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LAD Unenforceable Upon Early Termination of Contractor

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Triple Point Technology, Inc v PTT Public Company Ltd^[1]

Contracts commonly impose liquidated damages (**LAD**) for delays up to the actual completion of works. These are often thought to be enforceable even where the contract is terminated midway through the project. However, the English Court of Appeal in *Triple Point* has found that such LAD clauses may not always be enforceable particularly if works remain incomplete.

In *Triple Point*, a contractor was engaged to provide software and related services but faced difficulties in progressing the works in a timely manner. The contract was eventually terminated with the works left partially completed. LAD was then sought against the contractor “per day of delay from the due date for delivery up to the date [the employer] accepts such work”.

Reading the above LAD clause, the court found that LAD was dependent on the completion of works. Put differently, where works were incomplete, the LAD clause could not be enforced by the employer. Applied to a scenario of sectional works, LAD could only be imposed for delays in sections where works were complete but not for those where works were outstanding. However, the court noted that the same outcome may not be the case and would depend on the specific wording of the LAD clause.

The English case bears significantly on the Malaysian construction industry. Where a Malaysian contract contains a similarly-worded LAD clause, *Triple Point* may persuade a Malaysian court to limit its enforceability and the remedy intended for enforcing party. Commercial parties should, therefore, revisit their LAD clauses to ensure that their interests are properly protected in cases of delays as intended.

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