1970] P. 106, 125.

[21] *Jugoslavenska Oceanska Plovidba* v. *Castle Investment Co. Inc.* [1974] Q.B. 292. If it should become necessary to convert the amount of the award into sterling for the purpose of enforcing such award, conversion was to be effected as at the date of the award.

[22] *Ibid.*, p. 299.

[23] [1976] A.C. 443.

[24] 1977 S.L.T. 219.

[25] The form of judgment approved in that case was: "It is adjudged . . . that the defendant do pay to the plaintiff [the sum in foreign currency] or the sterling equivalent at the time of payment."

[26] [1976] A.C. 443, 501.

In the *Commerzbank* case the Inner House adopted a similar approach. After stating that:

> "the search must be for the latest practicable date for conversion in order to reduce to a minimum the risk that the foreign creditor who has to enforce his decree will suffer by reason of an adverse fluctuation of the value of sterling as against the currency of account"[27]

the court accepted that the pursuer could appropriately crave that the foreign currency should be converted either "at the date of payment or at the date when the decree is extracted whichever is the earlier". The effect of this new approach by the courts has been to make the foreign currency in question the standard which determines how much is to be paid by the judgment debtor.

21 Since *Miliangos* the English courts have been engaged in the task of working out the application of the new approach to various categories of claim. In every type of case the court first has to ascertain the appropriate currency in which judgment may be given. The principles on which this question is to be determined have now been developed for some types of foreign money claim, such as claims for agreed sums due under contracts[28] and for some kinds of action for damages.[29] In other types of case, such as actions for death or personal injuries,[30] the principles still remain undeveloped. In every case, however, the essential aim of the court is to ascertain whether the currency in which the claim is formulated most truly expresses the plaintiff's loss and will most appropriately compensate him for that loss: once the appropriate currency has been determined, it becomes the currency in which the judgment will be expressed and the standard of measurement of what is to be paid. In a particular case, therefore, fluctuations of that currency against sterling until the judgment is satisfied may *in terms of sterling* redound as well to the benefit of the judgment debtor as to that of the judgment creditor, depending on whether sterling falls or rises in relation to the foreign currency.[31] The purpose of the new rules is not so much to "protect" either the debtor or the creditor as to provide a yardstick in terms of the foreign currency by which the amount payable is to be ascertained.

22 We should point out, at this stage, that the fundamental philosophy of the Convention[32] is in sharp contrast to the present law. The main purpose of the Convention appears to be to protect the creditor automatically against a fall in the value of the relevant foreign currency as against the currency of the place

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[27] 1977 S.L.T. 219, 224.

[28] *Miliangos* v. *George Frank (Textiles) Ltd.* [1976] A.C. 443.

[29] *The Despina R, The Folias* [1979] A.C. 685.

[30] See *Jean Kraut A.G.* v. *Albany Fabrics Ltd.* [1977] Q.B. 182, 189; *The Despina R* [1978] Q.B. 396, 417, *per* Brandon J.

[31] It is true that a limitation is imposed on this principle by the rule that execution of a judgment in foreign currency must be effected in sterling, converted as at the date on which the court authorises enforcement of the judgment: see para. 20, above. That date will, if payment is not made until after the initiation of an enforcement procedure, be one prior to the date of actual payment. However, the former date is as close to the date of actual payment as is practicable. This qualification does not affect the general principle.

[32] Which underlies Article 4 (discussed in paras. 37–42, below) and Article 7(1) (discussed in paras. 48–50, below) of the Annex.

where payment is due—e.g., sterling, where the place of payment is the United Kingdom—in the case both of judgment debts[33] and other debts.[34] The philosophy of the Convention is therefore quite different from that on which the rules of the present law are based: it is not directed, as are the present rules, to the ascertainment of the currency which represents the plaintiff's true loss.

### *(b) Specific issues*

#### *(i) Loss suffered by a creditor from currency fluctuations as a result of late payment*

23 As we have explained in paragraph 21 above, the currency which most truly expresses the plaintiff's loss constitutes the standard of measurement of what is to be paid. It follows that in principle a depreciation of the value of that currency relative to sterling between the date on which payment fell due and that on which it was actually made would not be regarded as constituting a "loss" to the creditor, since "the creditor has no concern with pounds sterling".[35] This is the case, of course, even if the debtor should choose to pay all or any part of his obligation in sterling, since any payment in sterling will be credited by calculating its conversion into the foreign currency in question as at the date of payment.

#### *(ii) The currency or currencies in which a creditor may demand payment when he institutes proceedings to enforce his obligation*

24 It must be borne in mind that, as we have pointed out in paragraph 21 above, the plaintiff in an action brought to enforce a foreign money obligation must indicate the particular currency for which he seeks judgment and thereafter satisfy the court that judgment should be given in that currency.[36] Both a claim and the form of judgment for a sum expressed in foreign currency will normally, whether expressly or by implication, allow the defendant at his option either to make payment in the foreign currency or to pay its sterling equivalent as at the date of payment.

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[33]By virtue of Article 7(1); but see also Article 1.

[34]Pursuant to Article 4(1).

[35]See *Miliangos* v. *George Frank (Textiles) Ltd.* [1976] A.C. 443, 466, *per* Lord Wilberforce. However, in England it would seem that, under the general law of damages, a creditor may in certain circumstances recover compensation for a *specific* loss ("special damage") resulting from the debtor's failure to make payment on the due date, where such loss ought reasonably to have been contemplated by the debtor. This approach has been taken by Donaldson J. in relation to a foreign money debt in *Ozalid Group (Export) Ltd.* v. *African Continental Bank Ltd.* [1979] 2 Lloyd's Rep. 231 and has since been generally adopted by the Court of Appeal in *Wadsworth* v. *Lydall* [1981] 1 W.L.R. 598. In Scots law a failure to pay money may found a claim for damages other than interest if the circumstances conducing to damage were in the contemplation of the parties: see *Roissard* v. *Scott's Trustees* (1897) 24 R. 861.

[36]There is as yet no direct authority as to whether a plaintiff is still permitted to claim what before *Miliangos* he would have been obliged to seek—namely judgment for a foreign money obligation in terms of sterling only, converted at the date when the cause of action accrued. In principle, he ought not to have that right, since its exercise would be contrary to the approach of the courts since *Miliangos*.

(*iii*) *Currency fluctuations between the date of judgment and satisfaction of the judgment debt*

25 Where judgment is given in the normal form approved in *Miliangos*, the defendant must satisfy such judgment either in the specified foreign currency or in the sterling equivalent of that currency as at the date of payment.[37] When, however, the sum of money due under the judgment is not paid voluntarily and enforcement procedures are required practical considerations, as Lord Fraser has pointed out,[38] make it necessary to convert the amount of the judgment into sterling as at the date of the commencement of the enforcement proceedings; in Scotland, at the date when the decree is extracted. Subject to that qualification, however, any fluctuations between sterling and the foreign currency in question between the date of a judgment and the date of its satisfaction will have no effect on the value of the creditor's judgment if it is satisfied in terms of the foreign currency specified in that judgment.

## C THE FORM AND SCOPE OF THE 1967 CONVENTION

26 The purpose of the Convention is expressed as being ". . . to harmonise certain rules relating to foreign money liabilities" against the background of the "aim of the Council of Europe [which] is to achieve a greater unity between its Members, in particular by the adoption of common rules in the legal field." The Convention consists of twelve Articles dealing with formal matters (including reservations allowing individual States not to apply certain provisions or to apply them with modifications) and an Annex of nine Articles containing the detailed rules which are considered in paragraphs 31–50 below.

27 Article 1(1) imposes on each Contracting Party a duty to make its legal system conform to the rules in the Annex to the Convention within twelve months of its coming into force in regard to that Party. However, it allows each country to decide its own manner of implementation: use of the wording of the rules is not mandatory.[39] Article 1(2) provides that the rules in the Annex should extend to all liabilities under which a sum of money is due, "whether originally expressed in money or not." Accordingly, although the term "due", in relation to a sum of money, generally signifies in English law that the sum is certain and that the obligation to pay is complete (though possibly at a future date),[40] it is clearly not so restricted in the Convention. The Convention apparently applies, therefore, to every liability resulting in a money judgment, whether or not before judgment the defendant was liable to pay a sum of money; and so the liability to pay damages for the commission of a tort, for example, would seem to be covered.

28 Article 1(3) permits a Contracting Party, in relation to specific matters, to exclude the rules in the Annex to the Convention or to apply them with

[37] See n. 25, above.

[38] See the passage from Lord Fraser's speech in *Miliangos* cited in para. 20, above.

[39] Explanatory Report, paras. 4 and 9.

[40] ". . . prima facie, and if there be nothing in the context to give them a different construction, they [the words "debts due to him"] would include all sums certain which any person is legally liable to pay, whether such sums had become actually payable or not": *Re Fastnedge, ex parte Kemp* (1874) L.R. 9 Ch. App. 383, 387 *per* Mellish L.J.

modifications. Thus a country which wished to exclude, say, bankruptcy or obligations arising under family law[41] from these rules is free to do so; though it would appear that the whole of contract or tort[42] would not be regarded as "specific matters" which could be excluded.

29 There is a related question of the extent to which the rules in the Annex are intended to be mandatory in effect. Paragraph 5 of the Explanatory Report indicates that only Articles 1 and 9[43] of the Annex are intended to be mandatory, and that whether other provisions are given mandatory force is left to national law. On the other hand, paragraph 9 of the Explanatory Report, discussing Article 1 of the Convention, states that "the rules prevailing in the national laws of the Contracting Parties must lead to the result envisaged", i.e., they are all to be mandatory in effect. Whilst we are not confident that we can establish the intention of the draftsmen of the Convention on this issue of the mandatory nature of the rules therein, we feel strongly that parties should be free in all cases to agree to exclude the operation of the rules contained in the Annex, subject only to the restraints of the general law on the use of exemption clauses.

30 Other salient provisions in the Convention itself are:

(*a*) the preservation, by Article 4, of the rights of Contracting Parties to legislate in the field of exchange control;

(*b*) protection, by Article 5, of obligations arising from any present or future treaties, conventions or agreements in special fields.[44] The Article directs that such obligations are not to be affected by the Convention;

(*c*) provision for the Convention to come into force in general three months after the third instrument of ratification or acceptance has been deposited with the Secretary General of the Council of Europe. In relation to a country that subsequently ratifies or accepts the Convention, it comes into force within three months of the deposit of its instrument of ratification or acceptance (Article 8);

(*d*) power for the Committee of Ministers to invite a non-Member State to accede (Article 9);

(*e*) the right of a Contracting Party to withdraw from the Convention on giving six months' notice to the Secretary General of the Council of Europe (Article 11).

## D THE DETAILED PRINCIPLES LAID DOWN IN THE ANNEX TO THE 1967 CONVENTION

31 We shall now consider the more significant principles contained in the Annex to the Convention and the Articles in which they are to be found.

[41]Explanatory Report, para. 11.
[42]See Convention, Article 6, and Explanatory Report, para. 16.
[43]Both of these Articles in fact make provision for the contrary intention of the parties.
[44]For example, the Geneva Conventions of 1930 and 1931, governing Bills of Exchange and Cheques; see Explanatory Report, para. 15.

## Article 1

### (*i*) *The general principle*

32 The essential principle of Article 1, subject to two exceptions which are discussed below,[45] is contained in Article 1(1), namely, that "a sum of money due in a currency which is not that of the place of payment may be paid in the currency of the place of payment." The place of payment is defined in Article 8 as "the place where payment is due." The general effect of this principle is to confer on a debtor who has agreed to pay in the United Kingdom U.S. $1,000 the right to pay the equivalent of that sum in sterling. Conversion is to be made at the date of actual payment.[46]

33 The adoption of the rule in Article 1(1) would not necessitate significant changes in our law. The rule is substantially the same as that now applicable in this country to a foreign money debt payable in the United Kingdom, namely that it may be paid either in the relevant foreign currency or in its sterling equivalent converted at the date of actual payment.[47] It ought perhaps to be emphasised that adoption of the rule in Article 1(1) would not give rise to any problem concerning the form of judgment approved by the House of Lords in *Miliangos* v. *George Frank (Textiles) Ltd.*[48] since the Article 1(1) rule has no bearing on the question of the form in which judgment should be given: it simply specifies what constitutes valid payment of a sum of money which has fallen due. Finally, the Convention does not purport to lay down rules for ascertaining the currency in which a sum of money is "due". As presumably the national law is left to determine that question in a particular case,[49] the English and Scottish courts would be no less free than at present to work out the principles applicable to the various categories of claim. Article 1 does not deal specifically with the case where a debt is to be paid abroad in a currency which is not that of the place of payment, e.g., where a debt whose proper law is English[50] is payable in francs in New York. The terms of Article 1 would indicate that it does apply to such a case and that payment may be made in U.S. dollars.

### (*ii*) *The exceptions*

(*a*) *The first exceptional case*: "*different intention*" *or* "*different usage*" (*Article* 1(1))

34 The principle in Article 1(1) does not apply if "a different intention of the parties appears, or a different usage is applicable." It appears probable, though the question has apparently not been settled, that under the present law the parties may by a contrary intention exclude the general principle whereby

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[45] See paras. 34 and 35, below.
[46] Article 3, discussed below, para. 36.
[47] See paras. 14–15, above.
[48] [1976] A.C. 443. For the form of judgment approved in that case see n. 25, above.
[49] See Explanatory Report, para. 10.
[50] The Convention does not include rules of private international law. These are left to national laws; see Explanatory Report, para. 6.

payment may be made in the currency of the place of payment.[51] If the present position is that the parties do have such a power of exclusion, or indeed if it is thought right that they ought to have it, the exception contained in Article 1(1), referring to a different intention of the parties, would seem to be substantially the same as English law. Nor would there be any difficulty in exclusion by "a different usage".

(*b*) *The second exceptional case*: "*substantial prejudice*" (*Article* 1(2))

35 Article 1(2) provides that a debtor may not avail himself of his option to pay in the currency of the place of payment if he knows or ought to know that payment in that currency would involve a substantial prejudice for the creditor. As the Explanatory Report makes clear,[52] this provision is conceived in the interest of the creditor alone. However, it may not be altogether successful in achieving this objective. Thus at the date of payment the debtor may not know, and may have no means of knowing, whether payment in the currency of the place of payment would "involve for the creditor a substantial prejudice". In that event, the exception will not apply. However, even where there is substantial prejudice to the creditor, it may be doubted whether a debt payable in the United Kingdom should not continue to be payable in sterling.

**Articles 2 and 3**

36 Article 2 provides that "[i]f a sum of money is due in a currency other than that of the place of payment, the creditor may, if the debtor is unable, or alleges his inability, to make settlement in that currency, require payment in the currency of the place of payment." Article 3 provides that "[i]f, in accordance with Article 1 or 2, the debtor pays in the currency of the place of payment, the conversion shall be effected at the rate of exchange at the date of actual payment." These two Articles are intended to elaborate on the general rule in Article 1 and would seem to be quite satisfactory.

**Articles 4 and 6**

***(i) The general principle***

37 The main burden of Article 4 is contained in its first paragraph which, in essence, provides that where the debtor defaults, by failing to pay at the "date of maturity",[53] and subsequently the "due" currency depreciates against the currency of the place of payment, the creditor is to be compensated for that depreciation.[54] This general principle raises two issues. The first is that Article

[51] *Anderson* v. *Equitable Assurance Society of the United States* (1926) 134 L.T. 557, 562. See para. 15, above.

[52] Para. 19.

[53] It is not clear what the "date of maturity" is for a claim for damages. Attention ought also to be drawn to Article 2 of the Convention which permits the substitution of the date when the debtor finds himself in *demeure* for that of the date of maturity. This is relevant only for those legal systems which provide that default occurs only when the debtor is "en demeure"; see Explanatory Report, para. 24.

[54] Article 6 states that: "Article 4 remains applicable even if during proceedings instituted in conformity with Article 5, [discussed below, paras. 43–47] the currency in which the sum of money is due depreciates in relation to the currency of the place of payment."

4(1) reveals a fundamental difference of approach from that of our law. No special rule is provided in our law to protect creditors against currency fluctuations. Indeed, the opposite is the approach in that once the foreign currency of the creditor's debt or loss has been identified, it is regarded as a constant yardstick against which to measure his entitlement. The second issue raised by this general principle concerns the assessment of the value of the "due" currency as against the currency of the place of payment, i.e., the place where payment is due. If the objective of Article 4 is to protect the creditor against losses caused by currency fluctuations, the loss should be calculated in relation to what are the appropriate currencies. The currency of the place of payment as such is hardly relevant, although in practice it will often be the currency in which payment is to be made. The creditor's loss is in fact likely to be suffered in relation to the currency in which he trades or conducts his business rather than that of the place of payment, especially if the claim relates to damages rather than to debt.[55]

### *(ii) Three exceptions to the general principle*

38 Three exceptional cases are laid down in Article 4(2) in which the automatic right to compensation conferred by paragraph (1) of the Article does not arise. The first exceptional situation is that where the inability of the debtor to pay arises from the "default of the creditor". This expression apparently refers to the case where the creditor's conduct is such as to prevent the debtor from making payment on the agreed date—for example, where under the contract the debtor has to pay the creditor at a specified time and place and the creditor fails to take such steps as may be necessary to enable the debtor to do so. This seems to be a desirable exception to the general rule.

39 The second exceptional case is that where the debtor's inability to pay arises from "force majeure". It would seem quite proper for the debtor to be relieved of the liability imposed by Article 4(1) if his inability to pay by the due date was due to any of the range of circumstances encompassed by the phrase "force majeure". We have, however, mentioned earlier[56] our doubt as to whether the parties are free to contract out of the obligations imposed by the rules in the Annex and we indicated our anxiety over the possibility of there being no such freedom. We would emphasise in the present context that the parties should continue to be free to allocate commercial risks by contract as they choose, including the risks consequent upon a "force majeure".

40 The third exception obtains where the debtor can prove that "the creditor has not suffered loss" as a result of the depreciation of the money of account in relation to the currency of the place of payment. The principle is clearly correct—that a creditor who has suffered no loss is entitled to no compensation. However, the determination of the exact effect of this exception is rather more complicated. In order to elicit the exact meaning of this exception it is necessary to bear in mind that the general rule in paragraph (1) of Article 4 must be based on an assumption that in general a creditor who is paid

[55]See, e.g., *The Despina R, The Folias* [1979] A.C. 685.
[56]See para. 29, above.

late automatically sustains a loss when, between the date of maturity and the date when payment is actually made, the due currency has depreciated as against the currency of the place where payment is due. However, this is a questionable assumption because a creditor's loss is likely to be suffered in the currency in which he conducts his business, and this is not in every case the currency of the place of payment. In order to determine, therefore, whether the creditor has suffered loss through the depreciation of the due currency[57] against that of the place of payment, one would have to investigate the extent to which there is also depreciation between those currencies and the currency in which the creditor trades and whether, if so, this had led to a loss to the creditor. This involves a detailed investigation into the conduct of the creditor's internal financial affairs. The creditor might reasonably consider this to be objectionable and it would inevitably add to the cost of litigation. The root of the problem is that Article 4 attempts to determine the loss suffered by the creditor by reference to fluctuations between what may in some cases prove to be inappropriate currencies.

### *(iii) The right conferred by Article 4(1) would be additional to other remedies*

41 Article 4(3) provides that the right to compensation is to be additional to any other remedies. To the extent that our present law already provides other and different remedies to compensate a creditor for late payment of a foreign money obligation, there would be a danger of double compensation if the present law were left unamended on implementation of the Convention. Although there is probably no general remedy in damages for the late payment of a debt either in English or in Scots law, it would seem that in England a creditor may in certain cases recover compensation under the general law relating to damages for a specific loss ("special damage") resulting from the defendant's failure to make payment on the due date; and in Scots law a failure to pay money might found a claim for damages other than interest if the circumstances conducing to damage were in the contemplation of the parties.[58] Clearly therefore in such cases, and possibly in other cases as well,[59] awards of damages could include an element for loss caused by currency fluctuations, provided that the appropriate rules as to causation and remoteness were satisfied. Adoption of Article 4 would necessitate an alteration of the present law to provide that the "statutory" compensation under Article 4(1) was to replace any existing right of a creditor to obtain compensation by way of damages.[60]

### *(iv) Reservation*

42 Article 6(1) of the Convention permits a Member State to accede subject to a reservation of the right, in respect only of non-contractual

[57]The Explanatory Report, para. 23, suggests that in the context of Article 4 the "due currency" means the "money of account". As we have seen (para. 33, above), no such explanation is provided for the meaning of "due currency" in Article 1.

[58]See n. 35, above.

[59]*McGregor on Damages*, 14th ed., (1980), para. 519.

[60]Article 4(3) would still require inclusion in order to ensure that rights other than that of compensation which a creditor has under the present law—for example, to interest on his debt or to rescind a contract (see Explanatory Report para. 26)—remained unaffected by the right conferred on him by Article 4(1).

liabilities, not to apply Article 4 or to apply it with the modifications such State finds necessary. This right of reservation has, in our view, little bearing on the question whether Article 4 is acceptable, since the great majority of the cases to which Article 4 would relate involve contractual obligations.

**Article 5**

43 Article 5 provides:

> "In the event of any proceedings for the recovery of a sum of money expressed in a currency other than that of the forum, the creditor may, at his choice, demand payment in the currency to which he is entitled[61] or the equivalent in the currency of the forum at the rate of exchange at the date of actual payment."

However, Article 3 of the Convention confers on a Contracting Party "the right to make its law conform to one only of the alternatives referred to in Article 5 of the Annex."[62]

44 In considering the effect of Article 5 it is necessary to bear in mind the present law on the matter, which may be illustrated by means of the following example:

> D agrees to pay C 1 million French francs on 1 May in New York, but fails to pay on that date. There are then 5 francs to the pound. C institutes proceedings in this country (relying on a clause conferring jurisdiction on the courts in this country). Between 1 May and 1 June there is a devaluation of the franc. On 1 June he obtains judgment when there are 10 francs to the pound.

C will claim "1 million francs" and the usual form of judgment will be for "1 million francs or the sterling equivalent at the time of payment".[63] D is entitled to satisfy that judgment by payment either of 1 million francs or, assuming that he pays on the date of judgment, £100,000 (the sterling equivalent on that day of 1 million francs). But the choice belongs exclusively to D: C has no say in the matter. It is possible that, alternatively, C may be permitted to claim in sterling alone, but whether he can do so has never been clearly decided,[64] and, even if he does have that right, there is no authority determining the date as at which conversion from francs into sterling is to be calculated. However, it seems clear that C cannot have judgment in a form which would order payment of an uncertain sum in sterling which will fluctuate according to its value relative to a

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[61] No criterion is provided in the Convention for determining the creditor's entitlement. The Explanatory Report, para. 29, does no more than indicate that this may be either "that in which the liability is expressed or under Article 2 of the Annex the currency of the place of payment." Presumably the former refers to the money of account.

[62] This right is considered at para. 46, below.

[63] *Miliangos* v. *George Frank (Textiles) Ltd.* [1976] A.C. 443. See n. 25, above.

[64] See n. 36, above. According to dicta of Donaldson J. in *Ozalid Group (Export) Ltd.* v. *African Continental Bank Ltd.* [1979] 2 Lloyd's Rep. 231, 234, the plaintiff creditor does not have a free choice; it is for him to select the currency in which to make his claim and to prove that a judgment in that currency will most truly express his loss.

foreign currency, such as a judgment in the following terms: for payment of "such sterling sum as is the equivalent of 1 million francs at the date of payment."[65]

45 Under the Convention, on the other hand, C is entitled to demand and, it appears, the court must give judgment for either (*a*) "1 million francs" (with no option for D to satisfy the judgment in sterling) or (*b*) for "such sterling sum as is equivalent to 1 million francs at the time of actual payment". In contrast to the present law, the choice belongs exclusively to C and it is D who has no option whether to pay in sterling or in francs and the court has no discretion as to the form of judgment it may award. Whilst it may be the case, though this is not wholly clear, that D could retain the right to discharge the debt in the above example by payment under the terms of Article 1,[66] i.e., by payment in dollars (New York being the place of payment) or by payment in francs as the due currency, this does not resolve the difficulties posed by Article 5. If judgment is given in francs, it cannot be satisfied under Article 5 by payment in sterling. Whether Article 1 gives D an option to discharge his obligation by payment in sterling depends on the extent to which that Article applies to judgment debts. The original debt cannot be discharged by payment in sterling because the currency of the place of payment (New York) is dollars. It is only if an English or Scottish judgment debt falls within Article 1(1) that the currency of its place of payment could be regarded as sterling, and the Convention, Annex and Explanatory Report are silent on the application of Article 1(1) to judgment debts.

46 We do not believe that the difficulties which we have seen in Article 5 could be overcome by the United Kingdom exercising the right given to a Contracting Party by Article 3 of the Convention to adopt only one of the alternative currencies referred to in Article 5. To adopt the currency of the forum alone, i.e., sterling, would be undesirable as that would amount to a reversal of the present trend in our law and would prevent the courts from giving judgment in foreign currency. On the other hand, to adopt only the currency to which the creditor is entitled, would deprive a judgment debtor from being able to satisfy a judgment of our courts, in a foreign money claim, by paying the equivalent sum in sterling.

47 Although, in contrast to Article 4, Article 5 relates to procedure rather than substance and its application would not affect how much the debtor has to pay, it runs contrary to the principles underlying the recently developed approach of the English and Scottish courts and, in particular, the effect of the *Miliangos* rule that the court may give judgment for a sum in the appropriate foreign currency or its sterling equivalent at the date of payment, with the choice of currency being the debtor's. Furthermore, one of the considerations

[65]There is also the possibility that C may ask that judgment be given in francs alone, thus depriving the debtor of the option of paying in sterling, although the courts in England would appear to have given judgment in this form only very rarely and then as a matter of their discretion.

[66]See the Explanatory Report, para. 30: "The Committee estimated that Article 1 of the Annex continues to apply after the institution of proceedings. Whether Article 1 also continues to apply after judgment is a question which must be decided in accordance with the respective national legislative system." The scope of Article 1 is discussed above, para. 33.

underlying our present law is that conversion at the date of actual payment after an enforcement procedure has been invoked is impracticable and that, in such cases, conversion under the *Miliangos* rule is to be made at the (earlier) date when the court authorises enforcement of the judgment debt.[67] Article 5 and also Article 7[68] refer to the date of actual payment and take no account of the practical and procedural difficulties involved in selecting such a date.

**Article 7**

48 Article 7(1) provides as follows:

> "If a judgment[69] entitles the creditor either to a sum of money in a currency other than that of the forum or the equivalent of such a sum in the currency of the forum, and a depreciation of the currency other than that of the forum in relation to that of the forum occurs between the date of the judgment and the date of actual payment, the debtor is obliged to pay an additional amount corresponding to the difference between the rate of exchange at the date of judgment and the date of actual payment."[70]

In relation to the United Kingdom, the effect of Article 7(1) would be to provide for compensation to be paid to the creditor in respect of depreciation of the relevant foreign currency against sterling, after a judgment has been given but before it is satisfied. The rule is expressed to operate only in the case of a judgment which entitles the creditor to a sum either in a foreign currency or its equivalent in the currency of the forum. It would apply to judgments given in a form which corresponded with the alternative claims that a creditor may make under Article 5.[71] The present form of foreign money judgment given by the English courts clearly seems also to fall within the ambit of this provision.

49 Article 7(1) does not in so many words purport to lay down principles governing when judgment ought to be given in foreign currency. Whether this is left to the individual national law or whether Article 7 assumes that the form of judgment is determined by the forms of claim permitted under Article 5 is not clear. However, whatever form of judgment is permitted under the rules in the Convention and Annex, there seems little doubt that the policy underlying Article 7(1) differs from the policy underlying our present law. The present law is founded on the *Miliangos* philosophy that, so far as is practicable, a judgment for a foreign money obligation should be valued throughout in the foreign currency irrespective of fluctuations in the rate of exchange of that currency against sterling. By contrast, the principle in Article 7(1) is that a creditor who obtains judgment ought to be protected against a subsequent fall in the value of the relevant foreign currency (relative to sterling) before satisfaction of his judgment. Under the Convention a debtor is in every case in the position that

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[67] See paras. 20 and 25, above.

[68] Discussed below, paras. 48–50.

[69] It is not absolutely clear whether this refers merely to a judgment of the forum or includes also a foreign judgment. The latter construction would lead to great complexity.

[70] Article 7(2) states that "The provisions of paragraphs 2 and 3 of Article 4 shall apply *mutatis mutandis*."

[71] Unless the option under Article 3 of the Convention discussed in para. 46, above has been exercised.

he has to pay no less than the sum awarded in the judgment but, in addition, must find an additional sum if the "due" currency should depreciate against sterling between the date of judgment and the date of satisfaction.

50 Furthermore, as already mentioned, Article 7 makes no allowance for the practical difficulties of dealing with currency fluctuations between the date when the enforcement procedure is set in motion and the date of actual payment.[72]

## E CONCLUSION

51 We have seen earlier that the rules contained in the Convention deal with four main issues[73] and we have also examined the present state of our own law on these issues.[74] We must now consider each of these issues in order to assess whether the approach of the Convention is to be preferred to that of our present law.

52 The first issue is that of determining the currencies in which a foreign money obligation, and in particular a debt, may be discharged. The rules on this issue, contained in Articles 1–3 of the Annex,[75] are substantially similar to those to be found in our own law and we do not think that their adoption would cause any great difficulty. It ought, however, to be pointed out that a similar rule was firmly rejected by a majority of the Private International Law Committee in their Sixth Report in 1961,[76] a view which they expressed to be "in entire agreement with the views of the commercial community on this important practical issue."[77]

53 The second issue concerns the situation where a creditor suffers loss as a result of currency fluctuations between the due date and the later date of actual payment of a foreign money obligation. On this issue there is a fundamental difference of approach between the Convention and our law. Articles 4 and 6 of the Annex[78] provide a foreign money creditor with a right to an extra sum of money to compensate him for any adverse currency fluctuations between the date when a debt, for example, should have been paid and the date of actual payment. He is also allowed to benefit from any beneficial currency fluctuations. Under our law,[79] there is no automatic compensation for loss caused by late payment of a debt, whether that loss be as a result of currency fluctuations or for any other reason. Whilst it is true that *Miliangos* is not directly concerned with currency fluctuations between the due date for payment of a debt or other foreign money obligation and the date of actual payment, but rather with the form in which judgments in foreign currency claims may be given and with the

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[72]See paras. 20, 25, and 47, above.
[73]See paras. 12–13, above.
[74]See paras. 14–25, above.
[75]Discussed in paras. 32–36, above.
[76]Cmnd. 1648.
[77]*Ibid.*, at para. 11. We indicated earlier, (n. 7, above) that we prefer the assessment of the present state of the law which is to be found in Dr. F. A. Mann's minority report.
[78]Discussed in paras. 37–42, above.
[79]See para. 23, above.

date for converting a foreign currency judgment into sterling, its whole philosophy is incompatible with the approach of Articles 4 and 6. The basic approach of the *Miliangos* rule is to make the "due" foreign currency in question the constant standard against which to measure the sum to be paid to the creditor by the debtor. The view that for the creditor "what matters is that a Swiss franc for good or ill should remain a Swiss franc"[80] applies whether payment by the debtor is made late but without any proceedings having been taken against him, or is made only after the creditor has obtained judgment against him.

54 We accept that there may be a case for allowing a creditor to claim general damages for late payment of a debt, though that does not appear to be the present law.[81] We do not, however, accept that there should be a special exception to the present rule in the case only of foreign currency obligations and that it should only be where foreign currency fluctuations cause loss that the creditor ought to be able to claim compensation. Furthermore, if one were to adopt a general rule which permitted damages to be claimed for late payment of a foreign money obligation, it is by no means clear to us that the measure of the creditor's loss should necessarily be calculated by reference simply to the adverse fluctuations, if any, in the appropriate currency. The case for such a rule is weakest where the claim is for a debt and the creditor has agreed upon the currency in which his obligation is to be measured. He should not, in our view, be able, solely in a foreign currency case, to claim damages by abandoning this constant standard and seeking to claim a further sum to compensate him for depreciation of his chosen currency. Furthermore, it should not be forgotten that both the Convention and the *Miliangos* rule apply to a wider range of foreign money obligations than debts. We have seen that the Convention applies to "all liabilities under which a sum of money is due, whether originally expressed in money or not"[82] and *The Despina R* and *The Folias*[83] have made it clear that the *Miliangos* rule applies to actions for damages in tort and contract. It does not seem to us obviously to be desirable to render a defendant automatically liable for currency fluctuations in the currency of the plaintiff's loss occurring after the date when a sum fell due as damages in contract or tort irrespective of whether such fluctuations were foreseeable. Furthermore, in some cases the operation of the principle in Article 4 achieves an eccentric result because, as we have seen,[84] it requires the creditor's loss from currency fluctuations to be assessed by reference to what may for him be an irrelevant currency, namely that of the place of payment.

55 There is one final factor to be borne in mind when considering the merits of Article 4 of the Annex and that is the question of interest. In the case of late payment of a contract debt, the parties are free to provide for the payment of interest and will often have done so. If there is no contractual provision, express or implied, there may still be an entitlement to interest under

[80] [1976] A.C. 443, 466, *per* Lord Wilberforce.

[81] The only right is in respect of special damages for specific and foreseeable loss: see above, n. 35 and para. 41.

[82] Article 1(2), discussed above, para. 27.

[83] [1979] A.C. 685.

[84] See para. 40, above.

the law of Scotland,[85] though not of England.[86] In the case of proceedings for damages, whether or not in foreign currency, both the English[87] and Scottish[88] courts have a power to make an award of interest.

56 Our conclusion so far as the matters raised by Article 4 of the Annex are concerned, is that our present approach embodied in the *Miliangos* rule is to be preferred and that there should be no special foreign money exception to the rule that damages are not available merely for late payment of a debt (as distinguished from being recoverable in the limited number of cases where there is a specific and foreseeable loss[89]), given the availability of interest at an appropriate rate for claims in foreign currency as well as in sterling.

57 The third issue concerns the form in which a creditor may demand payment of a foreign money obligation. Article 5 gives the creditor the right to demand payment in "the currency to which he is entitled" (whatever that may mean[90]) or the equivalent in the currency of the forum converted as at the date of actual payment. The choice is the creditor's. The *Miliangos* rule does not relate directly to the form of the creditor's claim, but its substantive effect is that, even though the creditor may claim foreign currency, the debtor has the option of paying the sterling equivalent. We think this is right and that a debtor should not be deprived of the possibility of satisfying a judgment of our courts in our currency, namely sterling. Furthermore, we think that the conversion date selected by Article 5, the date of actual payment, is quite impracticable in the case of a judgment debt of which the court has authorised enforcement, for the reasons which led the House of Lords in *Miliangos* to select, as the latest possible conversion date, the date when the court authorises enforcement of the judgment.

58 The fourth main issue arising from the rules in the Convention is whether it is desirable, as Article 7 of the Annex provides, to require a debtor, against whom judgment in a foreign currency has been given, to pay an additional amount to compensate the creditor for adverse currency fluctuations between the dates of judgment and of actual payment, and also to allow the creditor to benefit from any beneficial currency fluctuations. Under our law, the *Miliangos* rule makes it quite clear that the foreign currency is to be regarded as a constant standard, and no protection for the creditor against currency fluctuations is provided. Once again, bearing in mind the availability of interest on judgment debts, the fact that there is no general protection

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[85] *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.* [1893] A.C. 429, 443; *Riches* v. *Westminster Bank Ltd.* [1947] A.C. 390, 412. However, where there is no stipulation for interest, express or implied, it must be concluded for in the summons and will only be awarded by the court, at the earliest, from the date of citation.

[86] *London, Chatham and Dover Railway Co.* v. *South Eastern Railway Co.* [1893] A.C. 429. The Law Commission has proposed a statutory right to interest on contract debts: Law Com. No. 88 (1978) but the Lord Chancellor announced in December 1980 that the Government did not accept that recommendation: see *Hansard* (H.L.), 18 December 1980, vol. 415, col. 1278.

[87] Law Reform (Miscellaneous Provisions) Act 1934, s. 3. This section applies also to claims for debts.

[88] Interest on Damages (Scotland) Acts 1958 and 1971.

[89] See n. 35 and para. 41, above.

[90] See n. 61, above.

available in our law for economic loss suffered by late payment of judgment debts relating to either debts or damages, and that there is, in our view, no clear case for a special foreign money exception, we prefer the *Miliangos* approach to that of Article 7.

59 It will be apparent that, of the four main issues raised by the rules in the Convention and Annex, only the first issue seems to us to be satisfactorily resolved therein. There are also a number of detailed drafting difficulties with both the Convention and the Annex which we have pointed out in the course of our analysis.[91] It might be argued, however, that, despite its deficiencies, the Convention should be accepted if its acceptance produced a wide measure of international agreement. Such agreement seems highly unlikely. The Convention permits Contracting States unilaterally to exclude Articles or to adopt them with modifications.[92] The Convention is not based on any principle of reciprocity. Furthermore, the prospects of widespread international acceptance of this Convention seem slight. As we indicated earlier,[93] the Convention has been signed by only three States and ratified by one.[94] Even if there were a substantial measure of international acceptance of the Convention, we should have grave doubts as to the acceptability in this country of the approach of the Convention to the question of compensation for late payment of foreign money obligations, whether before or after judgment.

60 We *recommend* that the United Kingdom should not become a party to the 1967 European Convention on Foreign Money Liabilities.

## PART III

## THE 1972 EUROPEAN CONVENTION ON THE PLACE OF PAYMENT OF MONEY LIABILITIES

### A THE BACKGROUND, SCOPE AND FORM OF THE 1972 CONVENTION

61 The European Convention on the Place of Payment of Money Liabilities[95] was drawn up within the Council of Europe by a committee of experts under the authority of the European Committee on Legal Co-operation (C.C.J.), and was opened for signature by Member States of the Council of Europe on 16 May 1972. It has been signed by three Member States, namely Austria, the Federal Republic of Germany, and the Netherlands, but we are not aware of any Member State having as yet become a party to the Convention.

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[91] See paras. 27, 29, 33, 35, 37, 40, 45, and 47, above.
[92] See Articles 1(3), 2, 3, and 6(1).
[93] See para. 10, above.
[94] Austria, France, and the Federal Republic of Germany have signed the Convention; Luxembourg has ratified it.
[95] Referred to hereafter in this Part as "the Convention".

62 The committee of experts also prepared an Explanatory Report[96] which, as amended by the C.C.J., was submitted to the Committee of Ministers of the Council of Europe and published under the authority of the Council. The preamble to the Explanatory Report contains the following note of caution:

> "This report does not constitute an instrument providing an authoritative interpretation of the text of the Convention, although it might be of such a nature as to facilitate the application of the provisions therein contained."

63 In the process of drafting the Convention the C.C.J. took into account a number of comments and suggestions made by the Foreign and Commonwealth Office after consultation with the two Law Commissions and other authorities in the United Kingdom. Some of these comments and suggestions, mainly on matters of detail in the drafts, are reflected in the form which the Convention finally assumed.

64 The general aim of the Convention, as described in the Explanatory Report,[97] is to unify the rules as to the place of payment of money liabilities. The broad argument in favour of this is that it would facilitate payment, particularly in cases where the parties reside in different States, and, more especially, where one of the parties has moved to another State after the obligation has arisen but before payment is made.[98] It is argued that the adoption of a uniform code would lead to an improvement in what is at present a confused situation in which different rules as to place of payment are in force in different Member States of the Council of Europe, and uncertainty prevails, at least in some of the States, as to what are the legal consequences if a party to a transaction changes his residence.

65 The Convention consists of a general text and two annexes. Annex I sets out the code of rules proposed for adoption by Member States. Annex II confers on Italy and the Netherlands (but not on other States) an option to reserve the right not to apply Article 3 of Annex I.[99]

66 The Convention[100] provides that it shall enter into force three months after the date of deposit of the fifth instrument of ratification or acceptance; or, (in respect of any signatory State ratifying or accepting the Convention after that date), three months after that State deposits its instrument of ratification or acceptance.

67 Each Contracting Party undertakes that, within twelve months from the date on which the Convention comes into force in respect of that Party, it will bring its national law into conformity with the rules in the Annex.[101]

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[96]Referred to hereafter in this Part as "the Explanatory Report".

[97]Explanatory Report, paras. 3–8.

[98]In the case of a liability such as a guarantee which is contingent on non-payment by the debtor, it may happen that payment by the guarantor (rather than the debtor) does not even become due from, let alone actually paid by, him until after such a change of residence.

[99]Referred to hereafter as "the Annex". Article 3 is concerned with certain aspects of relief for the debtor. See paras. 120–126, below.

[100]Convention, Article 5.

[101]Convention, Article 1.

68 The Convention and Annex I deal with two main issues. The first is the initial determination of a place at which a money obligation is to be discharged: the "place of payment". The second issue is the provision of relief to the debtor in circumstances where it is considered unjust to make him discharge his obligation at that place. Where the rules in the Annex apply, they are not limited to determining the country in which payment is to be made. They relate both to the country of payment and also to a location within that country. Indeed, it is clear that the rules of the Annex would apply not only to international cases but also to purely domestic transactions. If the United Kingdom implemented the Convention, the rules of the Annex would apply to all transactions governed by English or Scots law. However, the Convention does not make absolutely clear the range of circumstances in which the rules in the Annex are to be applied. Under Article 1 of the Convention, each Contracting State undertakes that "its national law shall conform" with the rules in the Annex. This does not indicate whether or not those amended rules apply in a Contracting State as a mandatory requirement of the law of that State, irrespective of the law applicable under its choice of law rules.

69 The comprehensive scope of the Convention is limited by the fact that the rules in the Annex are to apply only in the absence of contrary intention or different usage.[102] Further, Article 3 of the Convention provides for all Contracting Parties a wide-ranging power to exclude various "specific matters" of their choice from the operation of the rules contained in the Annex, or to modify the operation of those rules in relation to such matters.[103] Examples of such "specific matters" are given in paragraph 22 of the Explanatory Report, as follows:

> "payment of sailors' wages or servants' salaries, payment out of bank deposits, . . . payment in cases of bankruptcy, the distribution of a fund insufficient for the discharge of the totality of liabilities, obligations arising under family law, obligations of parties to negotiable instruments, judgment debts and maintenance orders."

The Convention also provides that it "shall be without prejudice to the provisions of any treaties, conventions or bilateral or multilateral agreements concluded or to be concluded, governing in special fields matters covered by this Convention."[104]

## B THE PRESENT LAW IN OUTLINE

70 Before we turn to a detailed examination of the Convention, we consider that, as in Part II of this Report, it would be helpful to the reader to provide a brief outline of the development and present state of our law on the place of payment of money liabilities. In that way, we hope that it may be easier to draw comparisons between the rather different approaches of the Convention and of our own law. As will become apparent, our law on the topic of

[102] Annex, Article 1.

[103] Convention, Article 3. The effect of this Article is further discussed in para. 137, below. See Explanatory Report, para. 22.

[104] Convention, Article 4.

place of payment of money liabilities is a great deal less developed than in relation to the matters considered in Part II of this Report. However, it is for consideration whether this lack of development has in practice given rise to any problems, and whether the Convention régime would represent an improvement.

## 1 The law of England and Wales

71 Apart from a number of particular topics which have their own special rules about place of payment and which are discussed below, there is in English law virtually no authority on the subject of where, as between several possible places, payment should be made. But in so far as English law has developed any general principles as to the place of payment of money liabilities, this development has taken place in the field of contract law; and it will therefore be convenient to begin with contractual liabilities.

### (*i*) *Contractual liabilities*

72 The historical development of English law relating to the place of payment of contractual money liabilities began in times when most payments were made by the tender and acceptance of actual coins. This would normally require the physical presence of both parties or at least of their agents, and this part of the law therefore began its development merely as one aspect of the general law relating to the place of performance of contracts where effective performance requires the presence of both parties. In modern times the banking system has to a great extent taken the place of cash payment, thus dispensing with the need for the debtor to be present when the payment is received. This might suggest that in the circumstances of modern commercial life the place of payment has lost most of its importance.

73 There has been little detailed discussion of the principles of law relating to place of payment. Most of the modern cases in which the place of payment has been directly in issue have been cases arising on applications for leave to serve notice of a writ outside the jurisdiction of the English courts; and the question in these cases has been whether payment ought to have been made in England or in some other country. The choice, therefore, has been between countries of payment, and not between particular locations within England or within some other country. As we have seen,[105] the Convention deals with the latter case as well as with the former.

#### (*a*) *Historical development of the law*

74 From early authorities has sprung the maxim, often cited as a general principle or rule of the common law, that it is the duty of a debtor, when the debt falls due for payment, to seek out the creditor and pay him.[106] The rule applies equally in the case where a contract is made abroad and the creditor is resident there at the time the contract was made, in which case the debtor is not

[105] See para. 68, above.

[106] See Litt. sect. 340, Co. Litt. 210a; Sheppard's *Touchstone* p. 136. See also *The Eider* [1893] P. 119, 131; *Drexel* v. *Drexel* [1916] 1 Ch. 251, 260.

excused from seeking out the creditor and paying him outside England.[107] However, the rule does not apply if the creditor leaves England after the contract was made.[108]

75 The general rule may be displaced by agreement, express or implied, and an example of the way in which an implied term of a contract can override the general rule is afforded by the case of wages payable weekly, where not only may it be for the employee (the creditor) to seek out his employer (the debtor), but also to attend at a particular location on the employer's premises to receive payment of the wages due to him.[109] A further example is the case of banker and depositor, where in the absence of agreement to the contrary the bank's obligation to pay is limited to the place where the account is kept.[110]

76 The place of payment has been considered in a group of relatively modern cases concerning leave to serve notice of a writ outside the jurisdiction. These cases arose out of the procedural rule which was contained in Order XI, rule 1(*e*) of the Rules of the Supreme Court 1883, as in force until 1921.[111] Order XI, rule 1(*e*) enabled leave for service out of the jurisdiction to be given in any action founded upon a breach or alleged breach within the jurisdiction of a contract wherever made, which, according to the terms thereof, ought to have been performed within the jurisdiction.

77 It was a necessary consequence of the form of this rule that what the court had to decide in these cases was entirely a question of construction, namely whether "according to the terms" of the contract in issue it was a contract which ought to be performed within the jurisdiction. "The terms" of the contract was interpreted by the courts in the usual way as meaning the express or implied intention of the parties.

78 Thus in *Rein* v. *Stein*[112] the plaintiff, who carried on business in England, was claiming from a German carrying on business in Germany the price of goods consigned by the plaintiff. The contract was made by correspondence and provided expressly that payment was to be made "in cash", though without specifying a place of payment. The Court of Appeal found that the surrounding circumstances supported the view that payment was to be made in England; and Kay L.J. added:

> "Prima facie, in commercial transactions, when cash is to be paid by one person to another, that means that it is to be paid at the place where the person who is to receive the money resides or carries on business."[113]

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[107] *Fessard* v. *Mugnier* (1865) 18 C.B. (N.S.) 286, 144 E.R. 453, cited with approval in *The Eider* [1893] P. 119, 131, 137.

[108] *Fessard* v. *Mugnier* (1865) 18 C.B. (N.S.) 286, 144 E.R. 453; *The Eider* [1893] P. 119.

[109] *Riley* v. *William Holland & Sons Ltd.* [1911] 1 K.B. 1029, 1031; and see *Halsbury's Laws of England*, 4th ed., (1974), vol. 9, para. 490.

[110] *Clare & Co.* v. *Dresdner Bank* [1915] 2 K.B. 576, where the bank's branch in London refused to pay out a sum held in an account at its Berlin branch; *Richardson* v. *Richardson* [1927] P. 228; and see *Joachimson* v. *Swiss Bank Corporation* [1921] 3 K.B. 110, 127 (C.A.) *per* Atkin L.J.

[111] The corresponding provision of the R.S.C. 1965 is O.11, r.1(g).

[112] [1892] 1 Q.B. 753.

[113] *Ibid.*, at p. 758. See also *Robey & Co.* v. *The Snaefell Mining Co. Ltd.* (1887) 20 Q.B.D. 152; *Thompson* v. *Palmer* [1893] 2 Q.B. 80.

79 In some cases in this group we find restatements of the old rule that the debtor must seek out his creditor and pay him.[114] Although, from the nature of the procedural rule on which the cases arose, the question for the court was essentially a question of construction of the contract, the old rule could be applied on the basis that it was an implied term of the contract; provided, of course, that it was consistent with the express provisions of the contract and the circumstances in which the contract was made.

80 The current law of England relating to the place of payment of contractual money liabilities is therefore an amalgam of two historical elements. One of these is the old and well-established principle that the debtor must seek out his creditor. Originally limited to seeking out the creditor in England, it has in the course of time been extended to seeking out the creditor in a foreign country, if the contract was made outside England and the creditor was resident outside England at the time the contract was made. The other element is the line of cases based upon the old Order XI, rule 1(*e*) for the purposes of which the court was required to determine the question in accordance with the "terms of the contract".

(*b*) *Where must the debtor seek out the creditor?*

81 If proceedings against a debtor have been started by a creditor, the debtor may make a payment into court. However, before that stage has been reached, he needs to know where he must seek to pay his creditor. It is clear that, if a particular place of payment is indicated by the contract, whether it is expressly specified or is implied by the surrounding circumstances or the prior course of dealing between the parties, then this is the place at which payment ought to be made.[115] It is equally clear that the parties may expressly or by implication vary their agreement as to the place of payment, or may add provisions relating to place of payment to an agreement which previously had no such provision. But where no place of payment is indicated, then it seems that there are four possible answers in English law as to the place at which the debtor should seek out the creditor and pay him.

(1) The place of payment is wherever the creditor actually happens to be at the time when payment is tendered.

(2) The place of payment is the place which was the creditor's residence or place of business at the time when the contract was made.

(3) The place of payment is the creditor's residence or place of business at the time when payment falls due.

(4) The place of payment is the creditor's residence or place of business at the time when payment is actually tendered.

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[114]See *The Eider* [1893] P. 119, 131, 136–7; *Drexel* v. *Drexel* [1916] 1 Ch. 251, 260; *Bremer Oeltransport G.m.b.H.* v. *Drewry* [1933] 1 K.B. 753, 765.

[115]*Halsbury's Laws of England*, 4th ed., (1974), vol. 9, paras. 488, 489; *Thorn* v. *City Rice Mills* (1889) 40 Ch.D. 357; *Vanbergen* v. *St Edmunds Properties Ltd.* [1933] 2 K.B. 223.

82 The first of these answers goes back to the earliest authorities,[116] and dates from the time when most payments were made in actual cash, and required the physical presence of both parties. However, outside the retail trade, there must now be few commercial transactions in which payment requires the actual presence of both parties. Further, many creditors and debtors are now companies, rather than individuals, and usually have a clearly identifiable place of business.

83 The second answer, referred to in paragraph 81(2) above, is that which is given in *Chitty on Contracts*,[117] in the following terms:

> "The place for payment of a debt is the business place or residence of the creditor *at the date when the debt was contracted* unless there is evidence of a contrary intention."

In support of this proposition are cited *Rein* v. *Stein*,[118] *Charles Duval & Co. Ltd.* v. *Gans*[119] and *Drexel* v. *Drexel*.[120]

84 These three cases all arose on the procedural rule relating to service out of the jurisdiction.[121] In applying that rule the courts took into account the surrounding circumstances. But it was generally accepted that the court was not entitled to look beyond the circumstances existing at the time when the contract was made. In *Rein* v. *Stein* Kay L.J. put the matter in this way:

> "It has been truly said that the only circumstances to look at are the circumstances existing at the time of the contract."[122]

85 One of the circumstances existing at the time when the contract was made would be the place of residence or place of business of the creditor. On the assumption that the correct interpretation of the procedural rule was that stated by Kay L.J., so that regard was to be had only to the circumstances existing at the date of the contract, then this would of itself, for the purposes of cases arising under that rule, exclude any change of residence or place of business occurring after the date of the contract. It should be borne in mind, however, that the cases mentioned in paragraph 83 were decided for jurisdictional rather than substantive purposes.

86 When we come to the third and fourth of the possible answers suggested in paragraph 81 above, namely that the place of payment is the creditor's residence or place of business either

(a) at the time when payment falls due, or

(b) at the time when payment is actually tendered,

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[116]See Litt. sect. 340, Co. Litt. 210a; Sheppard's *Touchstone* p. 136; and see also *Halsbury's Laws of England*, 4th ed., (1974), vol. 9, para. 490. To the extent that cases on tender are relevant, they appear to support the proposition that tender must be made to the creditor personally or to his agent. See, for example, *Kirton* v. *Braithwaite* (1836) 1 M. & W. 310, 150 E.R. 451.

[117]24th ed., (1977), vol. 1, para. 1297 (emphasis added).

[118][1892] 1 Q.B. 753.

[119][1904] 2 K.B. 685.

[120][1916] 1 Ch. 251.

[121]See para. 76, above.

[122][1892] 1 Q.B. 753, 759.

we find, unfortunately, even less guidance in the authorities. Thus, in *The Supreme Court Practice* 1979 the general principle is stated as follows:

> "Where no place of payment is provided by the terms of the contract (including such as are to be implied from the course of dealing between the parties), it is the duty of the debtor to seek out his creditor at his residence or place of business . . .".[123]

But nothing is said as to the possibility of a change in the creditor's place of residence or place of business which has occurred since the contract was made.

87 *In W. J. Alan & Co. Ltd.* v. *El Nasr Export & Import Co.*[124] the question before the court was as to the currency in which the money was payable under a contract. The decision of Orr J. was reversed on other grounds in the Court of Appeal, but was upheld with regard to the place of payment; and in his judgment on this point he said (at p. 405):

> "In as much as neither contract specified at what place the credit to which it referred should be made available, I am satisfied that it was the duty of the buyers to provide it at the place of business of the sellers, namely, Nairobi . . .".

But again there is no indication in the judgment as to the time at which the place of business of the creditor ought to be ascertained.

88 It seems to us that in the present state of English law no conclusive determination can be made as to which of the four possible answers suggested in paragraph 81 above represents the law as to the place of payment where no place is indicated by the contract, either expressly or by implication. In the great majority of transactions, however, there are, in the express terms of the contract, in the surrounding circumstances, or in the course of dealing between the parties, sufficient indications of the intention of the parties to obviate the need for resorting to any general rule. And even where this is not so, and the courts have been thrown back on the general principle that the debtor must seek out his creditor, all that the courts have actually had to decide is the *country* in which the money ought to have been paid. Even the references to the creditor's residence or place of business have been little more than *obiter dicta*, except in so far as they related to the country in which the creditor resided or carried on business.[125]

### *(ii) Liability in tort*

89 The place at which damages in tort should be paid does not seem to have arisen as an issue in English case-law. This is not surprising, since damages in

[123] Para. 11/1/12, in a note on R.S.C. O.11, r. 1(*g*).

[124] [1971]1 Lloyd's Rep. 401; [1972] 2 Q.B. 189, (C.A.).

[125] If the original creditor dies before the contractual obligation falls due to be performed, and the benefit of the contract vests in his personal representative, the latter becomes the creditor and the debtor's duty to seek out and pay the creditor applies equally to the personal representative: *Fowler* v. *Midland Electric Corporation* [1917] 1 Ch. 656 (C.A.). There appears to be no authority in English law on the effect of a change in the identity of the creditor, such as may occur, for example, by assignment, on the place of payment of a contractual money liability, whether the new creditor's residence or place of business is in the same country as that of the original creditor or is in a different country.

tort are unliquidated until the amount payable has been ascertained. If the amount is determined by the court in legal proceedings, the liability of the defendant will be a liability arising under the order of the court.[126] If the claim is settled by agreement, then a contractual liability arising by virtue of the agreement will be substituted; and in either event the place of payment will be determined accordingly.

### (*iii*) *Administration of estates*

90 The place where personal representatives are obliged to pay legacies seems to be of little practical importance, and there appear to have been no cases directly on this subject. But where the identity of the legatee is known to the personal representative, and there is no other obstacle which prevents payment, it seems clear that it is for the personal representative to pay the legacy at the end of the executor's year, and not to await a demand from the legatee for payment.[127]

### (*iv*) *Liability of trustees*

91 There is little authority on the duties of trustees which would throw any light on the place of payment of money payable under a trust. The only relevant principle is the duty of the trustee to pay what is due to the beneficiary without awaiting a demand for payment.[128]

92 There seems to be no authority on the question of the place at which payment should be made to the beneficiary, or, in particular, whether a beneficiary can demand that payment should be made at a place other than his habitual residence at the time of payment, or on questions arising where a beneficiary has changed his habitual residence. It is thought that in this context a place of business probably has no relevance.

### (*v*) *Money liabilities imposed by court order*

93 There is no general rule as to the place at which money payable under a judgment or order of the court should be paid. There are provisions under which the money may, or in some cases must, be paid into court, or (in the case of sums payable by order of a magistrates' court) to the clerk of the court.[129] Apart from this, it would appear that, on the analogy of the general principle which applies to contractual liabilities, it is for the judgment debtor to seek out the judgment creditor in order to pay him; but that nothing more specific can be

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[126] See para. 93, below.

[127] *Wroe* v. *Seed* (1863) 4 Giff. 425, 66 E.R. 773. Money may be paid into court under s. 63 of the Trustee Act 1925 or s. 52(3) of the County Courts Act 1959, for example, where a personal representative is unable to trace the legatee. There is a power under the Consular Conventions Act 1949, in relation to States designated by Order in Council, for payment of a legacy due to a foreign national resident abroad to be made here to a consular officer of the State of which the legatee is a national. The consular officer may give a valid discharge for money or property due to the foreign legatee under the will.

[128] See *Hawkesley* v. *May* [1956] 1 Q.B. 304, 323–325.

[129] See County Courts Act 1959, s. 99(3); Magistrates' Courts Act 1980, s. 59; R.S.C. O.80, r. 12(1), (2); Magistrates' Courts Rules 1981, r. 48.

said as to the place in this country at which the payment ought to be made. However, a creditor under an English judgment is only entitled to be paid in England. He cannot insist on payment of the English judgment debt at his foreign residence or place of business. "The creditors must come within the realm, and if they are within the realm, then no doubt the debtor must search them out".[130]

### *(vi) Money payable by statute to or by public authorities*

94 There is a wide range of legislation under which sums are payable to public authorities. This range includes national taxation, both on income and on capital, in all its forms; contributions to social security; Customs and Excise duties; local taxation by way of general rates and water rates; and a variety of charges for the use of public services, such as gas, electricity and telephone. Where tax or a social security contribution is deductible at source, this of itself determines the place of payment so far as the taxpayer or contributor is concerned. But in most cases the relevant Act specifies the authority responsible for collecting payment, and the rest (up to the point at which some procedure for enforcement has to be invoked) is left mainly to administrative arrangements to be made by that authority. Thus, under the Taxes Management Act 1970 income tax, corporation tax and capital gains tax are placed under the management of the Commissioners of Inland Revenue ("the Board"); collectors appointed by the Board are responsible for receiving the tax when it becomes due and payable; and demands for payment are to be in accordance with forms prescribed by the Board.[131]

95 The most important categories of payments to be made by public authorities are the various forms of social security benefits; and the mode of payment of these has been dealt with in a number of statutory regulations. For example, many of the benefits under the Social Security Act 1975, including widow's benefit and retirement pensions of all categories, are to be paid by means of benefit orders payable to the beneficiary "at such place as the Secretary of State, after enquiry of the beneficiary may from time to time specify".[132]

### *(vii) Rent payable by tenants*

96 The question as to where a tenant is required to pay his rent may arise either in the context of re-entry for non-payment of rent, or in the context of a covenant or agreement to pay the rent.

97 In cases involving the ancient common law rules relating to the exercise by a landlord of a right of re-entry for non-payment of rent, there was, and indeed still is, a requirement (which is subject to a limited statutory exception) that the landlord's re-entry must be preceded by a formal demand for payment

[130] *In re A Debtor* [1912] 1 K.B. 53, 56 *per* Cozens-Hardy M.R.; and see *Re Stogdon, ex p. Leigh* [1895] 2 Q.B. 534; *Dalmia Cement Ltd.* v. *National Bank of Pakistan* [1975] Q.B. 9, 24.

[131] Taxes Management Act 1970, ss. 1, 60, 113(3).

[132] Social Security (Claims and Payments) Regulations 1979, S.I. 1979, No. 628, reg. 16(2).

on the land, unless (as is normally the case in leases granted by formal document) this requirement is excluded.

98 It is clear that the general rule does not apply in the case of payments due under an express covenant to pay the rent, since a covenant to pay the rent is a contractual liability, and the proper place of payment is to be determined accordingly.[133] It would seem that the same approach would today be applied to agreements not under seal[134] and to implied covenants or agreements.[135] It would today be very exceptional to find a lease or tenancy agreement drafted in terms containing no express covenant or agreement by the tenant to pay the rent, or an informal tenancy which did not imply an agreement to that effect.

## 2 The law of Scotland

99 Although the question of place of payment of a money liability was discussed in relation to Scots law as early as 1655, in *Craig's Jus Feudale*,[136] it has not received detailed treatment in modern case-law or legal writings. The general rule of Scots law on the matter has been formulated as follows:

> "If no place for performance is specified expressly or impliedly and the act of performance requires the presence or co-operation of both parties the general rule is that the onus is on the debtor to seek out the creditor in the obligation and tender performance at his place of business or residence."[137]

That general rule is to the same effect as the general rule for England and Wales.[138]

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[133]See *Halsbury's Laws of England*, 4th ed., (1974), title "Contract", vol. 9, para. 491; *op. cit.*, 3rd ed., (1958), title "Landlord and Tenant", vol. 23, para. 1199; *Woodfall's Law of Landlord and Tenant*, 28th ed., (1978), p. 299, para. 1-0746; *Haldane* v. *Johnson* (1853) 8 Ex. 689, 155 E.R. 1529.

[134]*Baynes & Co.* v. *Lloyd & Sons* [1895] 1 Q.B. 820, 826 (aff'd. [1895] 2 Q.B. 610 (C.A.)). The case concerned an implied covenant for quiet enjoyment.

[135]It would seem that the statement in *Halsbury's Laws of England*, 4th ed., (1974), title "Contract", vol. 9, para. 491, that "... where rent is reserved without any *express* covenant for payment and no place for payment is specified in the reservation, it is payable on the demised premises ..." [emphasis added] may be too restrictive. There is a similar statement in *Halsbury's Laws of England*, 3rd ed., (1958), title "Landlord and Tenant", vol. 23, para. 1199. This is to be contrasted with what Lord Denning M.R. said in *C. H. Bailey Ltd.* v. *Memorial Enterprises Ltd.* [1974] 1 W.L.R. 728, at p. 732: "It is time to get away from the medieval concept of rent. That appears from a passage in *Holdsworth, A History of English Law*, vol. VII (1900), p. 262, which was referred to by Evershed L.J. in *Property Holding Co. Ltd.* v. *Clark* [1948] 1 K.B. 630, 648:

> '... in modern law, rent is not conceived of as a thing, but rather as a payment which a tenant is bound by his contract to make to his landlord for the use of land.'

The time and manner of the payment is to be ascertained according to the true construction of the contract, and not by reference to out-dated relics of medieval law."

[136]2.3.37.

[137]Walker, *The Law of Contracts in Scotland*, para. 31.14. See also *Gloag on Contract*, 2nd ed., at p. 709 and Gloag and Henderson, *Introduction to the Law of Scotland*, 8th ed., at p. 153.

[138]The general rule in Scots law may historically have been subject in the case of agricultural leases to an exception to the effect that rent may fall to be paid on the ground if no alternative provision is made. However, that exception is based on old authorities and is invariably displaced by alternative provision in practice.

100 The Scottish cases do not, however, give guidance as to the manner in which the general rule would fall to be applied in particular circumstances, such as an alteration in the place of residence of a creditor between the date of the contract and the date of payment. The report of the modern case cited in the text books as authority for the existence of the general rule[139] does not contain a statement of the Lord Ordinary's reasoning and there is no decision of the Scottish courts on the point decided for England and Wales in *Fessard* v. *Mugnier*.[140] Since the procedural rules as to service of writs outside the jurisdiction do not have any application in Scotland, the opportunity has not arisen in Scotland, as it has in England, to put a gloss on the general rule in the course of decisions on procedural points. No inference can be drawn from the form of decree for payment of money liabilities used by the Scottish courts; such decrees are given in entirely general terms and the debtor and creditor in the liability are left to rely on the general rule.

101 It is a matter for speculation whether Scots law would, if the opportunity arose, develop its general rule in the same way as the English general rule has so far been developed. It is clear, however, that in the present state of Scots law the questions posed in paragraph 81 above are no more susceptible of conclusive determination in Scots law than they are in English law.

## C AN OUTLINE OF THE SCHEME IN THE ANNEX TO THE 1972 CONVENTION

102 The Annex contains a basic principle in Article 2, paragraph 1, namely that payment shall be made at the creditor's habitual residence at the time of payment. The rest of the Annex constitutes an elaborate code of rules providing for exceptions to this basic principle and containing certain provisions designed to relieve the debtor. There appears to be an underlying assumption, (which is, however, not expressed) that the debtor should not have to suffer a burden greater than that which would exist if his obligation were to pay at the place which was the creditor's habitual residence or place of business at the time the liability arose.[141] Taking this as a starting-point, the Annex confers three options on the creditor and provides two types of relief for the debtor.

103 The options for the creditor are—

(i) to accept payment at the place which is his habitual residence or place of business at the time of payment, in accordance with the basic principle in Article 2, paragraph 1;

(ii) to require payment at another place in the same State;

(iii) to require payment at a place in the State of the creditor's habitual residence or place of business at the time when the liability arose.

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[139] *Haughead Coal Co.* v. *Gallocher* 1903 11 S.L.T. 156. The Lord Ordinary's decision was that payments by an employer of compensation under the Workmen's Compensation Act 1897 must be made at the residence of the workmen entitled to them.

[140] (1865) 18 C.B. (N.S.) 286, 144 E.R. 453. See para. 74, n. 107, above.

[141] See para. 135, below.

104 The two types of relief for the debtor are as follows—

(i) if the creditor so exercises his options that the debtor would be required to pay at a place other than the creditor's habitual residence or place of business at the time when the liability arose, and the result would be to render his liability "substantially more onerous" than his primary liability, the debtor may refuse to pay at the place required by the creditor. In the event of such a refusal, different rules for payment are laid down by Article 3, paragraph 2;[142]

(ii) if the debtor has to pay at a place other than the creditor's habitual residence or place of business at the time when the liability arose, any increase in the expenses or any financial loss resulting from the change in the place of payment is to be borne by the creditor.

105 Although the Annex is evidently conceived in terms of contract, and the rules in the Annex are expressed in terms of "the creditor" and "the debtor", those rules are not intended to be limited to contracts or to debts. The Convention provides that they are to extend to "all liabilities under which a sum of money is due, whether originally expressed in money or not".[143] In the Explanatory Report, this is paraphrased as meaning that "the Convention and the Annexes are intended to cover money obligations of any kind (whatever their origin), i.e. contractual and non-contractual liabilities whether originally expressed in money or not."[144] It therefore appears that "money liabilities" includes *all* legal obligations to pay money, whether the total amount payable to discharge the obligation has been finally ascertained or not and whether payment is due immediately or at some future time. Whether or in what way the rules in the Annex would apply to a right to damages, before the amount of damages payable has been determined by a judgment or award of a court or tribunal or by agreement of the parties, is, however, not clear.

## D AN ANALYSIS OF THE PROVISIONS OF THE ANNEX

106 We shall now consider in greater detail the more significant principles contained in Annex I to the Convention and the Articles in which they are to be found.[145]

### (i) Article 1

107 Article 1 provides that:

> "Unless a different intention of the parties appears or a different usage is applicable, the place of payment of money liabilities shall be determined by the following rules."

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[142]See paras. 122–126, below.

[143]Convention, Article 1(2).

[144]Explanatory Report, para. 17.

[145]These may be compared with Article 57 of the United Nations Convention on Contracts for the International Sale of Goods (1980), Cmnd. 8074, which deals with the determination of the place of payment of the price in an international contract for sale of goods. And see para. 128, below.

108 In paragraph 31 of the Explanatory Report it is explained that "intention of the parties" was preferred to "agreement" as being wider in scope. The common intention of the parties is to prevail even if no express agreement has been reached. This is similar in principle to the view taken by the English courts in taking into account the surrounding circumstances and the general course of dealing between the parties for the purpose of securing that the intention of the parties shall prevail.[146] As to "usage", the only explanation given is that it is possible that in certain fields practices have developed, the results of which differ from the rules of the Annex. Perhaps the payment of weekly wages at an employer's place of business might be regarded as an example of such a usage.[147]

109 The basis of the Annex is therefore that its provisions are not mandatory; they are to apply only in the absence of a different intention or contrary usage.

**(ii) Articles 2 and 5**

110 Article 2 provides as follows:

> "1. Payment shall be made at the creditor's habitual residence at the time of payment.
>
> 2. Nevertheless if the creditor so requires, payment shall be made at any other place in the State of the creditor's habitual residence at the time of payment or at any place in the State of the creditor's habitual residence at the time when the liability arose."

111 Article 2 (and the rest of the Annex) must be read with Article 5, which provides that:

> "Where the liability arises in the course of the creditor's professional or business activity, the 'place of business' where this activity is carried on shall, in the preceding articles, be substituted for the 'habitual residence' of the creditor."

It is left to the domestic law of each Contracting State to determine what constitutes the "place of business" of the creditor, e.g., where the creditor is a company carrying on business at a number of different places.

***(a) Article 2, paragraph 1***

112 Article 2, paragraph 1 is the general rule to which the remainder of the Annex provides a number of exceptions, with consequential provisions where those exceptions apply. Paragraph 35 of the Explanatory Report emphasises that no definition of "habitual residence" is provided in the Convention. Although the use of the term "habitual residence" in legislation in the United Kingdom is increasing, the phrase tends to be used to refer to the country with which a person is connected, rather than a municipality or a particular building

[146] See paras. 84–85, above.
[147] See para. 75, above.

or part of a building in which a person lives. The former interpretation is clearly excluded by the terms in which Article 2 is drafted. However, it is left to the domestic law of each Contracting State to determine whether "habitual residence" is to mean the precise address at which the creditor resides, or whether it is to signify only the municipality or community in which he resides. Paragraph 35 of the Explanatory Report indicates that the large majority of the committee of experts was of the opinion that it should be taken to mean the precise address, the house of the creditor. A further unresolved problem is whether a creditor may be regarded as having more than one habitual residence. This may be of particular significance in the case of a corporate creditor with several places of business.

113 There is also a problem in connection with the identity of the creditor, and accordingly in determining with whose "habitual residence" the rule is concerned. This problem recurs throughout the Annex. The Annex contains no definition of "the creditor". Since Article 1, paragraph 2, of the main text of the Convention provides that the rules in the Annex shall apply to all liabilities under which a sum of money is due, it is evident that "the creditor" must be widely construed, so as to include any person to whom a sum of money is due by virtue of a legal liability. Paragraph 39 of the Explanatory Report also explains that the Articles of the Annex are so formulated as to cover cases of assignment and succession and other cases of transfer of a claim. "The creditor" must therefore, in our view, be construed as meaning the actual person for the time being entitled to the benefit of a legal liability under which a sum of money is due. This interpretation, however, produces an inconsistency later in the Annex, when one comes to the phrase "the creditor's habitual residence at the time when the liability arose". To interpret "the creditor" as meaning "the assignee" in this context would be to produce a quite unreasonable result; yet to do otherwise in, for example, Article 2, paragraph 2, would be to use the word "creditor" as meaning two different people in the same sentence. We believe, however, that this use of the word in two different senses must have been what was intended.

114 The general rule, therefore, corresponds broadly to the rule in both England and Scotland that, at least in relation to contracts, the debtor must seek out the creditor. The Convention rule however is not restricted to contracts. Further, it seems clear that under the Convention régime a change in the identity of the creditor will involve a change in the place of payment. There appears to be no authority in either England or Scotland on the question whether such a change of creditor can alter the place at which money payable (at least under a contract) ought to be paid. Such a change of creditor would be particularly important in the case where the habitual residence or place of business of the new creditor and that of the former creditor were located in different States.

### (*b*) *Article 2, paragraph 2*

115 Article 2, paragraph 2, provides:

"2. Nevertheless if the creditor so requires, payment shall be made at any other place in the State of the creditor's habitual residence at the time of

payment or at any place in the State of the creditor's habitual residence at the time when the liability arose."[148]

This is essentially a gloss on paragraph 1 of Article 2 and allows the creditor to designate as the place of payment a place other than his habitual residence or place of business at the time of payment.[149]

116 There can be no doubt that the rule in Article 2, paragraph 2 could place a greatly increased burden on the debtor, though the Explanatory Report states that "any prejudice to the debtor would be offset by Articles 3 and 4 of Annex I".[150] However, apart from any provisions for relieving the debtor, there ought surely to be, in the first instance, some positive reason for conferring such a position of advantage on the the creditor. No doubt, in most cases a creditor would exercise these options reasonably, since normally he would have every incentive to facilitate payment rather than to put obstacles in its way. There are also circumstances in which it would be quite reasonable for a creditor to require payment at a place which is not his habitual residence or place of business; for example, the office of his solicitor or of an agent who has handled the transaction to which the payment relates. The *first* of the two options might therefore be justifiable if it were qualified by the test of reasonableness, so that it would be limited to another place in the same State where the creditor reasonably requires to be paid. However, there are situations in which Articles 3 and 4 (which provide protection for the debtor) would not apply,[151] and in the absence of any such limitation, the creditor could specify a place which would be highly inconvenient to the debtor, despite the fact that, in the circumstances of the case, Articles 3 and 4 would afford the debtor no relief.

117 In connection with the *second* option conferred on the creditor, (namely, to require payment at any place in the State where the creditor had his habitual residence or place of business at the time when the liability arose), there are two possible reasons why that place may be in a State other than that in which, at the time of payment, the creditor has his habitual residence or place of business. One is that, since the liability arose, the creditor has moved from one State to another. The other is that the person who was "the creditor" at the time when the liability arose is not the same person as "the creditor" at the time of payment,[152] and that the new creditor has his habitual residence or place of business in a different State from that of the original creditor. In either of these cases it might well be argued that the debtor would reasonably have expected to pay at the original place of payment. There would therefore be an obvious case for conferring on the *debtor* an option to pay at the creditor's habitual residence or place of business at the time when the liability arose, subject to some provisions for affording relief to the creditor where payment

[148]It is not clear what is meant by "the time when the liability arose". No definition is given of this phrase but the Explanatory Report, at para. 42, gives it as the opinion of a majority of the committee of experts that this phrase indicates "the moment when the obligation is or becomes a liability to pay money".

[149]This designation may be subject to the provisions of Articles 3 and 4, discussed below, paras. 120–129.

[150]Explanatory Report, para. 41. See paras. 120–129, below.

[151]See paras. 125 and 129, below.

[152]See para. 113, above.

there would be to his detriment. In so far as any justification is to be found in the Explanatory Report for conferring these options on the *creditor*, it is contained, not in the commentary on Article 2, but, by implication, in the commentary on Article 3; and it proceeds in two stages. The first stage[153] is the argument that the debtor cannot reasonably object to being required to pay at the creditor's habitual residence or place of business at the time when the liability arose since, at least in the case of a contract, he will have had to consider that place as the probable place of payment when concluding the contract. The second stage[154] is based upon the first option in Article 2, paragraph 2 discussed in the preceding paragraph, and therefore stands or falls with the first option. If the creditor's habitual residence or place of business at the time when the liability arose had been the same as at the time of payment, then the creditor could have exercised the first option in Article 2, paragraph 2, so as to require payment to be made at any other place in the same State. Therefore, if the creditor is to be entitled to require payment at his habitual residence or place of business at the time when the liability arose, he ought equally to be entitled to require payment at any other place in the same State. He would thus have in all respects the same rights as if his habitual residence or place of business had not changed. The consequence is that, in so far as the second option enables the creditor to require payment, not at his habitual residence or place of business at the time when the liability arose, but at another place in the same State, the case for it is dependent upon the case for the first option.

118 For the reasons given in paragraph 116 above, we think that the first option is too favourable to the creditor, and ought at least to have been limited by applying the test of reasonableness. If the first option had been qualified in this way, then presumably the second option, in so far as it relates to a place other than, but in the same State as, the creditor's habitual residence or place of business at the time when the liability arose would have been made subject to a similar qualification. As to the main principle of the second option, in so far as it enables payment to be required at the creditor's habitual residence or place of business at the time when the liability arose, it seems to us that there is an even greater need for applying a test of reasonableness than in the case of the first option. This is because, where payment is required at the creditor's habitual residence or place of business at the time when the liability arose, the debtor can obtain no relief under Article 3 or Article 4.[155] There is therefore nothing to "offset any prejudice to the debtor" in the event of an unreasonable exercise of this option by the creditor.

119 It is our view that both the options conferred by Article 2, paragraph 2, go too far in favour of the creditor.

### (iii) Articles 3 and 4: Relief from the general rule

#### (*a*) *Introduction*

120 There are several possible situations in which a debtor may be required to pay at a place other than that which was the creditor's habitual

[153] Explanatory Report, para. 49.
[154] *Ibid.*, para. 50.
[155] See paras. 125 and 129, below.

residence at the time when the liability arose. Examples of these situations are:

(*a*) where the creditor has changed his place of habitual residence;

(*b*) where the identity of the creditor has changed, e.g., by assignment or by succession;

(*c*) where the creditor exercises one or other of the options conferred on him by Article 2, paragraph 2.

121 The underlying principle, implied as a premise to both Article 3 and Article 4,[156] appears to be that the proper burden of discharging a money liability is that which would be represented by discharging it at the creditor's habitual residence or place of business at the time the liability arose.[157] If, by the operation of Article 2, the debtor is required to pay at a different place, and this represents an increased burden, he will be entitled to relief. The relief, however, may take either of two forms. One (Article 3) is a right to refuse to pay at the place indicated to him. The other (Article 4) is a right to reimbursement of increased expenses or financial loss.

### (*b*) *Article 3*[158]

122 Article 3 provides as follows:

"1. Where the application of the provisions of Article 2 would require payment to be made at a place other than the creditor's habitual residence at the time when the liability arose and the discharge of the liability would be rendered substantially more onerous in consequence thereof, the debtor may refuse to pay at such place.

2. In the event of such refusal, the place of payment shall be the place of the creditor's habitual residence at the time when the liability arose, provided that the debtor may defer payment at that place until the creditor shall have arranged for the payment to be received there by him or on his behalf. Nevertheless the creditor may designate another place in the State where the creditor had his habitual residence at the time when the liability arose, at which, subject to paragraph 1 of the present article, payment shall be made by the debtor."

123 Where the debtor exercises his right of refusal under Article 3, paragraph 1, the second sentence of paragraph 2 of Article 3 confers on the creditor a new option, namely, to designate another place in the State of the creditor's habitual residence or place of business at the time the liability arose. The reason for conferring this option, so far as it appears from the Explanatory Report,[159] is the same as the reason for which, under Article 2, paragraph 2, the creditor is empowered to designate a place other than, but in the same State as,

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[156]Discussed below, paras. 122–129.

[157]See para. 135, below.

[158]It should be noted that Italy and the Netherlands may reserve the right not to apply the provisions of Article 3: see Annex II.

[159]Explanatory Report, para. 50.

the original place of payment; and this has already been discussed in paragraph 117, above.

124 It appears, though the language is perhaps not entirely clear, that the debtor might be entitled again to refuse payment at the place designated by the creditor if payment there were "substantially more onerous" than payment at the creditor's habitual residence or place of business at the time the liability arose; and that upon the debtor's exercising his right of refusal a second time the creditor might designate yet another place in the State of the creditor's habitual residence or place of business at the time the liability arose, and so on.

125 Article 3 affords no relief to the debtor unless payment in accordance with the provisions of Article 2 would be "substantially more onerous" than payment at the creditor's habitual residence or place of business at the time the liability arose. The Article is however unsatisfactory because, in the first place, of the vagueness of the phrase "substantially more onerous";[160] and, in the second place, circumstances can be envisaged in which Article 3 would not in fact afford any relief to the debtor; for example, where both parties are originally habitually resident in State A and both subsequently move to State B, payment can still be demanded in State A, and Article 3 does not permit a refusal to do so.

126 The substantial merit of Article 3 is that the rigour of the primary rule may in some circumstances be mitigated, as (for example) where the debtor has remained where he is but the creditor has moved, or a different creditor resident elsewhere has become entitled to the benefit of the obligation: in such a case it might cause considerable and uncontemplated hardship to the debtor to have to follow the creditor.

### (c) *Article 4*

127 Article 4 provides as follows:

> "Where in accordance with the provisions of Article 2 or of Article 3, paragraph 2, payment is to be made at a place other than the creditor's habitual residence at the time when the liability arose, any increase in the expenses or any financial loss resulting from the change in the place of payment shall be borne by the creditor."

128 It appears from paragraph 55 of the Explanatory Report that one of the principal reasons for this provision was to ensure conformity with the principle in Article 59 of the Hague Convention relating to a Uniform Law on the International Sale of Goods.[161] It is, however, a very considerable extension of that principle to apply it over the wide field of money liabilities that this Annex is intended to cover.

129 Where in the exercise of one of his options the creditor demands to be paid at his habitual residence or place of business at the time when the liability

[160] Discussed at para. 47 of the Explanatory Report.

[161] See now Article 57(2) of the United Nations Convention on Contracts for the International Sale of Goods (1980), Cmnd. 8074.

arose, Article 4, like Article 3, affords no relief to the debtor, notwithstanding that payment there may cost him considerably more than payment in accordance with the primary rule. Similarly, if the creditor demands to be paid at another place in the State of his habitual residence or place of business at the time when the liability arose, Article 4 does not relieve the debtor, except in so far as payment at the place designated by the creditor may be more expensive to the debtor than payment at the original place of payment.

## E GENERAL ASSESSMENT OF THE RULES IN THE ANNEX

### (i) Comparison of present law with the Annex

#### (*a*) *Primary rule*

130 From our review of this area of the law both of England and Wales and of Scotland it will have appeared that there is no consistent rule as to the place where payment ought to be made. In most modern cases relating to contractual liabilities the English courts have treated the matter as simply a question of construction. Where this fails, they fall back on the old principle, common to English and Scots law, that it is for the debtor to seek out his creditor and pay him, with the relatively modern gloss that the creditor is to be sought at his residence or place of business; but there is no clear authority as to the time by reference to which the creditor's residence or place of business is to be ascertained.[162] The present state of our law is to be contrasted with Article 2, paragraph 1, of the Annex, which (if one can for the moment disregard its ambiguities) does state a simple rule, not as a residual rule of last resort, but as a primary rule, to be displaced only by proof of a different intention or different usage or by the deliberate exercise of a right conferred by the Annex on one or other of the parties, and which is complete in as much as it specifies the time by reference to which the rule is to be applied.

131 The English and Scottish courts, partly by way of construction and partly by applying the principle of seeking out the creditor, have in most cases produced a result which, apart from the time factor, is broadly the same as the primary rule in the Annex. As to the time factor, the uncertainty as to the time by reference to which the creditor's residence or place of business is to be ascertained does not appear from the case-law to have caused much difficulty in practice.

#### (*b*) *Flexibility*

132 An important defect in both English and, apparently, Scots law as to the place of payment of money liabilities is its inflexibility. While both in our law and under the Convention the parties are free to choose the place of payment, the residual principle of English and Scots law (namely that it is for the debtor to seek out his creditor) contains no flexibility and takes no account of possible hardship to the debtor, or, for that matter, the creditor. In so far as the place of payment is to be ascertained by construing the contract or

[162] See paras. 81–88, above.

interpreting the relevant transaction, the parties (unless they agree to change it) are bound by what the transaction expressly or impliedly provides. And where the answer is to be found in the principle of following the creditor, this again takes no account of possible hardship to the debtor in being called upon to pay at some distant place not originally foreseen. It is one of the principal virtues of the Annex that it makes what is at least a serious attempt to deal with this problem in that first, it is flexible and does not seek to impose a single rule for ascertaining the place of payment which is to apply in all cases; and secondly, by conferring rights on each party successively, it endeavours to hold the balance fairly between debtor and creditor. In particular, we agree with the principle of Article 4 of the Annex. But the machinery of Articles 2 and 3, with the opportunities which it affords for a prolonged interchange between the parties, seems to us to be excessively complex and to give too much tactical advantage to the creditor.

### (c) *Transmission of benefit of obligation*

133 One of the problems which a code of law relating to the place of payment of money liabilities ought to solve is what is to be the consequence of a change in the identity of the person for the time being entitled to the benefit of an obligation. Such a change can occur by way of assignment of the benefit, or it may arise from succession on death or from bankruptcy or any other mode of transfer by operation of law. The problem is aggravated if the successor has his place of residence or business in a different country from that of the original creditor. Whether such a change can alter the place of payment is left uncertain by English law,[163] and is undecided in Scots law. The Annex was evidently intended to be capable of solving the problem, and to produce the result that the "creditor" referred to in the primary rule is the person entitled to the benefit of the obligation at the time of payment.[164] We think that the Annex does produce this result.

## (ii) General defects of the rules in the Annex

134 The Annex does contain a number of general defects, apart from the particular ones noted in the discussion of each Article. These general defects may be summarised as follows.

### (a) *Basic conflict of principle*

135 The primary rule in the Annex is that which is stated in Article 2, paragraph 1, (as read with Article 5), namely that payment is to be made at the creditor's habitual residence or place of business at the time of payment. However, as mentioned in paragraph 102 above, the Annex contains extensive qualifications of and exceptions to this primary rule. These appear to be based on (and are certainly consistent with) an unarticulated assumption about the burden which the debtor ought to bear in making payment. This assumption is, it seems, that in a particular case, and notwithstanding the primary rule, the

[163] See para. 88, n. 125, above.
[164] Explanatory Report, paras. 39, 44.

debtor should not have to suffer a burden greater than that which he would bear if his obligation were to pay at the place which was the creditor's habitual residence or place of business at the time the liability arose (rather than at the time of payment). On this basis there is a fundamental conflict within the provisions of the Annex between the primary rule on the one hand, and the assumption on the other. As has been seen,[165] Article 2, paragraph 2, and Article 3 of the Annex provide for an elaborate dialogue between debtor and creditor, whose purpose appears to be that of providing a means whereby, in any particular case, injustice to the debtor caused by the application of the primary rule can be avoided, and a result achieved which is more consistent with the assumption about the burden he ought to bear. The scheme of the Annex would have been more satisfactory if the primary rule had itself been such as to produce results which, at the end of the day, were more compatible with the implied assumption; or, alternatively, if the implied assumption had been spelt out in terms. Unfortunately, the Annex does not indicate which principle (that of the primary rule, or that of the implied assumption) is to be paramount.

### *(b) Lack of uniformity in application of the rules*

136 The principal aim of the Convention, as described in the Explanatory Report,[166] is to provide a uniform code with regard to the place of payment of money liabilities. The rules in the Annex, however, fall far short of realising this aim, in that so many matters, some of them only minor details but many of considerable importance, are left to be determined in accordance with the national laws of Contracting States. These include, for example, the question of the time within which rights conferred by the Annex, whether on the creditor or on the debtor, are to be exercisable; what the consequences are to be if the creditor or the debtor seeks to exercise one of these rights out of time; and what consequences are to follow if a right is exercised after the date of maturity of the relevant obligation. It may be that, in some of the Contracting States, these questions could be answered by the courts through the application of existing general principles. But in other States—and certainly, in our view, in both England and Wales and in Scotland—special rules would have to be made with regard to these matters with express reference to the rules in the Annex. It is therefore very probable that different answers would be given to these questions in the laws of different Contracting States, with the result that the Convention would, at least in part, fail to achieve its express objective of international uniformity.

137 A substantial obstacle to uniformity is found in Article 3 of the Convention, which provides that:

> "Each Contracting Party has the right, in specific matters or in matters of public law or with regard to payments made to or by public authorities, not to apply the provisions of Annex I or to apply them with such modifications as it considers necessary."

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[165] See paras. 115–126, above.

[166] Explanatory Report, para. 3; and see para. 64, above.

Examples of "specific matters" in respect of which that right might be exercised are given in paragraph 22 of the Explanatory Report.[167] The examples extend over a large range of subjects and the list is not exhaustive; if the right either not to apply or to apply with modifications the provisions of the Annex to such matters were exercised widely, but differently by different Contracting States, the area within which any degree of uniformity could exist in the application of the Annex would be correspondingly reduced.

138 The presence of Article 3 of the Convention is to be contrasted with the absence of any provision permitting a Contracting State to decline on the grounds of public policy to apply the rules contained in the Annex. The statement in paragraph 24 of the Explanatory Report that "the Convention is without prejudice to legislation bearing upon the place of payment or its change, which applies as an overriding matter of public policy" appears not to be supported by any provision of the Convention.

## F CONCLUSION

139 In the foregoing paragraphs we have examined the present state of both English and Scots law in the field covered by the Convention, and we have also examined the provisions of the Convention and its Annexes. The Convention establishes a complex set of rules to determine the place of payment, and in so doing to balance the interests of debtor and creditor. By contrast, neither English nor Scots law is well developed in this field. Adoption of the Convention would therefore result in the introduction of a set of rules into an area of our law where there exists at present little specific provision.

140 Although we have expressed doubts in the course of our analysis about certain provisions of the Convention and the Annex, on points both of drafting[168] and of principle,[169] we think that, on the whole, the results reached by the Convention would not, in the absence of other factors, cause great difficulties in the United Kingdom. However, whether or not the United Kingdom should accede to the Convention does, in our view, depend on two further factors.

141 The first factor is whether the Convention, unobjectionable in itself, would effect an improvement in the state of our law. In the first place, it should be noted that both under our law and under the Convention, the parties are free to agree, expressly or by implication, where the place of payment is to be. Both under our law and under the Convention, therefore, rules to determine the place of payment cater only for the residual case where there has been no such express or implied agreement. In this residual case it might be thought that the Convention would effect an improvement in our law if our law had given rise to real problems in practice. However, we do not believe this to be the case. The absence of litigation in this area of the law seems to us to be one indication that the practical difficulties, if any, which may arise here are few. On the other

[167] See para. 69, above.
[168] See paras. 68, 112, 113, 124 and 125, above.
[169] See paras. 116, 117, 118, 119, 125, 129, 132, 135, 136, 137 and 138, above.

hand, adoption of the Convention would, we believe, unnecessarily introduce an elaborate set of rules into this area of the law and litigation would, we believe, be needlessly encouraged. Furthermore, it is in our view undesirable in principle to add any provisions to our law (let alone detailed, complex and in some instances unclear provisions) when there appears to be no real need to do so.

142 The other factor is that, as in the case of the 1967 Convention discussed in Part II of this Report, it might be argued that the Convention should be adopted if to do so would tend towards a wide measure of international agreement.[170] Again, as with the 1967 Convention, such agreement seems highly unlikely. The Convention permits two States (Italy and the Netherlands) unilaterally to exclude Article 3 of the Annex;[171] and permits all Contracting States to adopt the Annex subject to exclusions.[172] Many matters are left to be determined in accordance with the national laws of the Contracting States.[173] The Convention is not based on any principle of reciprocity. Further, the prospects of widespread international acceptance of this Convention seem slight. As we indicated earlier,[174] the Convention has been signed by only three States[175] and ratified by none.

143 We *recommend* that the United Kingdom should not become a party to the 1972 European Convention on the Place of Payment of Money Liabilities.

(*Signed*) MICHAEL KERR, *Chairman,*
*Law Commission.*
STEPHEN M. CRETNEY.
STEPHEN EDELL.
PETER NORTH.*

R. H. STREETEN, *Secretary.*

J. O. M. HUNTER, *Chairman,*
*Scottish Law Commission.*
A. E. ANTON.
R. D. D. BERTRAM.
E. M. CLIVE.
J. MURRAY.

R. EADIE, *Secretary.*
24 *June* 1981.

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[170]See para. 59, above.
[171]See para. 65, above.
[172]See paras. 69 and 137, above.
[173]See para. 136, above.
[174]See para. 61, above.
[175]Austria, the Federal Republic of Germany and the Netherlands.
*The late W. A. B. Forbes, Q.C. participated as a Commissioner in the preparation of this Report until its final stages and expressed himself in agreement with the conclusions, but died on 4 May 1981 before its submission.

## APPENDIX A

# EUROPEAN CONVENTION ON FOREIGN MONEY LIABILITIES (1967)

The member States of the Council of Europe, signatory hereto,

Whereas the aim of the Council of Europe is to achieve a greater unity between its Members, in particular by the adoption of common rules in the legal field;

Considering that it is advisable to harmonise certain rules relating to foreign money liabilities,

Have agreed as follows:

### *Article 1*

1. Each Contracting Party undertakes that within twelve months of the date of entry into force of the present Convention in respect of that Party, its national law shall conform with the rules set forth in the Annex appended hereto.

2. The application of the rules of the Annex shall extend to all liabilities under which a sum of money is due, whether originally expressed in money or not.

3. Each Contracting Party has the right, in specific matters, not to apply the provisions of the Annex or to apply them with the modifications it finds necessary.

### *Article 2*

Each Contracting Party shall have the right to substitute the date from which the debtor finds himself in *demeure* for the date of maturity referred to in Article 4 of the Annex.

### *Article 3*

Each Contracting Party shall have the right to make its law conform to one only of the alternatives referred to in Article 5 of the Annex.

### *Article 4*

This Convention shall not prevent any Contracting Party from maintaining or introducing into its legislation provisions concerning exchange control or prohibiting in certain cases the conclusion of contracts and the payment in foreign money.

### *Article 5*

This Convention shall be without prejudice to the provisions of any treaties, conventions or bilateral or multilateral agreements concluded or to be concluded, governing in special fields matters covered by this Convention.

### *Article 6*

1. Any Contracting Party may, at the time of the signature or when depositing its instrument of ratification, acceptance or accession, declare that, in regard to non-contractual liabilities, it reserves the right not to apply the provisions of paragraphs 1 and 2 of Article 6 of the Annex or to apply them with the modifications it finds necessary.

2. Any Contracting Party may wholly or partly withdraw a reservation it has made in accordance with the foregoing paragraph by means of a declaration addressed to the Secretary General of the Council of Europe, which shall become effective as from the date of its receipt.

### *Article 7*

Each Contracting Party shall transmit to the Secretary General of the Council of Europe the official text of any legislation concerning the matters governed by the Convention. The Secretary General shall transmit copies of the texts to the other Parties.

### *Article 8*

1. This Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.

2. This Convention shall enter into force three months after the date of the deposit of the third instrument of ratification or acceptance.

3. In respect of a signatory State ratifying or accepting subsequently, the Convention shall come into force three months after the date of the deposit of its instrument of ratification or acceptance.

### *Article 9*

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any non-member State to accede thereto.

2. Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect three months after the date of its deposit.

### *Article 10*

1. Any Contracting Party may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, specify the territory or territories to which this Convention shall apply.

2. Any Contracting Party may, when depositing its instrument of ratification, acceptance or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.

3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn according to the procedure laid down in Article 10 of this Convention.

### *Article 11*

1. This Convention shall remain in force indefinitely.

2. Any Contracting Party may, in so far as it is concerned, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

3. Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification.

### *Article 12*

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention of:

(*a*) any signature;

(*b*) any deposit of an instrument of ratification, acceptance or accession;

(*c*) any date of entry into force of this Convention in accordance with Article 8 thereof;

(*d*) any declaration received in pursuance of the provisions of paragraphs 2 and 3 of Article 10;

(*e*) any reservation made in pursuance of the provisions of paragraph 1 of Article 6;

(*f*) the withdrawal of any reservation carried out in pursuance of the provisions of paragraph 2 of Article 6;

(*g*) any notification received in pursuance of the provisions of Article 11 and the date on which denunciation takes effect.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Paris, this 11th day of December 1967, in French and English, both texts being equally authoritative, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each of the signatory and acceding States.

## ANNEX

### *Article 1*

1. A sum of money due in a currency which is not that of the place of payment may be paid in the currency of the place of payment, unless a different intention of the parties appears, or a different usage is applicable.

2. The debtor may not avail himself of this option if he knows or ought to know that payment in the currency of the place of payment would involve for the creditor a substantial prejudice.

### *Article 2*

If a sum of money is due in a currency other than that of the place of payment, the creditor may, if the debtor is unable, or alleges his inability, to make settlement in that currency, require payment in the currency of the place of payment.

### *Article 3*

If, in accordance with Article 1 or 2, the debtor pays in the currency of the place of payment, the conversion shall be effected at the rate of exchange at the date of actual payment.

### *Article 4*

1. If the debtor does not pay at the date of maturity and if after such date the currency in which the sum of money is due depreciates in relation to the currency of the place of payment, the debtor, whether he pays in the currency due or in the currency of the place of payment as provided in the preceding articles, shall pay an additional amount equivalent to the difference between the rate of exchange at the date of maturity and the date of actual payment.

2. Nevertheless, the above-mentioned additional amount shall not be payable to the extent that the inability of the debtor is due to default of the creditor, or to *force majeure*, or the creditor has not suffered loss resulting from the depreciation. The debtor bears the burden of proof.

3. The provisions of paragraph 1 do not in any way limit other rights which the creditor may be in a position to claim from the debtor.

### *Article 5*

In the event of any proceedings for the recovery of a sum of money expressed in a currency other than that of the forum, the creditor may, at his choice, demand payment in the currency to which he is entitled or the equivalent in the currency of the forum at the rate of exchange at the date of actual payment.

### *Article 6*

Article 4 remains applicable even if during proceedings instituted in conformity with Article 5, the currency in which the sum of money is due depreciates in relation to the currency of the place of payment.

### *Article 7*

1. If a judgment entitles the creditor either to a sum of money in a currency other than that of the forum or the equivalent of such a sum in the currency of the forum, and a depreciation of the currency other than that of the forum in relation to that of the forum occurs between the date of the judgment and the date of actual payment, the debtor is obliged to pay an additional amount corresponding to the difference between the rate of exchange at the date of the judgment and the date of actual payment.

2. The provisions of paragraphs 2 and 3 of Article 4 shall apply *mutatis mutandis*.

### *Article 8*

The place of payment referred to in the preceding articles shall be the place where payment is due.

### *Article 9*

For the application of the preceding articles the rate of exchange shall be that intended by the parties, or, failing such intention, that which may enable the creditor to procure the sum due without delay. Usages shall be taken into account.

## APPENDIX B

# EUROPEAN CONVENTION ON THE PLACE OF PAYMENT OF MONEY LIABILITIES (1972)

The member States of the Council of Europe, signatory hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its Members, in particular by the adoption of common rules in the legal field;

Considering that it is advisable to harmonise certain rules relating to the place of payment of money liabilities,

Have agreed as follows:

### *Article 1*

1. Each Contracting Party undertakes that within twelve months of the date of entry into force of this Convention in respect of that Party, its national law shall conform with the rules set forth in Annex I appended hereto.

2. The application of the rules in Annex I shall extend to all liabilities under which a sum of money is due, whether originally expressed in money or not.

### *Article 2*

Each Contracting Party shall submit, within 24 months of the date of the entry into force of this Convention in respect of that Party, to the Secretary General of the Council of Europe a report on the implementation of this Convention, containing, in particular, the official text of any legislation introduced in consequence of its entry into force. The Secretary General shall transmit copies of the report to the other Contracting Parties.

### *Article 3*

Each Contracting Party has the right, in specific matters or in matters of public law or with regard to payments made to or by public authorities, not to apply the provisions of Annex I or to apply them with such modifications as it considers necessary.

### *Article 4*

This Convention shall be without prejudice to the provisions of any treaties, conventions or bilateral or multilateral agreements concluded or to be concluded, governing in special fields matters covered by this Convention.

### *Article 5*

1. This Convention shall be open to signature by the member States of the Council of Europe. It shall be subject to ratification or acceptance. Instruments of ratification or acceptance shall be deposited with the Secretary General of the Council of Europe.

2. This Convention shall enter into force three months after the date of the deposit of the fifth instrument of ratification or acceptance.

3. In respect of a signatory State ratifying or accepting subsequently, the Convention shall come into force three months after the date of the deposit of its instrument of ratification or acceptance.

### *Article 6*

1. After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may invite any non-member State to accede hereto.

2. Such accession shall be effected by depositing with the Secretary General of the Council of Europe an instrument of accession which shall take effect three months after the date of its deposit.

### *Article 7*

1. The provisions of this Convention or of Annex I hereto shall not be subject to any reservation with the exception of that referred to in Annex II to this Convention.

2. Any Contracting Party may withdraw a reservation it has made in accordance with Annex II by means of a declaration addressed to the Secretary General of the Council of Europe, which shall become effective as from the date of its receipt.

### *Article 8*

1. Any Contracting Party may, at the time of signature or when depositing its instrument of ratification, acceptance or accession, specify the territory or territories to which this Convention shall apply.

2. Any Contracting Party may, when depositing its instrument of ratification, acceptance or accession or at any later date, by declaration addressed to the Secretary General of the Council of Europe, extend this Convention to any other territory or territories specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings.

3. Any declaration made in pursuance of the preceding paragraph may, in respect of any territory mentioned in such declaration, be withdrawn according to the procedure laid down in Article 9 of this Convention.

### *Article 9*

1. This Convention shall remain in force indefinitely.

2. Any Contracting Party may, in so far as it is concerned, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.

3. Such denunciation shall take effect six months after the date of receipt by the Secretary General of such notification.

### *Article 10*

The Secretary General of the Council of Europe shall notify the member States of the Council and any State which has acceded to this Convention of:

(*a*) any signature;

(*b*) any deposit of an instrument of ratification, acceptance or accession;

(*c*) any date of entry into force of this Convention in accordance with Article 5 thereof;

(*d*) any reservation made in pursuance of the provisions of paragraph 1 of Article 7 and of Annex II;

(*e*) the withdrawal of any reservation carried out in pursuance of the provisions of paragraph 2 of Article 7;

(*f*) any declaration received in pursuance of the provisions of paragraphs 2 and 3 of Article 8;

(*g*) any notification received in pursuance of the provisions of Article 9 and the date on which denunciation takes effect.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Basle, this 16th day of May 1972, in English and French, both texts being equally authoritative, in a single copy which shall remain deposited in the Archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each of the signatory and acceding States.

## ANNEX I

### *Article 1*

Unless a different intention of the parties appears or a different usage is applicable, the place of payment of money liabilities shall be determined by the following rules.

### *Article 2*

1. Payment shall be made at the creditor's habitual residence at the time of payment.

2. Nevertheless if the creditor so requires, payment shall be made at any other place in the State of the creditor's habitual residence at the time of payment or at any place in the State of the creditor's habitual residence at the time when the liability arose.

*Article 3*

1. Where the application of the provisions of Article 2 would require payment to be made at a place other than the creditor's habitual residence at the time when the liability arose and the discharge of the liability would be rendered substantially more onerous in consequence thereof, the debtor may refuse to pay at such place.

2. In the event of such refusal, the place of payment shall be the place of the creditor's habitual residence at the time when the liability arose, provided that the debtor may defer payment at that place until the creditor shall have arranged for the payment to be received there by him or on his behalf. Nevertheless the creditor may designate another place in the State where the creditor had his habitual residence at the time when the liability arose, at which, subject to paragraph 1 of the present article, payment shall be made by the debtor.

*Article 4*

Where in accordance with the provisions of Article 2 or of Article 3, paragraph 2, payment is to be made at a place other than the creditor's habitual residence at the time when the liability arose, any increase in the expenses or any financial loss resulting from the change in the place of payment shall be borne by the creditor.

*Article 5*

Where the liability arises in the course of the creditor's professional or business activity, the "place of business" where this activity is carried on shall, in the preceding articles, be substituted for the "habitual residence" of the creditor.

ANNEX II

Any of the States mentioned hereafter may, at the time of signature or when depositing its instrument of ratification or acceptance of the Convention, declare that it reserves the right not to apply the provisions of Article 3 of Annex I:

Italy,
The Netherlands.

## APPENDIX C

### JOINT WORKING PARTY ON FOREIGN MONEY LIABILITIES

| | |
|---|---|
| Dr. P. M. North | (Law Commission) *Chairman* |
| Mr. A. E. Anton, C.B.E. | (Scottish Law Commission) |
| Mr. R. D. D. Bertram | (Scottish Law Commission) |
| Mr. R. Brodie | (Scottish Courts Administration) |
| Mr. R. Cassels | (Royal Bank of Scotland) |
| Mr. A. Cope | (Law Commission) |
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