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Liquidated Damages and Project Losses: A Comparative Approach

Liquidated Damages: A Legal Crossroad

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In infrastructure and energy projects, delays can have significant financial consequences especially for project companies whose entire business model is built on timely completion and commercial operation. To mitigate this risk, parties often include liquidated damages ("LD") clauses in their contracts.

How the chain of LD's risks cascade between the parties is a crucial issue for a project's bankability and successful completion.

Typically, in energy projects, LD's risk is often passed down the chain, with the off-taker transferring liability to the developer, who in turn shifts it to the EPC contractor, and further down to subcontractors, each LD's obligor effectively passing the buck to the next.

This article explores how courts in the UK, Singapore, and Mauritius evaluate the enforceability of LD clauses in relation to delays in achieving contractual milestones in project agreements.

The UK Approach: From Pre-Estimate of Loss to Legitimate Interest

The enforceability of liquidated damages clauses under English law evolved with the Supreme Court's decision in ***Cavendish Square Holding BV v Makdessi [2015] UKSC 67***. While the earlier test in ***Dunlop Pneumatic Tyre Co Ltd v New Garage [1915] AC 79*** focused on whether the clause was a genuine pre-estimate of loss, Cavendish shifted the focus to whether the clause protects a legitimate commercial interest and imposes a proportionate consequence.

This principle was applied in ***GPP Big Field LLP & Anor v Solar EPC Solutions SL [2018] EWHC***, the High Court, held that the enforceability of the LD clause did not depend on evidence of actual loss. Instead, the Court found that the clause, agreed at the time of contracting, served a valid commercial purpose, which was compensating the employer for the loss of opportunity and delay in delivery of an operational project.

The approach in GPP underscores that a genuine pre-estimate of loss remains a valid justification, but not a necessary condition. A liquidated damages clause may still be upheld even if it does not correspond exactly to the actual loss suffered, provided it is not extravagant, unconscionable, or intended to punish. This principle was further confirmed by the UK Supreme Court in ***Triple Point Technology Inc v PTT Public Company Ltd [2021] UKSC 29***, which clarified that LD generally accrued up to the point of termination, after which general damages may be claimed unless the contract provides otherwise.

The English position favours commercial certainty where LD clauses will be enforced even where actual loss is absent, so long as they are not extravagant or punitive.

Singapore's Approach: A Return to Traditional Principles

In ***Denka Advantech Pte Ltd v Seraya Energy Pte Ltd [2021] 1 SLR 631***, the Singapore Court of Appeal reaffirmed the traditional rule that LD clauses must reflect a genuine pre-estimate of loss. The court rejected the broader Cavendish approach and held that commercial justification alone cannot save a penal clause.

The Court held that in Singapore, commercial justification alone does not suffice to save a penal clause. Liquidated damages must remain compensatory in nature. In Denka, the clauses were ultimately upheld because the amounts were not excessive and were supported by expert evidence showing they reflected anticipated losses at the time of contracting. The case confirms that Singapore adheres to a more traditional, compensation-based approach placing greater emphasis on predictability and contractual fairness over commercial flexibility.

While both England and Singapore recognise the value of LD clauses, they apply different standards. The English courts have taken a more flexible, commercially minded approach, particularly after Cavendish, allowing clauses that go beyond compensation if they protect a legitimate interest. Singapore, on the other hand, has retained the traditional position that LD must remain compensatory in nature, and the clause will only be upheld if it reflects a genuine pre-estimate of loss.

Mauritius' Approach: Moderated Enforcement Under Civil Law Principles

Mauritius adopts a measured and equitable approach to LD, grounded in Article 1152 of the Civil Code, which allows parties to fix damages in advance but permits judicial moderation if the amount is manifestly excessive or derisory. The courts consistently emphasise that LD must be compensatory in nature, not punitive, and must reflect a reasonable approximation of anticipated loss.

In ***Alliance Builders Contractors Ltd v Coolkote Enterprise Ltd [2017 MR 299]***, the Supreme Court refused to enforce a penalty clause contained in a main contract between a contractor and an employer against a subcontractor. Although the subcontract made reference to the main contract, the Court found that the subcontractor had not been sufficiently made aware of the specific penalty clause nor agreed to its terms. The Court stressed that LD provisions must be clearly incorporated into the relevant contract and reflect the parties' true consent. The Court also found that the scale of the claimed delay damages was clearly disproportionate in relation to the value of the subcontract and could not reasonably have reflected the true intention or mutual contemplation of the parties at the time of contracting.

This decision underscores the Court's commitment to fairness and reasonableness, reinforcing that under Mauritian law, a penalty clause must be clearly agreed upon and proportionate to the contract's value. Courts retain the discretion to reject such clauses if they appear punitive or if their enforceability would violate the principle of good faith.

Mauritian courts will generally uphold such clauses where they reflect a genuine attempt to estimate loss and align with commercial expectations. However, the courts retain the discretion to moderate or increase the amount, depending on the circumstances. This was reaffirmed in ***Bistrots des Îles Ltée v Sanmukhiya N. [2020] SCJ 184***, where the Supreme Court reduced a penalty interest of 5% per month to the legal rate, finding it disproportionate to the actual prejudice suffered.

More recently, in ***V.5 Co Ltd v Ramdonee & Anor [2024 SCJ 165]***, the Court upheld a fixed penalty sum but refused to enforce an additional 15% annual interest due to lack of proven loss and the debtor's good faith. These cases illustrate that while Mauritian courts respect the autonomy of contracting parties, they will intervene where a clause appears punitive or inequitable. Therefore, the courts retain the power under Article 1152 to reduce or strike out LDs that appear to be clearly excessive if the breaching party can demonstrate that its conduct is not tainted of bad faith.

In its publication of November 2023 **[LRC _ R & P 175]** the Law Reform Commission defines the concept of « Bad Faith » as « *La bonne foi, dans sa conceptualisation la plus large, est envisagée comme <u>une norme de conduite dictant l'honnêteté, la loyauté et la confiance entre les parties contractantes</u>* » [emphasis is ours].

Taken together, these cases show that Mauritian courts adopt an approach broadly aligned with the Singaporean model prioritising a compensatory rationale and enforcing LD clauses only where they are reasonable, proportionate, and reflect actual or foreseeable loss. However, under Article 1152 of the Civil Code, courts retain discretion to adjust the quantum, particularly where there is evidence of good or bad faith on the part of the breaching party.

When delays are unavoidable, a party exposed to liquidated damages must act in utmost good faith by mitigating delay, maintaining transparency, and cooperating with the other party. A lack of such conduct may bar relief under Article 1152 or indicate bad faith.

Conclusion

While England, Singapore, and Mauritius apply different standards ranging from England's legitimate interest test to Singapore and Mauritius's compensatory approach, all three jurisdictions recognise the importance of LD clauses in commercial contracts. So long as the clause is not punitive and reflects a fair allocation of risk, courts across these jurisdictions are prepared to uphold.