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FOREIGN CURRENCY PAYMENTS UNDER INTERNATIONAL CONSTRUCTION CONTRACTS: INTERPRETING FIDIC CLAUSES 13.4 AND 14.15 WITHIN GLOBAL PRACTICE AND INDIAN EXCHANGE CONTROL

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ABSTRACT

International construction contracts commonly involve complex currency arrangements due to multi-jurisdictional expenditures and financing. The FIDIC Conditions of Contract provide a nuanced framework to allocate exchange rate and payment risks between the Employer and Contractor, prominently through Clauses 13.4 and 14.15, which regulate the payment of variation adjustments and the currencies of payment, respectively. This article critically examines these clauses within the broader context of international construction law, comparative FIDIC practices, and the specific rules under Indian law.

The discourse reveals an inherent tension where contractors, contractually entitled to foreign currency payments, procure goods and services locally yet claim reimbursement in foreign currencies. This creates challenges in reconciling contractual rights with domestic foreign exchange regulations. The study foregrounds the interplay between contractual freedom and mandatory currency controls under Indian law, specifically the Foreign Exchange Management Act 1999 (FEMA) and Reserve Bank of India (RBI) guidelines, which mandate strict documentary proof of foreign currency expenditure.

Additionally, the article highlights the crucial role of the Engineer in adjudicating such disputed claims before escalation, emphasizing the importance of verifying documentary evidence and applying contract provisions and regulatory requirements to either adjust or reject unsupported foreign currency claims. The analysis draws on doctrinal interpretation, international arbitration precedents,

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and Indian case law, ultimately advocating for a harmonised interpretative framework integrating contract law, Multilateral Development Banks (MDB) procurement policy, domestic foreign exchange regulation, and proactive dispute management. Such an approach is essential for ensuring contractual certainty, regulatory compliance, and financial integrity in the administration of multi-currency international construction contracts.

Keywords: FIDIC, Clause 13.4 & 14.15, Foreign Currency Payments, FEMA, MDB

INTRODUCTION

The choice and mode of currency payments in large-scale international construction contracts remain among the most underappreciated yet complex facets of contract administration. Multilateral Development Banks (MDBs), including the World Bank, African Development Bank, and Asian Development Bank, regularly finance infrastructure projects requiring cross-border procurement by contractors who incur expenditures in multiple currencies. These cost streams typically reflect a hybrid of foreign currency components such as imported plant and equipment and local expenditure items, including domestic labour, subcontracting, and duties.

Efficient allocation of payment currency is therefore critical, ensuring that contractors receive remuneration in currencies matching their outlays while employers comply with exchange control policies and MDB disbursement rules. The conventional industry standard to govern these complexities is the FIDIC Conditions of Contract for Construction, MDB Harmonised Edition 2010 ('FIDIC MDB 2010').[3] This edition, specifically adopted in multilateral agency funded projects, delineates in Clauses 13.4 and 14.15 the allocation of payment currency relative to contract variations and the overall Contract Price.

Clause 13.4 governs 'Payment in Applicable Currencies', prescribing that adjustments for contract variations must be paid in the currencies and proportions stipulated in the contract. Clause 14.15, 'Currencies of Payment', fixes the modalities for interim and final payments, mandating adherence to the agreed currency split throughout the contract duration.[4] Both aim to mitigate foreign exchange risk while balancing contractors' exposure and employers' compliance with exchange control regimes and MDB financing conditions.

[3] FIDIC, *Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer: MDB Harmonised Edition* (2010).
[4] Ibid, cls 13.4, 14.15.

Notwithstanding these clear contractual provisions, practical challenges abound. Contractors, while contractually entitled to payments in foreign currency, often procure materials locally, subsequently seeking reimbursement in foreign currencies. This practice induces complex disputes over compliance, good faith, and the reconciliation of contract terms with national foreign exchange laws.

In managing such disputes, the Engineer plays a pivotal role as the contract's primary adjudicator before escalation. The Engineer's responsibility includes a rigorous examination of documentary evidence supporting foreign currency claims and assessing their compliance with contractual currency allocations and applicable foreign exchange regulations, such as India's FEMA and RBI Master Directions[5]. Where evidence of bona fide foreign procurement is absent, the Engineer is empowered to issue a reasoned determination rejecting or adjusting claims, potentially converting foreign currency payments to local currency amounts aligned with actual expenditure. This pre-arbitral adjudicative function helps maintain financial discipline, uphold regulatory compliance, and mitigate disputes effectively.

India's regulatory framework exemplifies the tension inherent in such claims. The Foreign Exchange Management Act 1999 ('FEMA')[6], supported by the RBI Master Directions and the FEMA (Current Account Transactions) Rules 2000[7], mandate that foreign currency remittances be strictly conditioned on demonstrable foreign procurement. Non-compliance risks punitive enforcement and undermines contractual privileges ostensibly afforded under international contracts.

This article explores this multidimensional problem against the backdrop of FIDIC MDB Clauses 13.4 and 14.15, juxtaposing international legal practice, arbitral jurisprudence, and Indian statutory and case law. Through doctrinal, judicial, and policy analysis, the paper elucidates the proper interpretation and application of these clauses, highlighting necessary adaptations within the Indian regulatory paradigm.

CLAUSE 13.4: PAYMENT IN APPLICABLE CURRENCIES FOR VARIATIONS

Clause 13.4 of the FIDIC MDB 2010 provides that contract price adjustments especially those resulting from variations in the work undertaken shall be paid in the currencies and proportions specified within the contractual documents. This clause serves a dual function: firstly, preserving the

[5] Reserve Bank of India, *Master Direction on Import of Goods and Services* (1 January 2016, updated).
[6] *Foreign Exchange Management Act 1999*.
[7] *Foreign Exchange Management (Current Account Transactions) Rules 2000* (India).

currency composition agreed upon at contract inception, and secondly, safeguarding the contractor against adverse currency fluctuations impacting the adjusted sums.[8]

The clause contemplates that payments in foreign currencies correspond to actual foreign-sourced expenditures imported goods, equipment, or services forming a legitimate foundation for reimbursement in said currencies. MDB procurement practice insists on documentary evidence such as import customs documentation and supplier invoices to substantiate foreign currency claims.[9] This evidentiary requirement mitigates speculative or opportunistic recourse to foreign currency payments for inherently domestic or local costs, thus preventing contractors from inflating claims in hard currencies to the financial detriment of the employer and MDB financiers.

Nael Bunni notably characterises this clause as balancing commercial adaptability with financial rigour, recognising the profound importance of currency stability in international engineering and construction contracts.[10] Ellis Baker and colleagues further emphasise the interplay between contractual currency allocations and broader public law frameworks, including exchange control regulations which restrict the unilateral disposition of foreign currency monies.[11]

Contracts governed by the FIDIC MDB 2010 thus bind the contractor to the currency proportions set forth at tender, yet condition entitlement to foreign currency payments upon bona fide foreign expenditure, aligning contractual currency risk allocation with genuine financial outlays.

Clause 14.15: Currencies of Payment for Contract Price

Clause 14.15 regulates the currencies in which payments both interim and final shall be rendered to the contractor. It mandates strict adherence to the pre-agreed currency breakdown, customarily documented in the Appendix to Tender or equivalent contractual annexures.[12] This ensures payment certainty and volumetric predictability for both parties, preventing unilateral currency substitution or recalculation.

MDB loans are almost invariably denominated in a foreign currency (typically US dollars or Euros), while counterpart or local funding manifests in the project's domestic currency. Clause 14.15 enforces compliance with MDB disbursement practices, simultaneously accommodating contractors' currency needs, particularly for foreign procurement.

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[8] Ibid, cl 13.4.
[9] World Bank Procurement Guidelines (2011) ch 4.
[10] Nael G Bunni, *The FIDIC Forms of Contract* (3rd edn, Blackwell 2005) 308.
[11] Ellis Baker, Ben Mellors, Scott Chalmers and Anthony Lavers, *FIDIC Contracts: Law and Practice* (2nd edn, Routledge 2019).
[12] FIDIC cl 14.15.

The clause carries considerable import in the context of international projects featuring multiple currencies, volatile exchange rates, and macroeconomic instabilities. By predetermining payment currencies upfront, the clause shields the contracting parties from the uncertainties of currency fluctuation during contract execution.

Frequently stipulated currencies include major international stable currencies and the host country's currency. In some cases, multiple currencies are necessitated by diverse funding mechanisms or the presence of multinational stakeholders. Within MDB-financed projects, the payment currency split correlates closely with the anticipated sources of finance.

Among the risks mitigated are exchange rate volatility adversely affecting contract performance; disputes arising from currency conversions; and payment delays attributable to currency settlement negotiations.[13]

PRACTICAL CONFLICT: FOREIGN CURRENCY CLAIMS FOR LOCAL PROCUREMENT

A recurring practical dilemma arises where contractors, obliged under the contract to demonstrate foreign expenditure commensurate with foreign currency payment claims, instead procure goods or services domestically but seek reimbursement in foreign currency. Such claims often face resistance from employers, particularly when MDB auditors demand documentary proof of foreign sourcing, including Bills of Entry, shipping records, and foreign supplier invoices.

Contractors may contest the requirement, asserting that the contract entitles them to payment in foreign currency according to the agreed currency breakdown regardless of actual procurement origin. Employers counter that contractual rights are subject to notions of good faith and the mandatory monetary laws of the project jurisdiction.

Resolving this tension revolves around the interpretation of Clause 14.15 in conjunction with Clause 13.4 and applicable law. To permit foreign currency payments without corresponding foreign outlays would risk transforming contractual currency regimes into speculative devices, undermining the financial integrity of MDB-funded projects.

[13] Phillip Loots and Donald Charrett, 'Currency Risks and FIDIC Contracts' (2015) 32(3) *International Construction Law Review* 311.

INTERPLAY AND INTERPRETATION OF CLAUSES 13.4 AND 14.15

Clauses 13.4 and 14.15 address different stages of contract financial management: valuation and payment. Clause 13.4 prescribes the currencies applicable for valuation adjustments, while Clause 14.15 dictates the actual payment currencies. Crucially, these clauses operate in tandem rather than in isolation.

Jeremy Glover cogently notes that currency proportions established by the contract, while binding, must not supersede the essential principle that foreign currency payments correspond to foreign obligations. Failure to observe this condition risks rendering Clause 14.15 a 'blank cheque' enabling unwarranted currency speculation.[14]

This legal principle recurs in variegated judicial and arbitral pronouncements, underscoring the conditional nature of foreign currency entitlement on proof of foreign expenditure.

INDIAN REGULATORY REGIME AND EVIDENTIARY REQUIREMENTS

In India, the statutory framework regulating foreign exchange is governed principally by the Foreign Exchange Management Act 1999 ('FEMA')[15], FEMA liberalises many current account transactions while maintaining strict RBI oversight and control over capital account transactions. Section 3 of FEMA proscribes dealing in or transferring foreign exchange save as permitted by RBI regulations.

Payments under construction contracts claiming foreign currency to fund imports fall within current account transactions but are strictly regulated by the Foreign Exchange Management (Current Account Transactions) Rules 2000, the RBI's Master Directions on Import of Goods and Services, and associated circulars.[16] Compliance requires contractors and employers to substantiate foreign currency payments with:

- Bills of Entry evidencing customs clearance of imports
- Foreign supplier invoices
- SWIFT messages confirming overseas payments
- Chartered Accountant certifications under FEMA guidelines

[14] Jeremy Glover, *FIDIC Contracts: Practical Legal Guidance* (2nd edn, Routledge 2018).
[15] *Foreign Exchange Management Act 1999*
[16] RBI, Master Direction on Import of Goods and Services (2016).

Failure to produce requisite documentation may result in the prohibition of foreign currency remittance, imposition of penalties under Section 13 of FEMA (including fines up to three times the amount involved), and potential tax scrutiny.

The Supreme Court in *Renusagar Power Co Ltd v General Electric Co*[17] recognised the enforceability of foreign currency contractual obligations but clarified that they are subject to exchange control laws, requiring contract terms to harmonise with FEMA mandates. Consequently, FIDIC Clauses 13.4 and 14.15, when applied in India, must be interpreted subject to FEMA and RBI regulatory requirements. Contractors cannot claim reimbursement in foreign currency in the absence of documentary proof of foreign procurement. Employers, bound by RBI rules, cannot lawfully disburse foreign currency without supporting evidence, notwithstanding contract provisions.

INTERNATIONAL AND INDIAN CASE LAW AND ARBITRAL INTERPRETATIONS

International arbitral tribunals and domestic courts have consistently interpreted Clauses 13.4 and 14.15 restrictively in regard to foreign currency claims absent corresponding foreign expenditure.

In the landmark ICC Case No. 10619 (2001)[18], the tribunal confronted a foundational conflict between contract and sovereign regulation, ruling decisively that a contractual entitlement to foreign currency cannot override the host state's mandatory exchange control laws. The contractor's claim for payment in foreign currency for locally sourced materials was dismissed because the tribunal deemed such laws a matter of essential public policy, designed to protect national economic stability. Critically, the award established that the validity of a foreign currency claim depends not on contractual language alone but on the underlying economic reality.

At an ICSID arbitration, *Impregilo SpA v Pakistan* (2005), although primarily addressing delay claims, the tribunal obiter noted that under FIDIC contracts 'foreign currency payments are anticipated only where they correspond to foreign obligations', reinforcing the principle that foreign currency allocations must reflect expenditure realities.[19]

[17] Renusagar Power Co Ltd v General Electric Co [1994] Supp (1) SCC 644.
[18] ICC Case No 10619 (2001).
[19] *Impregilo SpA v Pakistan* ICSID Case No ARB/03/3 (Award, 2005).

In India, the Bombay High Court in *Centrotrade Minerals & Metals Inc v Hindustan Copper Ltd* gave effect to arbitral awards involving foreign currency payments but emphasised enforcement remained subject to FEMA.[20]

These cases confirm that Indian law, consistent with MDB practice, subordinately conditions contractual currency rights on regulatory compliance. An Indian contractor claiming foreign currency for locally sourced inputs would likely be precluded without evidence of genuine foreign expenditure. MDB procurement rules further codify this position, which explicitly require that foreign currency payments correspond to actual imports, supported by documentary evidence. For instance, the World Bank's Procurement Guidelines (2011) mandate such verification as a precondition to foreign currency disbursements[21]. Similarly, the Asian Development Bank's Disbursement Handbook (2012) obliges borrowers to certify that payments in foreign currency reflect genuine foreign expenditure.[22]

Accordingly, Clauses 13.4 and 14.15 of the FIDIC MDB Harmonised Edition 2010 must be interpreted consistently with these MDB financing institution requirements. Failure to do so exposes contractors to the risk of claim rejections, suspension of disbursements, or even blacklisting for non-compliance.

THE PROBLEM OF CONTRACTORS PROCURING LOCALLY BUT CLAIMING FOREIGN CURRENCY

This pervasive issue can be analysed doctrinally by contrasting two interpretive stances:

- Literal Approach: The contractor is entitled to foreign currency payments strictly according to the contract's currency allocation, regardless of actual expenditure patterns.
- Purposive Approach: Foreign currency payments should only be made to the extent actual foreign currency disbursement is demonstrated.

MDB practice, arbitral jurisprudence, and relevant legal scholarship overwhelmingly endorse the purposive approach as a safeguard against unjust enrichment.

World Bank and multilateral financed projects underscore transparency and accountability by requiring evidence of foreign expenditure before foreign currency disbursements. Contractors

[20] *Centrotrade Minerals & Metals Inc v Hindustan Copper Ltd* (2006) 11 SCC 245.
[21] World Bank Procurement Guidelines (2011)
[22] Asian Development Bank Disbursement Handbook (2012).

procuring domestically but claiming foreign disbursements contravene procurement rules. As Ellis Baker observes, 'payment in foreign currency is a protective device, not a windfall'.[23]

The perspective of ICC Case No. 10619 (2001) directly reinforces this analysis. The tribunal's foundational ruling characterized foreign currency clauses as mechanisms for reimbursement, not vehicles for financial speculation. Consequently, claims for foreign currency that are disconnected from demonstrable foreign outlays are deeply problematic; they distort the underlying project financing model, artificially inflate contractor margins, and fundamentally breach both the contract's intent and the financial discipline required by Multilateral Development Banks (MDBs). In refusing to honour such unsupported claims, employers are not merely exercising discretion but are fulfilling their dual obligations under the contract and relevant regulatory frameworks, a position entirely vindicated by the reasoning of the ICC award.

THE ENGINEER'S ROLE IN ADJUDICATING FOREIGN CURRENCY PAYMENT DISPUTES

The Engineer holds a central and quasi-judicial role in resolving disputes related to foreign currency payment claims under FIDIC-administered contracts, particularly when contractors seek reimbursement in foreign currency without demonstrating actual foreign procurement. This responsibility requires more than routine administrative review; it demands a thorough and impartial examination of all relevant documentation such as Bills of Entry, import licences, supplier invoices, shipping records, and payment confirmations including SWIFT messages to establish credible evidence of genuine foreign expenditure.

In instances where procurement originally planned as foreign-sourced is substituted by local procurement, the Engineer may invoke Clause 13.1 to classify this as a variation. Such treatment allows adjustment of the contract price and, where applicable, the currency allocation in accordance with Clause 13.4. This empowers the Engineer to determine new rates that reflect actual local procurement costs and the corresponding currency, potentially differing from the original foreign currency-based estimates.

This evaluative process must align closely with the overarching contractual framework. Clauses 13.4 and 14.15 of the FIDIC MDB 2010 delineate the currencies applicable for variations and the agreed currency split for all contract price payments. Simultaneously, stringent compliance with Indian

[23] Baker, Mellors, Chalmers and Lavers (n 11).

regulatory requirements namely the Foreign Exchange Management Act 1999 and Reserve Bank of India Directions necessitates rigorous evidentiary scrutiny. Beginning with the final contract documents, often documented in the Appendix to Tender, if the Contract Price is explicitly stated in local currency, then payments, including those for Bill of Quantities items initially quoted in foreign currency, are to be made accordingly. The contractual currency allocation thus supersedes preliminary quotations.

Clause 14.15 functions as a definitive control on foreign currency payments, limiting such payments strictly to the extent specified in the agreed currency breakdown. Unless the contract explicitly preserves foreign currency payment for certain line items, there is no contractual obligation for the Employer to make payments in currencies different from those stipulated. Consequently, payment entitlements rest on the contractually established currency proportions rather than the individual currency of BoQ quoted price.

Practically, if the Engineer determines that adequate proof of foreign expenditure is lacking or that the claimed amount exceeds the foreign currency share allocated under the contract, the decision to adjust or reject the claim must be clearly articulated. Adjustments typically involve converting disallowed foreign currency claims into local currency payments at the agreed or prevailing exchange rates, ensuring conformity with the contract's financial architecture and relevant public policy.

A well-reasoned, transparent, and documented determination by the Engineer serves not only as an adjudication of the specific dispute but also as a vital instrument for containing conflict. By clarifying the legal and regulatory bases for payments and facilitating early resolution, the Engineer effectively minimizes the escalation of disputes to the Dispute Adjudication Board or arbitration. In this capacity, the Engineer stands as a fundamental pillar of contractual compliance and dispute prevention, ensuring that foreign currency claims linked to locally sourced procurement are rigorously examined and resolved in harmony with both the contractual agreement and applicable law.

CONCLUSION

Clauses 13.4 and 14.15 of the FIDIC MDB Harmonised Edition 2010 establish a sophisticated mechanism for currency risk allocation that balances contractors' legitimate expectations for currency stability with employers' obligations under MDB financing conditions and sovereign exchange control regulations. These clauses operate within a broader regulatory matrix, especially in jurisdictions like India where FEMA and RBI Master Directions impose stringent documentary requirements to substantiate foreign currency claims.

Disputes arising from contractors procuring locally yet seeking foreign currency payments highlight the necessity for rigorous documentary scrutiny and principled adjudication. The Engineer's proactive role in assessing and adjusting claims before escalation is essential to aligning contractual payments with bona fide expenditures, preserving financial discipline, and ensuring compliance with mandatory foreign exchange law.

Ultimately, the effective administration of foreign currency payments under Clauses 13.4 and 14.15 depends on an integrated approach encompassing contract law, MDB policy mandates, domestic monetary regulation, and vigilant contract management. Through such holistic integration and active dispute prevention, international construction contracts can harmonise commercial fairness with regulatory compliance amid the complexities of multi-currency project execution.

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