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Change in Law in Enforceability of Liquidated Damages

Cubic Electronics Sdn Bhd v Mars Telecommunications Sdn Bhd (FC)
[Appeal No 02(f)-64-09/2016(W)]

The Federal Court's decision in *Cubic Electronics Sdn Bhd v Mars Telecommunications Sdn Bhd (Cubic Electronics)* appears to represent a dramatic change in law in respect of liquidated damages (LAD) clauses — especially important in the construction industry.

An LAD clause is a provision which stipulates the agreed sum of damages for failure to perform under a contract (often used in the construction industry for delays in completion of works). Such provision is commonly enforceable in other jurisdictions. However, the law in Malaysia has long been that an innocent party, in a contract that has been breached, cannot recover *simpliciter* the sum fixed in an LAD clause — he must prove the actual loss suffered unless his case falls within a limited category of cases where it is difficult to assess actual damage or loss: see *Selva Kumar*.^[1]

In modifying the principles enunciated in *Selva Kumar*, the Federal Court in *Cubic Electronics* held:

- (a) The initial onus lies on the party seeking to enforce the LAD to adduce evidence that:
 - i. There was a breach of contract; and
 - ii. The contract contains a clause specifying a sum to be paid upon breach.
- (b) Once the two elements have been established, *the innocent party is entitled to receive a sum not exceeding the amount stipulated in the contract, irrespective of whether actual damage or loss is proven*, unless the defaulting party proves the unreasonableness of the LAD clause including the sum stated therein.
- (c) If there is a dispute as to what constitutes “*reasonable compensation*”, the burden of proof falls on the defaulting party to show that the LAD clause including the sum stated therein is unreasonable.

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Selva Kumar Murugiah v Thiagaraja Retnasamy [1995] 1 MLJ 817 (FC)