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International Arbitrations: The Conversion Rate of Judgments Measured in Foreign Currencies

by Patrick R. Kingsley and Brandon M. Riley

Commerce becomes more international every day. With that comes a rise in international commercial disputes and the resultant international arbitrations. Prosecuting a claim alleging damages measured in a foreign currency adds the following complication, if you wish to convert the award to U.S. dollars: What is the proper exchange ratio to apply? Exchange rates fluctuate over time, sometimes significantly. The answer to this question could add or subtract significantly from the value of your award.

Suppose you are a litigant prosecuting a Japanese counterparty in an international commercial dispute in which you will successfully allege a breach of contract dating back five years. An arbitration panel sitting in New York – where most domestic international arbitrations are venued – issues an award in your favor. Suppose further that the value of the dollar has changed significantly against the yen in those five years. What amount are you entitled to recover? The conversion rate at the time your counterparty breached, five years ago? Or the conversion rate as of the date the arbitration panel decides in your favor? Currency fluctuations are common, and the answer to this question could have a significant monetary effect on the recovery.

The answer depends on whether the U.S. jurisdiction in question follows the "breach-day rule" or the "judgment-day rule." Under the breach-day rule, where damages are sustained in a foreign currency, the appropriate conversion rate is the rate on the day when the alleged breach of the contract occurred. Under the judgment-day rule, on the other hand, the conversion rate is the rate in place on the day the court or arbitration panel renders its decision. While that may sound relatively simple, New York complicates things by embracing both rules, but in different circumstances. By common law, New York courts follow the breach-day rule when damages sustained in a foreign currency are converted to U.S. dollars. But New York also has a statute – New York Judiciary Law § 27 – that adopts the judgment-day rule where the cause of action is based upon an obligation "denominated" in a currency other than the currency of the United States.

Suppose, for example, that your contract with your Japanese counterpart required it to transfer 1 million yen upon achieving a certain post-transaction milestone. In that case, a strong argument could be made that this particular obligation is specifically denominated in a foreign currency. Hence the judgment-day rule would apply.

On the other hand, if your contract requires your Japanese counterpart to indemnify you for losses that may occur (in Japan, in the U.S. or elsewhere) or to satisfy warranty obligations (again, in Japan, in the U.S. or around the world), that obligation appears to be an executory performance obligation that is not specifically denominated in any currency. If a warranty claim was made against you in Japan, the underlying payment would have been in yen, but that is merely happenstance. If a warranty obligation was asserted in Australia, the payment would have been in Australian dollars. In this case, it would appear that the obligation at issue is not specifically denominated in any currency, and hence the catch-all of the New York common law breach-day rule would arguably apply: The current arbitration judgment would be valued on the date of your injury, i.e., the date of breach.[1]

Please contact any of the attorneys in our ADR practice group (https://www.stradley.com/services/practices/alternative-dispute-resolution) if you would like additional information regarding this issue or other ADR matters.

[1] *See, e.g., Nature's Plus Nordic A/S v. Natural Organics Inc.*, 78 F. Supp. 3d 556 (E.D.N.Y. 2015); *Hood v. Ascent Med. Corp.*, 2016 WL 1366920 (S.D.N.Y. 2016). See also Restatement (Third) of Foreign Relations Law § 832 (suggesting that "the conversion from foreign currency to dollars is to be made at such rate as to make the creditor whole and to avoid rewarding a debtor who has delayed in carrying out the obligations").

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