RECOVERY OF CURRENCY LOSSES CAUSED BY EXCHANGE RATE FLUCTUATION: AN INDIAN LAW PERSPECTIVE

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Currency exchange rate fluctuations are a common phenomenon in modern commerce, which can significantly impact monetary obligations in cross-border commercial transactions. Particularly, when a currency exchange rate fluctuates in a specific direction, it can negatively impact either the expenditure incurred by a party in the performance of a contractual obligation, or the quantum of money to be received by a party via the other party’s performance of a monetary obligation. If such loss is incurred following a breach of contract, a claim for damages may be set up to recover it, and under the Indian law of damages, such a claim would have to satisfy the criteria of causation, remoteness and mitigation in order to succeed. This paper analyses whether Indian law permits the recovery of currency loss, whether claimed as damages or as sums due under contractual performance. From the analysis, I conclude that currency loss can be recovered in both forms of claims, but find certain shortcomings in the existing position of Indian law.

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I. INTRODUCTION

Cross-border linking of markets and the use of floating exchange rates across jurisdictions has increased the uncertainty associated with contracts involving performance of

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obligations in more than one jurisdiction.\(^1\) Currency exchange rates are inherently unpredictable and volatile, especially over longer periods of time,\(^2\) and a fluctuation in the relevant exchange rate after the conclusion of a contract can have an immense impact on monetary obligations under it.\(^3\) This is especially so when the money changing hands requires conversion either by the obligor, prior to the payment, from the currency in which it operates to the currency of payment, or by the obligee, after the payment is made, from the currency of payment to the currency in which it operates.

A ‘currency loss’ or ‘exchange rate loss’ most commonly arises where due to the delayed payment of a fixed sum under a contract, a fluctuation in the relevant currency exchange rate causes the amount received by the obligee\(^4\) in the currency of its operation to be less than what it would have received from a timely payment.\(^5\) Similarly, such loss can also arise where a party incurring certain expenditure under a contract incurs a greater amount of that expenditure on account of a currency exchange rate fluctuation.\(^6\)

While the principles governing the recoverability of currency loss under English law are well-documented,\(^7\) the opposite is true as far as Indian law is concerned. To my knowledge, there is a complete lack of any scholarly literature studying the recovery of such loss under Indian law. This paper attempts to remedy this state of affairs by analysing the relevant legislative provisions and judicial observations pertaining to Indian contract and damages law.

To further elucidate how a currency loss may arise, Part II of this paper lays out a factual situation, followed by two detailed scenarios to which this factual situation might lead. These scenarios—which must be considered independently of each other—will serve as reference points throughout this paper. Scenario 1 is a case where currency loss arises in the course of contractual performance, without a breach of contract, and where the claim for recovery is made under the provisions of the contract itself. Scenario 2 is a case where the currency loss has arisen following a breach of contract, and where the loss is sought to be recovered through a claim for damages.

As far as Scenario 1 is concerned, it is evident that Courts will necessarily have to interpret the parties’ contract to give effect to their bargain and determine whether the claim falls within the scope of the contract.\(^8\) Several principles exist to guide Courts in this exercise, which specify that the explicit terms of the contract are to be treated as conclusive

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4. The converse of this situation, i.e., where the obligor-in-breach would have to pay a lesser amount post the breach, than it would have had to pay on the date ascertained for performance, is, theoretically, equally possible. However, despite the fact that this might appear to be an efficient breach, it is doubtful that an obligor will risk being accused of unjust enrichment by breaching a monetary obligation solely to gain this benefit. See Howard, Knot & Kimbell, *supra* note 2, ¶¶13.16, 13.51 (discussing the principles preventing an obligor from operating in this manner) at 2.
5. *Id.*, ¶13.4.
6. See, e.g., Scenario 1 below.
with regard to the parties’ intentions\(^9\) keeping in mind the commercial objective of individual clauses\(^10\) and the context in which the contract was made.\(^11\) Further, the contract must be read as a whole and its terms must be construed, so far as possible, harmoniously and as mutually explanatory.\(^12\)

In contrast, for Scenario 2, Courts will have to analyse the claim for damages in light of §73 of the Indian Contract Act, 1872 (‘ICA’). Three elements have to be satisfied under §73—causation,\(^13\) remoteness,\(^14\) and mitigation of loss.\(^15\) Pertinently, a Court’s objective in awarding damages is to place the party suffering from a breach of contract in as good a position as it would have been had the contract been performed, so far as money can achieve this objective.\(^16\)

Part III of this paper contains an analysis of the four available judgements of Indian Courts in which questions of recovery of currency loss have arisen\(^17\)—the judgements in *Pure Helium India Pvt. Ltd. v. Oil and Natural Gas Commission*\(^18\) (‘Pure Helium’), *Numaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd.*\(^19\) (‘Numaligarh Refinery’), *PEC Ltd. v. Thai Maparn Trading Co. Ltd. & Ors.*\(^20\) (‘Thai Maparn’), and *Oil and Natural Gas Corporation v. M/s. Soconord OCTG* (‘Soconord’).\(^21\) The analysis of these judgements will assist in the determination and critical analysis of the existing position of Indian law on the recovery of currency loss, undertaken in Part IV. Part V applies this existing position to Scenarios 1 and 2 and provides some concluding thoughts.

**II. SCENARIOS OF CURRENCY LOSS**

The factual situation referred to in the Introduction is as follows. Assume that a private entity registered in England (Company A) and operating in Foreign Currency (‘FC’) enters into a joint venture agreement (‘JVA’) with a private entity registered in India (Company B) and operating in Domestic Currency (‘DC’). The JVA is dated January 1, 2018, and is governed by Indian law. Under the JVA, the parties agree to incorporate a JV entity (Company C) in India, with 20% of Company C’s shares owned by Company A and 80% owned by Company B. The JVA defines what constitutes a ‘material breach’ of the JVA and provides that in case of a material breach by Company B, Company A may enforce a put

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\(^10\) Novartis Vaccines and Diagnostics Inc. v. Aventis Pharma Limited, 2010 (2) ArbLR 85 (Bom), ¶38.


\(^12\) South East Asia Marine Engineering and Constructions Ltd. v. Oil India, Civ. App. No 673 of 2012 (S.C) (Unreported), ¶28.

\(^13\) HUGH BEALE, CHITTY ON CONTRACTS, 32nd ed. (Sweet & Maxwell Ltd., 2015), ¶14.

\(^14\) Pannalal Jankidas v. Mohanlal, 1950 SCR 979, ¶27.

\(^15\) The Indian Contract Act, 1872, §73, Explanation; See also Murlidhar Chiranjilal v. Harishchandra Dwarkadas, (1962) 1 SCR 653, ¶9.


\(^17\) The only other case the author is aware of in which an exchange rate fluctuation had impacted a monetary obligation under a contract was Punjab National Bank v. Indian Bank, AIR 2003 SC 2284. In that case, however, there arose no question of the recovery of currency loss, but the Supreme Court of India permitted the plaintiff to amend its plaint in order to avoid the negative effects of an exchange rate fluctuation during the course of litigation.; See also VAUGHAN BLACK, FOREIGN CURRENCY CLAIMS IN THE CONFLICT OF LAWS 137 (Bloomsbury Publishing, 2010) (discussing the aforementioned judgement).

\(^18\) Pure Helium India Ltd. v. Oil and Natural Gas Commission, AIR 2003 SC 4519.


\(^21\) Oil and Natural Gas Corporation v. M/s. Soconord OCTG, 2014 SCC OnLine Bom 1277.
option with respect to its shareholding in Company C. The two scenarios to which these facts can lead are detailed below.

A. SCENARIO 1: CURRENCY LOSS DURING THE COURSE OF CONTRACTUAL PERFORMANCE

In Scenario 1, no breach of contract has been committed between the parties, but the relevant currency exchange rate has fluctuated between the date on which the contract was entered into and the date on which the amount under the contract became payable.

Suppose that Company C has won, after a tender process, a contract to supply to a company registered in India (Company D) certain quantities of grains, on the basis of orders placed with Company C by Company D from time to time, for a fixed price of DC 100 per tonne. Under the master supply agreement, Company C must import the grains from outside India every time an order is placed. Company C further contracts with a foreign entity for the supply and transport of the grains by sea to India at a fixed price of FC 02 per tonne. Clearly, since the payment has to be made in FC, Company C will have to convert DC to FC prior to payment.

On January 1, 2020, Company D places an order for the supply of 50 tonnes of grains, at a total fixed price of DC 5000 payable to Company C. Assume that the DC-FC exchange rate on January 1, 2020 is FC 1 = DC 50. Accordingly, Company C would have to convert DC 5000 to make the payment of FC 100 for 50 tonnes of grains. Suppose that by the time Company C receives the grains and has to make payment, on January 10, 2020, the exchange rate has fluctuated to FC 1 = DC 60. Company C will now have to convert DC 6000 to make the payment of FC 100. As such, Company C has incurred an increased expenditure, and thereby suffered a currency loss of DC 1000 due to exchange rate fluctuation.

Company C claims this difference from Company D, as money due to it for supply of grains as per the latter’s order, but Company D rejects this claim. Company C subsequently initiates arbitration proceedings, claiming DC 1000 as an amount due to it under the master supply agreement.

B. SCENARIO 2: CURRENCY LOSS FOLLOWING A BREACH OF CONTRACT

In Scenario 2, a contractual obligation for the payment of money has been breached and the relevant currency exchange rate has fluctuated between the date of the breach and the date on which the payment is made under a judicial decree or arbitral award. In anticipation of this fluctuation, the non-breaching party claims damages in order to recover the loss.

Suppose that Company A alleges a material breach of the JVA by Company B on June 1, 2018, and seeks to enforce Company B’s obligation to purchase Company A’s shares in Company C by July 31, 2018. However, Company B either refuses or fails to effect the purchase by that date. Subsequently, arbitral proceedings are initiated and an award is passed in Company A’s favour on March 1, 2020. The award determines the currency of account as well as the currency of payment\(^\text{22}\) to be DC, and directs Company B to pay Company A, DC 10,000 in performance of contractual obligations.

\(^{22}\) See Renusagar Power Co. Ltd. v. General Electric Co., AIR 1994 SC 860, ¶100 (defining currency of account and currency of payment); See also HOWARD, KNOT & KIMBELL, supra note 2, ¶2.17 at 2.
Assume the FC-DC exchange rate on 31 July 2018 to be FC 1 = DC 20. When Company B makes the payment under the award in DC, it will do so at the exchange rate prevailing on the date of the award.\textsuperscript{23} Assuming that the exchange rate on March 1, 2020 was FC 1 = DC 25, Company A will receive FC 400 from the payment made under the award, after conversion. However, had it been paid the same amount on July 31, 2018, it would have received FC 500.

In anticipation of this, Company A claims damages for currency loss before the tribunal; it claims the difference of FC 100 between the amount it would have received on July 31, 2018 and the amount receivable on March 1, 2020 as unliquidated damages. Assume finally that the tribunal defers a decision on this claim to a future award.

III. JUDICIAL OBSERVATIONS ON RECOVERY OF CURRENCY LOSSES

To determine the fate of the claims in Scenarios 1 and 2, the four judgements mentioned in the Introduction must be analysed, but before proceeding with the analysis, the judgements must be contextualised and their relevance to the subject of this paper must be clarified. The facts of Pure Helium correspond to Scenario 1; no breach of contract exists, the currency loss has arisen in the course of contractual performance, and the claim is made under the terms of the contract itself. In contrast, the facts of Soconord correspond to Scenario 2 – a contractual obligation was breached, leading to a claim for damages for currency loss caused by an exchange rate fluctuation between the agreed-upon date of performance and the actual date of performance.

Numaligarh Refinery involves two claims of currency loss. The first corresponds to Scenario 1, while the second largely corresponds to Scenario 2, with the distinction that the claim is not for unliquidated damages, but for liquidated damages under the parties’ contract itself.\textsuperscript{24}

The claim for currency loss in Thai Maparn is based on unique facts.\textsuperscript{25} The currency loss occurred neither during the course of contractual performance, nor following a breach of contract, and as such, the case corresponds neither to Scenario 1 nor Scenario 2. Instead, the claim for currency loss was in the form of a claim for restitution.

The relevance of the judgement in Pure Helium is twofold. First, Pure Helium, along with Numaligarh Refinery, clarifies the position of Indian law with respect to the facts of Scenario 1. Second, both Pure Helium and Thai Maparn make certain observations on the inherent nature of currency loss which are relevant to the analysis of remoteness under §73 ICA.\textsuperscript{26} This is despite the fact that neither of these judgements involved a claim for damages for currency loss under §73 under the ICA. Finally, the judgement in Soconord is relevant because it clarifies the position of Indian law with respect to the facts of Scenario 2.

A. THE DECISION IN PURE HELIUM

The decision of the Supreme Court of India in Pure Helium was rendered in an appeal against a decision of the Division Bench of the High Court of Bombay, in an application to set aside an arbitral award under the Arbitration Act, 1940. The facts are as follows. The respondent, the Oil and Natural Gas Commission (‘ONGC’), had issued a notice

\textsuperscript{23} See Forasol v. Oil and Natural Gas Commission, 1984 SCR (1) 526, ¶53.
\textsuperscript{24} See infra Part III.B at 9.
\textsuperscript{25} See infra Part III.C at 12.
\textsuperscript{26} See infra Part IV.B at 19.
inviting global tenders for the extraction and supply of Helium gas to ONGC. The notice provided, *inter alia*, that Indian tenderers could indicate a part of the payment to be received by them as a ‘foreign exchange component’, in case they incurred some amount of the expenditure in foreign currency. However, the total payment the supplier would receive would be in INR only, for both components together. The appellant, Pure Helium India Pvt. Ltd. (‘PHI’), submitted a tender, and its bid was accepted. Pursuant to negotiations, the final agreement provided that ONGC would pay PHI INR 149 per cubic meter of gas, of which USD 4.60 would be the foreign exchange component.

Following a letter from ONGC, the Indian Ministry of Petroleum and Natural Gas released INR 44,700,000 for the procurement of 300,000 cubic meters of Helium gas, including a foreign exchange component of INR 23,800,000 (equivalent to USD 1,380,000 @ \(1 \text{ USD} = 17.2786 \text{ INR}\)). Subsequently, ONGC placed a supply order for 300,000 cubic meters of Helium gas with PHI, at the agreed-upon price. However, in the intervening period between the parties’ contract and date of supply of Helium gas, the INR had depreciated as against the USD. Therefore, on the date of supply, PHI would receive lesser USD for the foreign exchange component of INR 23,800,000, as compared to the USD it would have received on the date of the parties’ contract. Consequently, PHI claimed the difference between the amount of the USD component as on the date of the contract and the date of supply, effectively seeking to increase the foreign exchange component of the total cost from USD 4.60 to USD 4.80. Upon rejection of the claim by ONGC, PHI initiated domestic arbitration proceedings under the parties’ contract, and the tribunal directed ONGC to compensate PHI for exchange rate fluctuation, in the sum of INR 10,341,309.

Dissatisfied with the award, ONGC initiated setting aside proceedings under the Arbitration Act, 1940 before the High Court of Bombay, and a Single Judge dismissed the appeal. ONGC thereafter preferred an appeal to a Division Bench, which allowed the appeal. Ultimately, PHI appealed before the Supreme Court.

Since the appeal dealt with the setting aside of an arbitral award, the Supreme Court did not delve into the merits of PHI’s claim, and limited its analysis to whether the tribunal had exceeded its jurisdiction. The standard the Supreme Court applied was that the jurisdiction of the tribunal can be ousted only if there exists a specific bar to PHI’s claim in the parties’ contract.

ONGC’s sole objection to the award was inarbitrability of the subject matter under the terms of the parties’ contract. ONGC contended that PHI’s claim amounted to an escalation of the price of the Helium gas, and relied on the following clause in the contract to resist the claim:

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27 Pure Helium India Pvt. Ltd. v. Oil and Natural Gas Commission, AIR 2003 SC 4519, ¶2.
28 Id., ¶14, ¶46.
29 Id., ¶2.
30 Id., ¶4.
31 Id., ¶5. (Unfortunately, the Court did not provide the date of the contract, the date of supply of Helium gas, or the prevailing exchange rate on either of those dates)
32 Id., ¶46.
33 Id.
34 Id., ¶24.
35 Id., ¶53.
36 Id., ¶18.
“2.6 Bidder shall quote a firm price and they shall be bound to keep this price firm without any escalation for any ground whatsoever until they compete the work against this tender, or any extension thereof.”\(^{37}\)

PHI countered ONGC’s contention by arguing that rather than an escalation in the price, PHI had only claimed damages in terms of the provisions of the contract, occasioned by fluctuations in the INR-USD exchange rate.\(^{38}\) The Supreme Court, however, applied its own interpretation to PHI’s claim, observing that the claim was not for price escalation, but only for the difference in the prices caused by the fluctuation.\(^{39}\) Thereafter, the Court made some interesting observations on the impact of exchange rate fluctuations on a contract:

“It is true that by taking recourse to the interpretation of documents, the appellant did not become entitled to claim a higher amount than Rs. 149/-, but, thereby the appellant had not unjustly enriched itself. Had the price of the dollar fallen, the respondent would have become entitled to claim the difference therefore. […] A contract between the parties must be construed keeping in view the fact that fluctuation in the rate of dollar was required to be kept in mind by the respondent having regard to the fact that the tender was global in nature and in the event the respondent was required to pay the foreign currency, the same would have an impact on the cost factor”.\(^{40}\)

Thus, the Court seems to have disregarded not only the explicit wording of Clause 2.6, but also its own interpretation of the parties’ agreement as prohibiting a price escalation, only because granting PHI’s claim would not amount to unjust enrichment. While this may be true,\(^{41}\) it does not add any value to the Court’s interpretation of the parties’ contract, because it clarifies neither the scope of the contract, nor the parties’ intention in agreeing upon particular terms.\(^{42}\)

Further, while the Court has presumed ONGC to have been aware of the fact that an exchange rate fluctuation would impact its payment obligation under the parties’ agreement, such knowledge has not been presumed on the part of PHI. Arguably, ‘having regard to the fact that the tender was global in nature’, and that a component of PHI’s cost was a foreign exchange component, PHI should have been equally aware of the impact of an exchange rate fluctuation on the cost determination under the contract.

In any event, following the observations quoted above, the Court ventured into an analysis of the contractual provisions, specifically studying Clauses 2.6 (quoted above) and 2.7:

\(^{37}\) Id., ¶14.
\(^{38}\) Id., ¶9.
\(^{39}\) Id., ¶43.
\(^{40}\) Id., ¶¶44-45.
\(^{41}\) See Indian Council for Enviro-Legal Action v. Union of India, 1996 AIR 1446, ¶170 (defining unjust enrichment as “unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience”). Evidently, PHI’s claim amounts neither to the unjust retention of a benefit to the loss of ONGC, nor the retention of any money or property of ONGC.
\(^{42}\) See supra Part I at 1 (explaining that contract interpretation requires the Court to determine the parties’ intention and the scope of their contract by interpreting contractual terms).
“2.7 The prices shall be given in the currency of the country of the bidder. If the bidder expects to incur a portion of this expenditure in currencies other than those stated in his bid, and so indicates in his bid payment of the corresponding portion of the prices as so expended will be made in these other currencies”.\textsuperscript{43}

In order to harmonise these clauses, the Court observed that ONGC’s liability to cover exchange rate fluctuations arises from Clause 2.7 and “does not amount to an escalation of the price or disturb [ONGC’s] cost evaluation”.\textsuperscript{44} Since Clause 2.7 permitted PHI to be paid a USD component for the expenses it incurred in USD, the Court opined that PHI’s claim was merely for the USD expenditure that it had actually incurred.\textsuperscript{45} Thus, concluding that there is no specific bar to a claim for currency loss under the parties’ contract, the Supreme Court upheld the arbitral award, overturning the decision of the Division Bench.

It is clear that PHI’s claim for currency loss did not arise from a breach of contract, which is why it would be inappropriate to characterise the claim as one for \textit{damages} for currency loss – even though PHI’s counsel attempted to do exactly that. Rather, the Court’s insistence that the claim for exchange rate fluctuation does not constitute a price escalation paints PHI’s claim as merely a correction or adjustment envisaged by the parties’ contract itself.

This position is difficult to accept. While it is true that PHI did not claim an escalation of the fixed price of INR 149 per cubic metre, the mere characterisation of its claim as a correction or adjustment does not prevent its claim from falling foul of Clause 2.6. ONGC released INR 44,700,000 for the supply of gas from PHI, but by PHI ‘adjusting’ the foreign exchange component from USD 4.60 to USD 4.80 and claiming INR 10,341,309, the cost of the gas for ONGC increases to INR 55,041,309, i.e., approximately INR 183 per cubic metre. In effect, this operates as an escalation of the purchase price.

The Court’s reasoning is questionable, because the very purpose of the explicit wording of Clause 2.6 seems to be to eliminate any scope for a correction or adjustment to the price. Further, in its harmonisation of Clauses 2.6 and 2.7, the Court has given priority to the latter, but there seem to be no grounds that justify this. Factually, the opposite position is equally possible, whereby under Clause 2.7, PHI would be entitled to receive a certain predetermined foreign exchange component of its total expenditure in USD, and under Clause 2.6, the proportion of this component in the total price would not be subject to any escalation in case an exchange rate fluctuation occurs. In fact, as argued above, if PHI can be presumed to have been aware of the possibility of a fluctuation, it could very well be expected to bear the risk of a loss caused by the fluctuation, just as the Court has expected ONGC to bear the risk of a cost escalation. Evidently, without any particular grounds to justify the prioritisation of Clause 2.7, the Court’s characterisation of PHI’s claim as a correction or adjustment will remain tenuous at best.

Nevertheless, the underlying logic applied by the Court is clear – the recoverability of a currency loss suffered in the course of contractual performance is determined by the parties’ intention as expressed through their contract.

\textsuperscript{43} Pure Helium India Pvt. Ltd. v. Oil and Natural Gas Commission, AIR 2003 SC 4519, ¶14.

\textsuperscript{44} Id., ¶46.

\textsuperscript{45} Id.
B. THE DECISION IN NUMALIGARH REFINERY

The Supreme Court’s judgement in Numaligarh Refinery arose out of an appeal against a decision of the High Court of Guwahati pertaining to proceedings to set aside an award under §34, Arbitration and Conciliation Act, 1996 (‘ACA’). The appellant, Numaligarh Refinery Ltd. (‘NRL’), an undertaking of the Government of India, invited bids for the construction of a power plant for its petroleum refinery at Numaligarh, Assam. The respondent company, Daelim Industrial Co. Ltd. (‘DIC’), incorporated in South Korea, submitted a bid, and was ultimately awarded the contract. In performance of the contract, DIC had to, *inter alia*, import several items required for the construction of the plant into India.

During the execution of the project, disputes arose between the parties and DIC initiated arbitration proceedings under the parties’ Consolidated Agreement, claiming INR 55.8 crore from NRL. The majority of the three-member tribunal held in DIC’s favour, awarding it INR 29.76 crore plus interest. However, the third arbitrator issued a dissenting award, awarding DIC only INR 13.7 crore plus interest recoverable from NRL. Pursuant to an application filed by NRL under § 34 of the ACA, a District Judge set aside the award, and DIC subsequently appealed this order before the High Court of Guwahati. The parties’ appeals and cross-appeals against the High Court’s decision were decided by the Supreme Court.

In the arbitration, DIC’s total claim was divided into twelve distinct heads, of which two are relevant for the purpose of this paper – a claim of INR 2.9 crore for excess payment of customs duty on account of exchange rate fluctuation (corresponding to Scenario 1), and a claim for liquidated damages of INR 8.9 crore for loss caused to DIC by a delay in the project (corresponding to Scenario 2, but with a slight distinction).

The first claim revolved around DIC having to pay excess customs duty upon the items it imported into India, due to an appreciation of the INR-US dollar exchange rate. Unfortunately, the judgement does not specify the circumstances that led to DIC having to pay customs duty at the appreciated exchange rate due. Nevertheless, DIC’s claim appears to have been grounded on the fact that the payment of excess customs duty caused an escalation in the price fixed under the contract and that it was entitled to receive the excess amount from NRL.

The majority of the arbitral tribunal awarded DIC the excess customs duty payment, but the Supreme Court’s judgement makes no mention of the grounds for the majority’s decision. The dissenting arbitrator, however, refused DIC’s claim on the ground that the quoted price in the bid documents was fixed, and that NRL had entered into a turnkey

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47 Id., ¶3.
48 Id., ¶5.
49 Id., ¶3.
50 Id.
51 Id.
52 Id., ¶3 (Item D), 9.
53 Id., ¶3 (Item E), 12.
54 Id., ¶10 (observing that DIC cannot benefit from the ‘upward’ trend of the exchange rate).
55 Id., ¶9 (indicating that the excess payment was due to a fluctuation of the INR–USD exchange rate).
56 Id., ¶10.
57 Id., ¶9.
fixed price contract for the sole purpose of avoiding any future economic liability till the completion of the contract.\(^{58}\) In the appeal, the High Court accepted the majority’s view.

In considering the parties’ submissions, the Supreme Court perused the document titled ‘Instructions to the Bidders’ that NRL had issued during the bidding process. Clause 12.2 of the Instructions provided:

“12.2 [...] No claim for financial adjustment to the contract awarded under these specifications and documents will be entertained by the owner. Neither any change in the time schedule of the contract nor any financial adjustments arising thereof shall be permitted by the owner, which are based on the lack of such clear information of its effect on the cost of the works to the bids”.\(^{59}\)

Further, Clause 13 specified the various elements covered under the price fixed by the contract, which included customs duty.\(^{60}\) Finally, and perhaps most significantly, Clause 14, which dealt with pricing and currency changes, provided:

“14.1 The prices quoted for the entire scope of work shall remain firm and fixed till complete execution of the work”.\(^{61}\)

The explicit wording of these clauses in the Instructions led the Court to conclude that there is no room to grant DIC the benefit of an exchange rate fluctuation, and endorsed the minority arbitrator’s view.\(^{62}\) The Court held:

“Once the price is fixed there is no provision for giving any benefit for fluctuation in terms of the contract then in that case, the claimant-DIC cannot raise this claim of excess payment made towards customs duty on account of fluctuation on exchange rate. ... Had there been downward trend in the exchange rate, then the DIC would not have slashed the exchange rate. If the downward trend cannot benefit either party then equally the up-ward trend cannot benefit the DIC for claiming the payment of the higher customs duty on account of fluctuation in exchange rate. Therefore, the expression, “firm and fixed” is clear answer to the question if during the course of contract certain fluctuation has taken place in the market then on that count the claimant cannot raise extra demand on account of upward trend in the exchange rate”.\(^{63}\)

Thus, given the fixing of the price in the parties’ contract, the Court determined that an exchange rate fluctuation, irrespective of the direction of the fluctuation, will not permit either party to attempt to alter its obligations or entitlements under the contract.

Interestingly, DIC’s counsel placed reliance on Pure Helium to claim recovery of a currency loss arising from exchange rate fluctuation during the course of contractual performance.\(^{64}\) However, the Court distinguished Pure Helium, observing – as was also

\(^{58}\) Id.
\(^{59}\) Id., ¶10.
\(^{60}\) Id., Cl. 13(f).
\(^{61}\) Id., ¶10.
\(^{62}\) Id.
\(^{63}\) Id.
\(^{64}\) Id.
observed in Pure Helium— that PHI’s claim in that case was not contrary to any contractual terms. In contrast, DIC’s claim was clearly against the wording of Clauses 12.2, 13 and 14.1 of the parties’ contract. Thus, holding Pure Helium to have been decided on peculiar facts, the Court declined DIC’s claim for excess customs duty on account of exchange rate fluctuation.

Despite the distinction drawn by the Court between Pure Helium and the first claim in Numaligarh Refinery, the underlying reasoning in both judgements is identical—the parties’ intention, as discerned from their contractual terms, is determinative of the recoverability of a currency loss that has arisen in the course of contractual performance.

The second claim for currency loss in Numaligarh Refinery was a claim by DIC for liquidated damages to compensate for the loss caused to it by a delay of 929 days in the execution of the project. DIC contended that NRL had caused delays at various stages of the project, and because the project was time-bound, DIC had suffered a loss on account of the fluctuation of prices and of the INR-USD exchange rate during the delay. Clause 22.2 of the parties’ contract provided:

“22.2 In case the Contractor's performance is delayed due to any act of omission on the part of the Owner or his authorized agents, the Contractor shall be entitled to claim demonstrable and reasonable compensation if such delays have resulted in any increase in the cost”.

Upon a review of the factual evidence, it was a straightforward matter for the majority of the arbitral tribunal to conclude that DIC was entitled to compensation under Clause 22.2, since the delay had in fact been caused by NRL. It appears from the wording of the clause, however, that it does not provide for liquidated damages, since it specifies neither the amount nor a formula to determine the amount of damages due. The majority of the tribunal avoided this dilemma by applying a formula prescribed in Clause 18 of the contract—which was to be used to determine the compensation due to NRL in case of a delay by DIC (i.e., the converse of the situation envisaged under Clause 22.2)—under Clause 22.2. As per this formula, NRL would be entitled to 5% of the value of the contract as compensation. The application of this formula was affirmed by the High Court. The Supreme Court, on its part, did not wish to delve into the merits of a factual claim in proceedings to set aside an arbitral award, and it therefore granted liquidated damages to DIC.

In Sir Chunilal V. Mehta & Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd., the Supreme Court had held that, “By providing for compensation in express terms, the right to claim damages under the general law is necessarily excluded”. In accordance with this holding, the outcome of the second claim confirms that parties are free to negotiate contractual terms which anticipate and attempt to allocate the risk of a currency loss which arises during the course of contractual performance, and which affects the performance of a monetary obligation under the contract. Once such clauses are included in

65 See supra Part III.A at 5.
67 Id., ¶13.
68 Id.
69 Id.
70 Id.
71 Sir Chunilal V. Mehta & Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd., AIR 1962 SC 1314.
72 Id., ¶13.
the contract, it will bar both parties from bringing a claim for unliquidated damages for the currency loss.

C. THE DECISION IN THAI MAPARN

The decision of the High Court of Delhi in Thai Maparn was rendered as a consequence of an application filed under §144 read with §151 of the Code of Civil Procedure, 1908 (‘CPC’). The application was filed following a complex chain of events. The applicant, Thai Maparn Trading Co. Ltd. (‘TMT’), a Thai company, and the respondent, PEC Ltd. (‘PEC’), an Indian company, had entered into several contracts for the sale of rice from TMT to PEC. In relation to one such supply contract, disputes arose between the parties and were referred to arbitration, wherein the arbitrators decided in PEC’s favour.

During the pendency of the arbitral proceedings, a separate supply contract was entered into between the parties. The payment under this contract was to be by letters of credit (‘L/C’) issued by PEC, with TMT named as the beneficiary. The State Bank of India (‘SBI’), as the issuing bank, would remit the funds under the L/Cs to TMT only upon the production of certain documents, including, inter alia, ten bills of lading (‘B/L’). SBI would have five days after the production of the documents to determine if they were in order, and thereafter to remit the funds.

Subsequent to the issuance of the arbitral award, PEC filed a petition in the High Court of Delhi, seeking ex parte relief against TMT and the New Delhi branch of SBI under §9 of the ACA. PEC claimed before the High Court that TMT had already submitted the ten B/Ls and other documents required under the L/Cs to SBI, and that once SBI found these documents to be in order, it would remit the funds to TMT within the five-day period. PEC contended that these B/Ls were the only assets owned or possessed by TMT anywhere in India and were accordingly the only assets which could serve as security pending the enforcement of the arbitral award in India. PEC thus argued that, pending the enforcement of the award, SBI should hold the B/Ls and not make any payments to TMT. The High Court accepted PEC’s contentions and passed an interim order directing SBI to retain an amount under the B/Ls not exceeding the amount of the award, till further orders.

Thereafter, TMT filed an interim application requesting vacation of this interim order, on the ground that it had filed an appeal against the arbitral award. The High Court subsequently did vacate the order, giving SBI the liberty to remit the funds retained by it under L/Cs, but only upon TMT furnishing security for the sum of the arbitral

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73 The Code of Civil Procedure, 1908, §§144, 151.
75 Id., ¶3.
76 Id., ¶5.
77 Id., ¶3.
78 Id., ¶4.
79 Id., ¶5.
80 Id.
81 Id.
82 Id., ¶6.
83 Though appeal is not a remedy usually associated with arbitral awards, the institution that administered the parties’ arbitration in this case, the Grain and Feed Trade Association of London, specifically allows an internal appeal of awards to an appellate board. See Grain and Feed Trade Association, Arbitration Rules No. 125, Rule 10.
award to the Registrar of the High Court. TMT appealed this order, but a Division Bench of the High Court reiterated that the amount under the L/Cs would be released only upon TMT furnishing sufficient security.

Dissatisfied with this order, TMT preferred an appeal against it via Special Leave Petition before the Supreme Court. Significantly, in the meantime, TMT’s appeal against the arbitral award had been allowed, and the award had been set aside. Consequently, in disposal of the appeal, the Supreme Court vacated both orders of the High Court that directed TMT to furnish security, on the ground that the very basis of the High Court’s orders had been obliterated. PEC had previously deposited the amount due under the L/Cs with SBI in an interest-bearing account and had also agreed to reimburse SBI in case it suffered a currency loss due to the delay in remitting the money to TMT. Taking note of this fact, the Supreme Court directed that the amounts due under the L/Cs be released to TMT immediately, along with the accrued interest.

Consequently, SBI repatriated the amounts due under the L/Cs to TMT, applying the INR-USD exchange rate applicable at the time of repatriation. The total amount paid to TMT, after conversion, was USD 12,894,988. According to SBI, TMT had received an extra USD 856,863 beyond the amounts due to it under the L/Cs, and USD 313,104 of this excess amount was on account of the depreciation of INR-USD exchange rate between the time when payment became due upon submission of the B/Ls and the time of payment. The remaining excess amount was the interest that had accrued on the money deposited by PEC with SBI.

The interim application under §144 read with §151 of the CPC was filed in the High Court by TMT to claim a currency loss caused by the fluctuation of the Thai Baht (“THB”)–USD exchange rate. TMT submitted that due to the orders passed by the High Court, the payments due to TMT under the L/Cs had been delayed. Thus, due to an appreciation of the THB as against the USD in the intervening period, TMT claimed that after converting the USD amounts received from SBI, it had received lesser THB at the time of payment than it would have received on the date when the payment under the L/Cs became due. TMT thus claimed USD 827,897 from PEC, for the currency loss. TMT argued that its claim was based on the principle of restitution under §144 of the CPC, because TMT was entitled to be placed in the same position as it was prior to the date when the High Court stayed the repatriation of the money under the L/Cs. This was

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85 Id., ¶8.  
86 Id., ¶9.  
87 Id., ¶10.  
88 Id.  
89 Id., ¶6.  
90 Id., ¶10.  
91 Id., ¶11.  
92 Id., ¶23.  
93 Id.  
94 Id.  
95 In essence, §144 of the CPC provides that where an order of a civil Court is reversed, that Court can, upon an application made by the party claiming restitution, cause such restitution to be made as will place the parties in the position in which they would have been but for the reversed order. §151 of the CPC is a savings provision, stating that nothing in the CPC shall limit or restrict the inherent powers of a civil Court to make such orders “as may be necessary for the ends of the justice or to prevent abuse of the process of the Court”.  
97 Id.  
98 Id., ¶14.
because the order staying the repatriation had subsequently been vacated by the Supreme Court, thus satisfying the elements of §144.

PEC’s primary ground to resist this claim was that all transactions between the parties, including the contract as well as the L/Cs, were denominated only in USD, and that none of the documents contemplated conversion of a USD amount into any other currency, whether INR or THB.\textsuperscript{99} PEC thus argued that any such conversion was beyond the contemplation of the parties as well. Further, PEC contended that THB had objectively suffered no loss, because it had received an excess amount of USD 856,863 beyond what it was entitled to under the L/Cs.\textsuperscript{100}

Before considering these claims, the High Court recounted the principles governing the exercise of the power of restitution by a civil Court, making explicit reference to the judgement in \textit{Special Officer (Revenue), Kerala State Electricity Board v. MRF Ltd.}\textsuperscript{101} In that case, the Supreme Court held that while granting relief in an action for restitution, a Court must not cause ‘unmerited hardship’ to either party and must grant relief which is ‘reasonable, fair and practicable’.\textsuperscript{102}

In this context, the fact that TMT received an extra USD 856,863 beyond what it was entitled to becomes significant, especially because this amount exceeds the amount of TMT’s claim for currency loss. In the context of §144, arguably, the receipt of this excess amount put TMT in a better position than it would have occupied but for the High Court’s interim orders. In these facts, it would also not be reasonable or fair to allow TMT’s claim, since it would potentially subject PEC to an unmerited hardship. This approach mirrors the ‘net loss’ approach adopted for the award of damages under §73 of the ICA, whereby the gains made by a plaintiff as a result of a breach of contract must be set off against the losses arising to him from the breach.\textsuperscript{103} Unfortunately, the High Court did not characterise the facts of the case in the context of §144 of the CPC, but it did observe that in the factual position of the case, TMT’s claim for restitution could not be granted.\textsuperscript{104}

Further, the High Court accepted PEC’s primary contention, noting that the parties’ contract or the L/Cs provided no assurance to TMT that it would be paid in any currency other than USD. Thus, the High Court opined that it was a matter of speculation as to what the THB-USD exchange rate would be on the date when the amount under the L/Cs became payable, and it had not been contemplated by the parties at the time the contract was entered into.\textsuperscript{105}

Pertinently, the High Court observed that since international trade involves a time lag between a transaction and the receipt of proceeds under the transaction, “hedging of risks associated with currency exchange fluctuation is not unknown”, and parties engaged in international trade are presumed to have anticipated and accounted for such risk.\textsuperscript{106}

Consequently, the High Court dismissed TMT’s application for currency loss. Similar to both Pure Helium and Numaligarh Refinery, the High Court primarily relied on the

\textsuperscript{99} \textit{Id.}, ¶15.
\textsuperscript{100} \textit{Id.}
\textsuperscript{101} Special Officer (Revenue), Kerala State Electricity Board v. MRF Ltd, (1996) 1 SCC 597.
\textsuperscript{102} \textit{Id.}, ¶24.
\textsuperscript{105} \textit{Id.}, ¶25.
\textsuperscript{106} \textit{Id.}
parties’ contract to ascertain whether they contemplated the possibility and allocated the risk of an exchange rate fluctuation in the relevant currency. No issue can be taken with the High Court’s reasoning on this point.

Issue can be taken, however, with the last point raised by the Court. The observation on the risk of exchange rate fluctuation – that parties account for such risk because there is invariably a delay between a transaction and the transfer of proceeds – while not otherwise inaccurate, does not seem entirely appropriate in the facts of this case. While there might have been a time lag between the supply of rice and receipt of proceeds, both PEC and TMT were aware that upon presentation of the B/Ls and other documents required under the L/Cs, SBI would have five days within which to determine whether the documents were in order, and thereafter remit the funds to TMT. This was the factual premise of PEC’s claim for ex parte relief as well. As such, it would have been reasonable for TMT to be certain that, barring the documents not being in order or other exceptional circumstances, there would be no delay in the remission of funds by SBI. Arguably, the delay in payment caused by the High Court’s various orders could be taken to be one such exceptional circumstance. Thus, there was potentially no exchange rate fluctuation risk which TMT had to “anticipate and account for”, and it did not add to the Court’s analysis of the facts of this case to make this presumption.

**D. THE DECISION IN SOCONORD**

The decision in Soconord was rendered by the High Court of Bombay in an appeal arising from proceedings to set aside an arbitral award under §34 of the ACA. The parties had entered into a contract for the supply of line pipes, risers and bends of different specifications by the respondent, M/s. Soconord OCTG (‘Soconord’), to the appellant, ONGC. The contract was valued at Belgian Franc (‘BEF’) 408,537,745, of which 0.5% was to be paid to Soconord’s agent in New Delhi in non-convertible INR at the official BC selling rate on March 21, 1992, while the balance was to be paid to Soconord.

The contract established that time ‘shall be the essence of the Supply Contract’, with Soconord to deliver the required materials by July 20, 1992. Further, if Soconord failed to deliver on time, ONGC would be entitled to recover liquidated damages from Soconord, without prejudice to any other remedies available to it to recover damages for breach. Soconord failed to make the delivery on time, and the required materials were delivered only in September 1992, i.e., after a delay of two months and three days, following which ONGC sought to recover liquidated damages. A dispute arose between the parties and arbitration was initiated under the Supply Contract. However, due to disagreements between the arbitrators, the matter was referred to an Umpire.

ONGC contended before the Umpire that due to the delayed delivery, it had suffered a loss on account of having to make payment at a higher BEF-INR exchange rate than it would have had to pay had the delivery been completed and payment made in July 1992, since the rate had fluctuated in the intervening period. ONGC thus claimed as

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108 Id., ¶5.
109 Id., ¶6(A).
110 Id., ¶6(B).
111 Id., ¶8.
112 Id., ¶2.
113 Id., ¶8.
damages the difference between the BEF-INR exchange rate in September and July.\textsuperscript{114} Soconord resisted this claim, arguing that such loss is too remote to be covered under §73 of the ICA.\textsuperscript{115} The grounds for this contention were that the currency loss was neither a direct loss that had naturally arisen in the usual course of things from Soconord’s breach, nor a loss which the parties knew, when they made the Supply Contract, to be a likely result of the breach.\textsuperscript{116}

The Umpire rendered an award dated December 20, 1999 in ONGC’s favour, allowing, \textit{inter alia}, the claim for damages for currency loss. Thereafter, the case landed before a Division Bench of the High Court of Bombay via a complex chain of orders and appeals. Soconord initiated setting aside proceedings under the Arbitration Act, 1940 in the High Court of Bombay,\textsuperscript{117} and a Single Judge of the High Court set aside the award, remanding the matter back to the Umpire on the ground that the Umpire had failed to consider whether ONGC had complied with §55 of the ICA.\textsuperscript{118} ONGC filed an appeal against this order of the Single Judge, which was one of the two appeals ultimately decided by the Division Bench. Thereafter, via a separate order, the Single Judge decided the other issues raised by Soconord in its setting aside petition and found against Soconord.\textsuperscript{119} Soconord filed an appeal against this separate order, which was the second appeal decided by the Division Bench.\textsuperscript{120}

In analysing the Umpire’s reasoning, the Division Bench agreed with the Umpire’s observation that the plain language of §73 of the ICA does not bar a claim for damages for currency losses, and that there is no reason to read such a limitation into the provision.\textsuperscript{121} The Division Bench then proceeded to recount and analyse the Umpire’s reasoning on whether ONGC’s claim satisfied the elements of the Section.\textsuperscript{122}

With regard to causation, it was a simple matter for the Umpire to conclude that ONGC’s loss was caused by the delay in payment, which was resultanty caused by Soconord’s delay in delivery, and thereby, there was a causal link between the loss and the breach.\textsuperscript{123} Notably, the judgement does not reflect consideration of any judicial precedents pertaining to the standard to be satisfied under the causation inquiry.

With regard to remoteness, the Division Bench cited the decision of the English Court of Appeal in \textit{Aruna Mills v. Dhanrajmal Gobindram}\textsuperscript{124} and propounded that there is no rule that “losses resulting from revaluation of currencies are always too remote in law to be recovered”.\textsuperscript{125} Thereafter, the Bench observed the following with respect to the Umpire’s conclusion that ONGC’s claim satisfied the remoteness element of §73 of the ICA:

\textsuperscript{114} \textit{Id}.
\textsuperscript{115} \textit{Id.}, ¶27.
\textsuperscript{116} Soconord is invoking the remoteness test originally laid down in \textit{Hadley v. Baxendale}, (1854) 9 Ex. 341 (Court of Appeal for England and Wales).
\textsuperscript{117} Oil and Natural Gas Corporation v. M/s. Soconord OCTG, 2014 SCC OnLine BOM 1277, ¶2.
\textsuperscript{118} \textit{Id.}, ¶4(A); It must be noted that the relevance of §55 of the ICA in this case is only with respect to the notice requirements prescribed in that section for acceptance of performance. \textit{See id.}, ¶34.
\textsuperscript{119} \textit{Id.}, ¶30(C).
\textsuperscript{120} \textit{Id.}, ¶4(D).
\textsuperscript{121} \textit{Id.}, ¶28.
\textsuperscript{122} \textit{Id.}, ¶30.
\textsuperscript{123} \textit{Id.}, ¶30(A).
\textsuperscript{124} \textit{Aruna Mills v. Dhanrajmal Gobindram}, [1968] 1 Q.B. 655 (Queen’s Bench Division Commercial Court for England).
\textsuperscript{125} \textit{Id.}, 669; Oil and Natural Gas Corporation v. M/s. Soconord OCTG, 2014 SCC OnLine BOM 1277, ¶28.
“...In international commercial transactions between an Indian purchaser and a foreign supplier, it would be common knowledge that loss due to foreign exchange fluctuation can arise. That is a reasonable inference. The learned Umpire was entitled to draw that inference. It would be absurd to suggest that evidence is required to prove that parties are aware that the rate between different currencies fluctuates on a regular, indeed daily basis. ...

(C) The contract between the parties is an international commercial transaction. The presumption would therefore apply in this case. The learned Umpire also construed the terms of the contract in arriving at this conclusion. ... The Umpire considered the effect of these terms and came to the conclusion that the aspect of foreign exchange fluctuation was present to the minds of the parties when the contract was made and that the foreign exchange fluctuation was treated as relevant. ... It is evident, therefore, that not merely on the basis of common knowledge in the trade but also from the terms and conditions of the contract, the parties were not only aware of the possibility of there being a foreign exchange fluctuation but were conscious of the same and considered the same to be a relevant factor”. 126

In view of these observations, the Division Bench refused to interfere with the Umpire’s award, allowing ONGC to recover damages for currency loss under §73. Just as in Pure Helium, Numaligarh Refinery and Thai Maparn, the Division Bench in Soconord was required to interpret the parties’ agreement, but the Division Bench also had to go a step further and consider how that interpretation fits within the elements of §73 of the ICA. In this light, it is significant that the Court found there to be no general rule barring the recovery of damages for currency loss under §73 of the ICA on the ground of remoteness.

IV. CRITICAL ANALYSIS OF THE POSITION UNDER INDIAN LAW

The analysis in Part III allows us to formulate the existing position of Indian law on the recovery of currency loss.

In a claim for recovery of currency loss that arises in the course of contractual performance, recoverability is governed by the scope of the parties’ contractual terms.127 Commercially prudent parties are therefore advised to include terms which expressly permit or prohibit recovery of such loss,128 whether in the form of a fixed price clause or a limitation or exclusion of liability clause. Moreover, parties to cross-border commercial transactions will be presumed to have known, at the time of contract conclusion, that exchange rates are subject to regular fluctuation and that they must therefore account for such risk.129

With regard to a claim for damages for currency loss, it is settled law in England since the decision of the House of Lords in President of India v. Lips Maritime Corporation that such a claim is subject to the same rules as a claim for damages for breach

126 Oil and Natural Gas Corporation v. M/s. Soconord OCTG, 2014 SCC OnLine Bom 1277, ¶¶30(B)-(C).
of contract generally, and this position has been adopted under Indian law as well. Thus, in order for a claim for damages for currency loss to be successful, the three elements of §73 of the ICA must be satisfied.

Causation can be established by proving that the breach of contract, i.e., the delay or default in performance of a contractual obligation – and therefore the currency loss – was caused by the defendant. As far as remoteness is concerned, there is a presumption that parties to cross-border commercial transactions are aware of the risk of exchange rate fluctuations, and of the impact of such fluctuations on their contract. Nevertheless, if the parties’ contractual relationship does not demonstrate that at the time of contract conclusion, the parties contemplated currency loss to be a likely result of a breach of contract, the loss will be considered to be too remote under §73.

I agree with the existing position of Indian law on the recovery of currency loss that arises during the course of contractual performance itself, where no breach has occurred. However, there exist certain shortcomings in the position on the recovery of damages for currency loss under §73, which are discussed below in relation to the three elements under this provision.

A. CAUSATION

For the successful recovery of damages under §73 of the ICA, there must exist a causal connection between the defendant’s breach of contract and the plaintiff’s loss. Significantly, damages can be recovered only for those losses for which the breach of contract is the ‘effective’ or ‘dominant’ cause. In case the loss is caused by an independent event other than the breach, over which the breaching party has no control, the resultant loss will be deemed not to have been caused by the breach.

Clearly, fluctuation of currency exchange rates is an independent event, well apart from any alleged breach of contract, over which the breaching party can have no control. It is caused by shifting market forces, not by the actions of the breaching party. A breach of contract may give occasion for the exchange rate fluctuation to become relevant as a factor affecting a potential loss, but the currency loss by itself does not arise merely because a breach was committed. This is because there is an equal probability that, instead of fluctuating in the direction that caused the currency loss, the exchange rate could have fluctuated in the opposite direction, thereby causing a non-breaching party to actually have a gain following a breach. Additionally, as the nomenclature suggests, the dominant cause of a ‘currency’ loss is not the breach, but a fluctuation in the exchange rate.

In Scenario 2, Company A’s claim for damages arises solely from the depreciation of DC as against FC in the period between Company B’s breach and the payment under the arbitral award. Consider the contrasting situation – if Company B had

132 Id., ¶30(A).
133 Id., ¶30(B).
134 Id., ¶30(C); See also The Indian Contract Act, 1872, §73.
135 POLLOCK & MULLA, supra note 103, ¶73.17.1 at 14; Firm Kishanlal Shrilal Patwa v. Union of India, AIR 1960 MP 289.
137 POLLOCK & MULLA, supra note 103, 1119-1120 at 14.
failed to purchase Company A’s shares and, instead of depreciating as against the GBP, the INR had appreciated in the intervening period, Company A would not have suffered the alleged currency loss in the first place. As such, the loss must be treated as an indirect loss arising from the breach. A similar notion regarding the causal connection between the fluctuation of exchange rates and a breach of contract has been expressed under English law as well.

The decision in Soconord suffers from an error in this regard. As far as the causal relationship between exchange rate fluctuation and currency loss is concerned, the Umpire only observed that ‘the rate of foreign exchange fluctuated in the meantime’*. Evidently, the independent fluctuation phenomenon – which, post the breach of contract by Soconord, was the sole factor effectively determining whether ONGC suffered a currency loss or a ‘currency gain’ – was implicitly dismissed as being a relevant factor in the causation inquiry. The foregoing discussion demonstrates the relevance of the fluctuation as a link in the chain of causation, and the oversight of this fact by the Umpire is unfortunate.

This proposed position on causation then has the potential of barring any claim for damages for currency loss under §73 of the ICA, since it would be impossible for a plaintiff to demonstrate how the breach caused the loss, or conversely, to demonstrate how the exchange rate fluctuation is not the dominant cause of the loss.

**B. REMOTENESS**

The remoteness of a particular loss has to be assessed with regard to the knowledge of the parties when they entered into the contract and is a question of fact to be answered by the Court. One of the tests of remoteness under §73 of the ICA pertains to a loss ‘which the parties knew to be likely to result from the breach’. The test under this rule is whether the loss is such that it must have been in the contemplation of the parties as being a possible result of the breach; if the parties contemplated the loss, it cannot be regarded as being too remote. This analysis must be conducted from the perspective of a reasonable person in the position of the parties.

In Pure Helium, the Supreme Court made significant observations on the nature of exchange rate fluctuations as a factor to be considered by parties at the pre-contractual stage. The Court stated that exchange rate fluctuations were ‘required to be kept in mind’ by ONGC, considering the global nature of the tender and the requirement for ONGC to pay PHI a foreign exchange component. Similarly, in Thai Maparn, the High Court observed that parties usually anticipate and account for the risk of exchange rate fluctuations in contracts involving international trade. These remarks suggest that currency

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138 Aruna Mills v. Dhanrajmal Gobindram, [1968] 1 Q.B. 655 (Queen’s Bench Division Commercial Court for England) (suggesting a possibility that the breach of contract will itself be sufficient to satisfy the element of causation).
141 The Indian Contract Act, 1872, §73; Pollock & Mulla, supra note 103, §73.19 at 14.
142 Pollock & Mulla, supra note 103, 1125 at 14; Howard, Knot & Kimbell, supra note 2, ¶13.36 at 2.
143 Pollock & Mulla, supra note 103, §73.19.3 at 14; Avatar Singh, Law of Contract and Specific Relief 188 (5th ed., Eastern Book Company, 2009).
144 Singh, supra note 143 at 19; Pollock & Mulla, supra note 103, §73.19.4.2 at 14.
145 Pure Helium India Pvt. Ltd. v. Oil and Natural Gas Commission, AIR 2003 SC 4519, ¶45.

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fluctuation is an inherent factor that the parties to a cross-border contract must be presumed to have contemplated at the time of contract conclusion.

While this may be true for a claim made under contractual terms – as was the case in Pure Helium – in order to claim damages under §73, the real question is whether the parties contemplated, at the time of contract conclusion, that a currency loss would be likely to result from a breach of the contract. This proposition is grounded in the wording of the aforementioned remoteness test under §73, whereby damages are provided for loss which the parties knew, at the time of contract conclusion, ‘to be likely to result from the breach of it’. Thus, it is not sufficient that a party has knowledge of the impact of exchange rate fluctuations on the performance of its monetary obligations – whether to give or receive money – under a contract. Rather, it must have knowledge of the impact of such fluctuations on its monetary obligations following a breach of the contract. This distinction between the pre and post-breach periods also finds support in the Division Bench’s observations in Soconord, where the Bench declared that prior to the occurrence of a breach, a party may be unaware of the consequences of the breach and the material aspects of the loss it might suffer, including the nature and extent of such loss.¹⁴⁷

Thus, while the presumption drawn in Soconord¹⁴⁸ is not incorrect, it does not seem wholly applicable to a claim for damages in its current form.¹⁴⁹ Parties can undoubtedly be presumed to have knowledge of the fact that exchange rates fluctuate regularly, and this presumption can easily be extended to knowledge of the impact of such fluctuations on the parties’ contract. However, it is questionable whether the presumption can be extended even further to knowledge of the impact of such fluctuations on the parties’ contract following a breach. Consequently, it would be most prudent for parties to have their contract clearly allocate the risk for a currency loss, such that there is no scope for a contention that the currency loss is too remote to be recovered.¹⁵⁰

C. MITIGATION

The Explanation to §73 of the ICA establishes the requirement of mitigation of loss – the plaintiff in a claim for damages has a duty to take all reasonable steps to mitigate the loss consequent upon the breach of contract, and any loss which arises from the plaintiff’s neglect to take such steps cannot be recovered.¹⁵¹ However, the duty of mitigation cannot impose upon the plaintiff, burdens of an unusual nature.¹⁵²

The plaintiff’s duty to mitigate its loss seems, at first glance, irrelevant to a claim of damages for currency losses; the quantum of currency loss is contingent upon the extent of the exchange rate fluctuation, which is outside the plaintiff’s control. Accordingly, the mitigation of this loss might seem similarly impossible. However, following a breach of contract, if a party anticipates a currency loss, it can hedge against such loss, especially

¹⁴⁸ See id., ¶30(B); See also supra Part III.D at 15.
¹⁴⁹ To be clear, the author is not of the opinion that the Division Bench’s conclusion on remoteness in Soconord was incorrect in the facts of that case. The decision was clearly grounded in the contractual terms between the parties. The only issue to be found is with the presumption endorsed by the Division Bench.
¹⁵⁰ This suggestion finds support in the ‘narrow’ view on the recovery of damages for currency losses under English law, expressed in HOWARD, KNOT & KIMBELL, supra note 2, ¶13.45 (“Where there is no express or implied undertaking [in the contract] in relation to exchange losses, they are irrecoverable”) at 2.
¹⁵² SINGH, supra note 143, 206 at 19; M. Lachia Shetty and Sons Ltd. and Ors. v. Coffee Board, Bangalore, AIR 1981 SC 162, ¶14.

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through the use of currency derivatives.\textsuperscript{153} It has thus been argued in the context of English law that a failure to hedge by a party who has foreseen a currency loss constitutes a failure to mitigate its loss, and the party will therefore not be entitled to damages.\textsuperscript{154}

Evidently, no occasion has arisen for Indian Courts to consider the duty of mitigation in the context of currency loss. However, in Thai Maparn, the Court appeared to recognise the existence of hedging as a means to reduce exchange rate risk, observing that “hedging of risks associated with currency exchange fluctuation is not unknown”.\textsuperscript{155} As such, it is possible that even under Indian law, a party who foresees a currency risk but does not hedge against it will have failed to mitigate its loss, and will therefore be barred from claiming damages for that portion of the loss which could have been mitigated by hedging.

V. CONCLUSION

The analysis conducted in this paper indicates that Indian law does not bar claims for recovery of currency loss caused by exchange rate fluctuation. Two types of claims have been raised before Indian Courts so far—claims for recovery of currency loss that arise during the course of contractual performance, and claims for damages for currency loss that arise following a breach of contract. The former claim requires the plaintiff to prove that the claim is covered within the scope of the parties’ contract, while the latter claim must satisfy the elements of §73 of the ICA.

With respect to the latter category, while the judiciary has granted damages for currency loss, it has failed to conduct a detailed analysis of the element of causation under §73. Such an analysis would establish that the dominant or effective cause of a currency loss is the exchange rate fluctuation and not the breach of contract, making it difficult to prove a causal connection between the breach and the currency loss. Further, the tendency to presume contemplation of currency loss by the parties at the pre-contractual stage fails to do justice to the remoteness inquiry. The true test is whether the parties contemplated a currency loss to be the likely result of a breach of their contract, and not whether they contemplated the impact of exchange rate fluctuations on their contractual performance prior to a breach. Finally, though the element of mitigation has not found mention in any judicial analysis yet, it has the potential to bar a claim for damages for a currency loss that could have been mitigated by hedging of exchange rate risk.

At a broader level, it must be noted that the Indian law on damages for currency loss is by no means developed. It is an issue that has been considered by an Indian Court only once, in Soconord. Even in that judgement, however, the Court failed to conduct a holistic consideration of the issue outside the facts of the case, making only certain broad and inconclusive statements as to the lack of a bar against such damages being recovered.

Nevertheless, the existing position of Indian law does allow us to consider how the two scenarios detailed in Part II will play out. In Scenario 1, Company C will be able to recover the currency loss of DC 1000 only if the master supply agreement reflects that Company D assumed the risk of a currency loss. Considering, however, that there is inevitably bound to be a delay between an order by Company D and the delivery of the grains to Company C, it is unlikely that Company D would have agreed to assume such risk. This is especially because the payment to be made by Company D to Company C is only in DC and


\textsuperscript{154} HOWARD, KNOT & KIMBELL, supra note 2, ¶13.52 at 2.

involves no foreign exchange component, indicating that Company C must bear the risk of any exchange rate fluctuation that affects its supply contract with the foreign entity supplying the grains.

Further, in Scenario 2, in order to recover damages for its currency loss of FC 100, Company A will have to demonstrate not only that Company B’s breach caused the loss, but also that the parties contemplated, at the time the JVA was concluded, that such a loss was likely to result from a breach of the JVA. Proving the former element should be relatively straightforward, since it mirrors the causation inquiry in Soconord, while proving the latter will require the tribunal to analyse the JVA’s terms and the parties’ pre-contractual correspondence.