WONG PARTNERSHIP

LAW WATCH

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DEALS

WONGPARTNERSHIP LLP ACTS IN…
The Singapore Economic Development Board's loan investment to Arcturus Therapeutics for a COVID-19 vaccine

WongPartnership acts for the Singapore Economic Development Board ("**EDB**") in the loan investment of US$45 million to Arcturus Therapeutics, Inc. ("**Company**") for the purpose of financing the development and manufacturing of a COVID-19 vaccine ("**Vaccine**"). EDB will have the right to purchase up to US$175 million of the vaccine.

The Company is a leading clinical stage messenger ribonucleic acid ("**RNA**") medicines company focused on the discovery, development and commercialisation of therapeutics for rare diseases and vaccines. It is currently developing a vaccine candidate, known as LUNAR-COV19, against SARS-CoV-2 that utilises the Company's self-transcribing and replicating internal messenger RNA (STARR™) technology and the Company's LUNAR® lipid-mediated delivery in order to produce a SARA-CoV-2 coronavirus vaccine for shipment into Singapore.

The transaction called for adherence to a strict and tight completion timeline while melding variable components into one ultimate, cohesive financing structure. It also required dealing with a myriad of issues while maintaining a delicate balance of interests of the various stakeholders to arrive at practical and effective commercial and legally sound solutions for our clients.

Partners involved in the transaction are Alvin Chia from the Banking & Finance Practice; and Ong Sin Wei and Kyle Lee from the Mergers & Acquisitions Practice.

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Other recent matters that WongPartnership was involved in were:

DESCRIPTION	TYPE
Acted in the refinancing of offshore term and revolving loan facilities relating to listing of the units of Sasseur REIT (in an aggregate amount of approximately S$248,700,000) to DBS Trustee Limited (in its capacity as trustee of Sasseur Real Estate Investment Trust) as part of an onshore / offshore financing	Banking & Finance
Acted in the S$900 million Suntec REIT financing with DBS and OCBC as mandated lead arrangers	Banking & Finance
Advised on the joint venture between Temasek Holdings and Singapore Exchange Limited to boost digital asset infrastructure in capital markets	Corporate/Mergers & Acquisitions
Acting in the possible mandatory conditional cash offer by Tianjin Pharmaceutical (Singapore) International Investment Pte. Ltd. for all the issued shares of Tianjin Zhong Xin Pharmaceutical Group Corporation Limited ("**Target**") listed on the Singapore Exchange Securities Trading Limited, and the possible mandatory unconditional cash offer by Jinhushen Biological Medical Science and Technology Co., Ltd (津沪深生物医药科技有限公司) for all the issued shares of the Target listed on the Shanghai Stock Exchange	Corporate/Mergers & Acquisitions
Acted in the proposed acquisition by Clay Holdings III Limited ("**Clay**") (which is indirectly owned by Mr. Lim Chap Huat (Executive Chairman of Soilbuild Group Holdings Ltd.) and an entity established by funds managed by affiliates of Blackstone Real Estate) of all the issued units in Soilbuild Business Space REIT via a trust scheme of arrangement, with Citigroup Global Markets Singapore Pte. Ltd. as financial adviser to Clay	Corporate/Mergers & Acquisitions REITS
Acted in the establishment by Temasek Holdings of Connect@Singapore, a new travel initiative and localised bubble that combines a new quarantine-free travel arrangement with dedicated short-stay facilities for short-term business travellers	Corporate/Mergers & Acquisitions Energy, Projects & Construction
Acting in the acquisition by Blueleaf Energy (a portfolio company of Macquarie's Green Investment Group), of a majority stake in an Indian clean energy solutions provider, Vibrant Energy Holdings, from ATN International	Corporate/Mergers & Acquisitions
Acting in the establishment of a S$1 billion multicurrency debt issuance programme by Lendlease Global Commercial REIT	Debt Capital Markets
Acting in the disposal of Ascendas China Business Parks Fund 4's interests in Ascendas Xinsu Portfolio, Ascendas Innovation Towers and Ascendas Innovation Hub to CapitaLand Retail China Trust	Corporate/Mergers & Acquisitions

ARBITRATION

A Cautionary Tale on Witness Gating

The Singapore Court of Appeal has upheld the Singapore High Court's decision in *CBP v CBS* [2020] SGHC 23 to set aside an arbitral award on the basis that the sole arbitrator's decision not to hold a hearing for the presentation of oral evidence from one party's witnesses amounted to witness gating in breach of the rules of natural justice: *CBS v CBP* [2021] SGCA 4.

Our Comments

Whilst the Court of Appeal accepted that witness gating may be permissible as part of a tribunal's general case management powers and in the interests of the efficient and effectual conduct of arbitration proceedings, the Court of Appeal cautioned that this is not an unfettered power that overrides the rules of natural justice. Much will depend on the specific facts and circumstances of each case – including the scope of the tribunal's powers provided for in the arbitral rules, any agreement between the parties, the reasons for witness gating, and the relevance and necessity of the witnesses' evidence to the determination of the dispute between the parties.

Although the arbitration was conducted under the Rules of the Singapore Charter of Maritime Arbitration (3rd Edn, 2015) ("**SCMA Rules**") and the issue turned primarily on the interpretation of Rule 28.1 of the SCMA Rules ("**Rule 28.1**"), this case has implications for arbitrations more generally given that Rule 28.1 is substantially similar to Article 24 of the UNCITRAL Model Law, and finds equivalent expression in the rules of most major arbitral institutions (such as Rule 24.1 of the Arbitration Rules of the Singapore International Arbitration Centre) and also Article 17(3) of the UNCITRAL Arbitration Rules.

The Court of Appeal's decision is also significant for clarifying that the Court of Appeal does not have original jurisdiction over an application to set aside an award and that its role in this context is limited to reviewing the High Court's decision. Where a party has not, in the first instance, sought an order for the award to be remitted to the tribunal to cure the grounds for setting aside, the Court of Appeal does not have the power to make such an order on appeal.

This update takes a look at the Court of Appeal's decision.

Background

The appellant was a bank ("**Bank**") and the respondent was a company engaged in the business of steel manufacturing and power generation ("**Buyer**"). The Buyer entered into two agreements with a third party ("**Seller**"), under which the Buyer agreed to purchase 50,000 metric tonnes ("**MT**") of coal from the Seller at a price of US$74 per MT. The coal was to be delivered in two shipments and the agreements contained an arbitration clause which provided for arbitration under the SCMA Rules.

The Seller had earlier entered into an accounts receivable purchase facility with the Bank under which the Seller had assigned its trade debts to the Bank. All amounts due from the Buyer to the Seller under the agreements were therefore payable to the Bank, and the Buyer was duly notified of this.

Underlying dispute

Some months later, disputes arose over the second shipment of coal with the Buyer alleging that there was a shortfall and refusing to make any payment for the entire shipment. Representatives of the Buyer and the Seller met to discuss the outstanding payment and the alleged shortfall ("**Meeting**"). Whilst it was not disputed that the Meeting took place, what transpired during the Meeting was disputed.

According to the Buyer, the parties reached an oral agreement for the global settlement of their disputes; specifically, that both parties agreed that the price of the coal would be revised to US$61 per MT for all 50,000 MT of coal contracted under the two agreements. The Seller contended that no such oral agreement was reached at the Meeting.

Subsequently, not having received any payment, the Bank commenced arbitration against the Buyer and a sole arbitrator was appointed under the SCMA Rules.

Witness gating

In the arbitration, the issue of whether the Buyer's witnesses should be permitted to give oral testimony at a hearing was hotly contested.

Along with its defence and counterclaim, the Buyer had submitted a list of seven witnesses, six of whom were persons which the Buyer claimed were present at the Meeting. On the other hand, the Bank informed the arbitrator that it did not intend to call any witnesses, as it was of the view that the dispute turned primarily on contractual interpretation.

The arbitrator then requested the Buyer to provide its reasons for calling the seven witnesses and to explain the need for their oral testimony. In response, the Buyer stated simply that an oral hearing was "required and necessary". Dissatisfied with the Buyer's response, the arbitrator directed the Buyer to submit detailed written statements from each of the witnesses that the Buyer intended to call, before the arbitrator would decide whether an oral hearing was necessary.

This led to a chain of correspondence in which the Buyer asserted, amongst other things, that the arbitrator's direction was a breach of the rules of natural justice and that the calling of witnesses to give oral testimony was within its entitlement under Rule 28.1, which provided as follows:

> ***Unless*** the parties have agreed on a documents-only arbitration or that no hearing should be held, the Tribunal ***shall*** hold a hearing for the presentation of evidence by witnesses, including expert witnesses, ***or*** for oral submissions.
>
> (Emphasis added)

The arbitrator eventually directed that, since the parties had not agreed to a documents-only arbitration, pursuant to Rule 28.1, a hearing would be held *for oral submissions only*, with no witnesses to be presented at the hearing as the Buyer had "failed to provide witness statements or any evidence of the substantive value of presenting witnesses".

A day before the scheduled hearing, the Buyer wrote to the arbitrator to reiterate that the denial of witness examination was "a violation of [the] principles of natural justice and also against the principles of [a] full

and fair hearing", and asserted that the hearing would be a "mere formality" and that "no fruitful purpose [was] served" by its participation.

The arbitrator proceeded with the hearing *via* telephone without the Buyer's participation and without any witnesses called to give oral testimony. The arbitrator found in favour of the Bank and issued his Final Award.

The Buyer then applied to set aside the entirety of the Final Award, chiefly on the ground that the arbitrator's refusal to allow its witnesses to give oral testimony at the hearing constituted a breach of natural justice in connection with the making of the Final Award and that the rights of the Buyer were prejudiced as a result.

The High Court's Decision

The High Court Judge found that there was a breach of the rule of natural justice that parties must have the opportunity to be heard by the arbitral tribunal.

In this regard, the main point of contention was the interpretation of Rule 28.1. In particular, whether the word "or" in the last part of the Rule should be read disjunctively such that the arbitrator could decide whether to hold a hearing for the presentation of evidence *or* only for oral submissions, which was what the arbitrator had effectively done.

The High Court Judge held that Rule 28.1 does not support the Bank's assertion that the arbitrator had wide-ranging witness-gating powers such that he could reject all of the Buyer's witnesses by deciding to allow a hearing *only* for oral submissions. The High Court Judge was of the view that, when read holistically, Rule 28.1 did not mean that oral submissions were an *alternative* to the presentation of witness evidence but rather, where parties have not agreed to a documents-only arbitration, they must be allowed to call witnesses to give evidence, if they wish to do so.

The High Court Judge acknowledged that, while Rule 25.1 of the SCMA Rules gave the arbitrator general and broadly worded case management powers, this did not allow the arbitrator to gate all of the Buyer's witnesses. In the High Court Judge's view, those procedural powers are not unfettered and must be balanced against the rules of natural justice.

Given the centrality of the oral settlement agreement that was purportedly reached at the Meeting to the Buyer's defence to the Bank's claim, the High Court Judge was satisfied that there was a sufficiently serious breach of the fair hearing rule and that this breach was directly connected to the making of the Final Award. The High Court Judge also found that there was some actual or real prejudice caused to the Buyer as the Buyer's defence based on the purported oral settlement agreement could supersede the documentary evidence which the Bank and the arbitrator had relied on which suggested that the Buyer had admitted to liability for the outstanding payment.

For these reasons, the Judge set aside the Final Award in its entirety for breach of natural justice and the Bank appealed to the Court of Appeal.

The Court of Appeal's Decision

The Court of Appeal agreed with the High Court Judge's interpretation of Rule 28.1 and finding that there had been a material breach of the rules of natural justice, and dismissed the appeal.

The Court of Appeal held that Rule 28.1 does not give the arbitrator the power to choose what type of hearing to hold in the absence of an agreement between the parties on a documents-only arbitration or that no hearing should be held. The Court of Appeal found that the Buyer was unequivocal in its insistence on a hearing for the presentation of oral testimony from its witnesses and the Buyer was acting within its legal rights to do so. The Court of Appeal also held that Rule 28.1 also does not give the arbitrator the power to impose a condition that the Buyer had to show that the oral testimony of its witnesses had "substantive value" before deciding whether to allow an oral hearing for the presentation of witness testimony.

Whilst the Court of Appeal accepted that tribunals have the power to limit the oral examination of witnesses as part of their general case management powers, the Court of Appeal held that this cannot be an unfettered power that overrides the rules of natural justice, not least given that Section 24(b) of the International Arbitration Act and/or Article 34(2)(a)(ii) of the UNCITRAL Model Law specifically provides that an award rendered in breach of the rules of natural justice by which a party's rights have been prejudiced is liable to be set aside. Whilst due latitude will be given to tribunals to control the proceedings, in the final analysis, the tribunal must weigh the desire for efficient and effectual proceedings against the necessity of affording parties their right to be heard. This balance is not amenable to prescriptive rules and each case will turn on its precise facts and circumstances.

The Court of Appeal also agreed with the High Court Judge that the breach of natural justice was directly connected to the making of the Final Award, and that the Buyer had suffered prejudiced. For these reasons, the Court of Appeal was satisfied that all the requirements for setting aside the Final Award for breach of natural justice were met and affirmed the decision of the High Court.

Also of significance is the Court of Appeal's finding that, where the Bank had not in the proceedings before the High Court Judge sought an order for the Final Award to be remitted to the arbitrator with a view to curing the breach of natural justice, the Court of Appeal does not have the power to make such an order. This is because the "court" referred to in Article 34(4) of the UNCITRAL Model Law which gives the "court" the power to remit the award back to the tribunal to cure the grounds for setting aside, is a reference to the High Court and not the Court of Appeal, and the power of remission under Article 34(4) is a matter reserved to the High Court. In the context of the setting aside of an award, the role of the Court of Appeal is limited to reviewing the High Court's decision on the matter.

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Singapore High Court Clarifies Law on Arbitration Agreements

The Singapore High Court has held that a clause requiring the parties to "consider resolving the dispute or difference through mediation" before referring the dispute to "arbitration or court proceedings" was not a valid arbitration agreement, but the parties had separately entered into a valid arbitration agreement through their subsequent conduct and correspondence: *Cheung Teck Cheong Richard and Ors v LVND Investments Pte Ltd* [2021] SGHC 28.

Our Comments

This update takes a look at the High Court's decision holding that, although the arbitration agreement set out in the contracts between the parties was invalid, the parties had subsequently entered into a valid and binding arbitration agreement through their conduct and correspondence in two sets of arbitration proceedings. In addition, the Court applied section 4(6) of the Arbitration Act to deem an effective arbitration agreement between the parties.

The High Court's decision highlights that the act of starting an arbitration can itself be regarded as an offer by the claimant to arbitrate the dispute, and participation in that arbitration without reservation by the respondent could amount to an acceptance that the dispute should be resolved by arbitration. Parties should also be mindful that an act or statement indicating an express or implicit consent to the arbitration may amount to an arbitration agreement under the Arbitration Act. A party which does not wish to submit a dispute to arbitration should clearly state so. The courts will not allow parties to approbate and reprobate in this regard.

Background

The defendant was the developer of a shopping mall and the 16 plaintiffs the owners of 12 shop units pursuant to 12 separate sale and purchase agreements ("**SPAs**").

Each SPA contained the following clause ("**Clause 20A.1**"):

> The Vendor and Purchaser agree that before they refer any dispute or difference relating to this Agreement to arbitration or court proceedings, they shall consider resolving the dispute or difference through mediation at the Singapore Mediation Centre in accordance with its prevailing prescribed forms, rules and procedures.

The plaintiffs later claimed that the defendant had, through its agents or representatives, made fraudulent (or, alternatively, negligent) misrepresentations to the plaintiffs to induce them to purchase their respective shop units in the shopping mall.

Following the commencement and termination of two arbitrations, the plaintiffs commenced court proceedings against the defendants for misrepresentation. The defendant then filed an application to stay the court proceedings pursuant to section 6(1) of the Arbitration Act.

At first instance, the Assistant Registrar held that:

- Clause 20A.1 did not constitute an arbitration agreement because, *inter alia*, it "does not indicate a choice by parties to resolve the dispute by arbitration".

- Nevertheless, the parties had entered into a valid arbitration agreement through their conduct and correspondence, such that the court proceedings should be stayed.

Both parties appealed against the Assistant Registrar's decision.

The High Court's Decision

The High Court Judge dismissed both appeals and upheld the findings of the Assistant Registrar. The High Court Judge held that Clause 20A.1 was not a valid arbitration agreement within the meaning of section 4(1) of the Arbitration Act.

The High Court Judge highlighted that:

- For there to be a valid arbitration agreement, there has to be an agreement by the parties to *submit* to arbitration. The agreement must contain the consent of both parties to be *bound* to arbitrate.

- Clause 20A.1 was not a valid arbitration agreement because it did not objectively evince any intention by the parties to be bound to submit their disputes arising from the SPAs to arbitration. The express words of Clause 20A.1 only stipulated that the parties had a duty to *consider mediation,* after which the parties *then* had to agree on whether to refer the dispute "to arbitration or court proceedings".

- The mere fact that Clause 20A.1 did not specify the seat of arbitration, arbitral institution, or arbitral rules was not determinative of whether it was or was not a valid arbitration agreement.

Notwithstanding the above, the High Court Judge found that the parties nevertheless had, by their conduct and correspondence, concluded a valid and binding arbitration agreement:

- The plaintiffs had initiated arbitration proceedings twice before commencing court proceedings. In the first arbitration, the defendant did not dispute the plaintiffs' position that Singapore was the seat of the arbitration, but disputed only the application of the Arbitration Rules of the Singapore International Arbitration Centre and whether the Singapore International Arbitration Centre would administer the arbitration. In the second arbitration, the plaintiffs expressly took the position in their Notice of Arbitration that the defendant had agreed to *ad hoc* arbitration in Singapore, and the defendant did not dispute the plaintiffs' assertion. Accordingly, the High Court Judge found that the parties had agreed to submit their disputes to arbitration seated in Singapore.

- The parties' arbitration agreement satisfied the requirements under section 4(1) of the Arbitration Act. In addition, the written record of the arbitration agreement was found in the parties' correspondence relating to both sets of arbitration proceedings, thereby satisfying section 4(3) of the Arbitration Act.

- In both sets of arbitration proceedings, the defendant did not dispute the existence of an arbitration agreement.

- In the circumstances, through their conduct and expressed statements, the parties had reached an agreement to arbitrate independently of Clause 20A.1.

- In addition, the High Court Judge found that an "effective" arbitration agreement was deemed pursuant to section 4(6) of the Arbitration Act, which provides that:

  > "Where in any arbitral or legal proceedings, a party asserts the existence of an arbitration agreement in a pleading, statement of case or any other document in circumstances in which the assertion calls for a reply and the assertion is not denied, there shall be deemed to be an effective arbitration agreement as between the parties to the proceedings. "

- There does not need to be a pre-existing arbitration agreement before section 4(6) of the Arbitration Act can operate. For example, whilst there is no duty on a party to respond to a notice of arbitration if the party takes the position that there is no arbitration agreement, if there is a response, and that response indicates an intention to participate in the arbitration without reserving their rights as to the lack of an arbitration agreement, that would constitute an effective arbitration agreement under section 4(6) of the Arbitration Act. The High Court Judge took the view that it would be abhorrent if, in such a situation, one party can subsequently withdraw from the process by raising the issue of the lack of an arbitration agreement.

- The High Court Judge further found that the deeming of an effective arbitration agreement pursuant to section 4(6) of the Arbitration Act creates an arbitration agreement that binds the parties even *outside* of the particular arbitration or other legal proceedings in which the assertion and acceptance or non-denial of the existence of the arbitration agreement was made.

The High Court Judge rejected the plaintiffs' submission that any purported arbitration agreement was, in any case, vitiated by the doctrine of mistake and should be set aside because such an agreement arose pursuant to the parties' mistaken belief that Clause 20A.1 was a valid and binding arbitration clause when it was not.

The High Court Judge noted that the fact that Clause 20A.1 was not an arbitration agreement did not *ipso facto* mean that the parties were mistaken as to its legal effect and there was no evidence that either the plaintiffs or the defendant were under any operative mistake as to its effect. In any event, the High Court Judge was of the view that the parties had, independently of Clause 20A.1, agreed to arbitrate their disputes over the SPAs on an *ad hoc* basis and there was no evidence to show that the parties were under any mistake that there was a separate agreement to arbitrate their disputes on an *ad hoc* basis.

In the circumstances, the High Court Judge agreed with the Assistant Registrar that the court should exercise its discretion to stay the court proceedings, and dismissed the appeals.

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CONTRACT

Singapore Court of Appeal Clarifies Law on Penalty Clauses in Singapore

Authored by Partner Chan Hock Keng with contribution from Senior Associate Chen Chi

The Singapore Court of Appeal has affirmed that, in Singapore, the legal test for determining whether a contractual provision is a penalty clause remains that enunciated in *Dunlop Pneumatic Tyre Company, Ltd v New Garage and Motor Company, Limited* [1915] AC 79 ("***Dunlop* test**"), i.e., whether the impugned clause provided a genuine pre-estimate of the likely loss at the time of contracting. It declined to extend the rule against penalties ("**Penalty Rule**") beyond breaches of contract or to adopt the wider "legitimate interest" standard laid down by the UK Supreme Court in *Cavendish Square Holding BV v Makdessi* [2016] AC 1172 ("***Cavendish* test**"): *Denka Advantech Pte Ltd and another v Seraya Energy Pte Ltd* [2020] SGCA 119.

Our Comments

The Court of Appeal's decision sets Singapore law apart from the developments on the Penalty Rule in the United Kingdom, Australia, New Zealand, Hong Kong and Malaysia, all of which have adopted or applied the *Cavendish* test in some form or another. The Court of Appeal's approach in adhering to the *Dunlop* test signals a commitment to the broad policy underlying an award of contractual remedies, which is to compensate the innocent party for breach (and not to punish). In contrast, the *Cavendish* test allows courts to consider other legitimate interests, beyond that of compensating the innocent party – in other words, a party may justify a liquidated damages clause based on some other consideration than the desire to recover compensation for a breach of contract.

In practice, however, it is unlikely that applying the *Dunlop* test or the *Cavendish* test would yield different outcomes in most situations. The UK Supreme Court in *Cavendish* acknowledged that in a straightforward damages clause, the legitimate interest will rarely go beyond compensation for the breach and so the *Dunlop* test would be adequate to determine the validity of the clause.

Further, as the Court of Appeal emphasised, the *Dunlop* test is sufficiently elastic to embrace both pecuniary and non-pecuniary interests, such as a commercial interest in protecting the goodwill of a business. A party which uses a liquidated damages clause to protect a more unusual, non-pecuniary interest – where it would be difficult or impossible to ascertain or calculate the appropriate amount of damages as a matter of arithmetic – would still be protected under the *Dunlop* test, provided there is a principled, reasonable, and proportionate basis for the quantum stipulated in the clause concerned. Seen in this manner, a non-pecuniary interest would encompass many of the "legitimate interests" under the *Cavendish* test.

It was also suggested that the Penalty Rule would have limited application in contracts where the parties are of equal or comparable bargaining power. If the parties to a dispute are sophisticated commercial entities or persons who are properly advised or have the necessary legal representation, there is a presumption that the disputed clause in question is not penal in nature.

This update takes a look at the Court of Appeal's decision

Background

The appellant was an electricity retailer ("**Appellant**") who brought proceedings against its customers ("**Respondents**"), alleging repudiatory breach of three electricity retail agreements ("**ERAs**") and claiming liquidated damages ("**LD**") under the LD clause in each of the three ERAs.

The Respondents denied that they had terminated or repudiated the ERAs, and argued that the LD clauses were, in any event, penalty clauses and thus unenforceable.

The High Court's Decision

The High Court Judge found the Respondents liable for repudiatory breach of the ERAs.

However, the High Court Judge, applying the *Dunlop test,* held that the LD clauses were unenforceable penalty clauses.

The Appellant appealed, and the Respondents cross-appealed, against the High Court's decision on the LD clauses and other issues.

The Penalty Rule

By way of a brief recap on the Penalty Rule, it may be recalled that:

- Until recently, *Dunlop* had been the seminal case on the Penalty Rule in the common law world. In *Dunlop*, the UK House of Lords held that a clause would be valid and enforceable as an LD clause if, as a matter of construction, it was a "genuine covenanted pre-estimate of damage".
- For more than a century, the following four principles enunciated by Lord Dunedin in *Dunlop* were the leading statement of the law on penalties:
    - A contractual provision for the payment of a monetary sum upon breach of contract will be held to be a penalty if the stipulated sum is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.
    - The contractual provision will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid.
    - There is a rebuttable presumption that the provision is a penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage".
    - It is possible for the stipulated sum to be a genuine pre-estimate of damage where the consequences of the breach are such as to make precise pre-estimation almost an impossibility. In fact, that is just the situation when it is probable that pre-estimated damage is the true bargain between the parties.

- In 2015, the UK Supreme Court in *Cavendish* reformulated the Penalty Rule, holding that the true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker "out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation". Any such "legitimate interest" need not be an interest in compensation only but may include wider "commercial interests".

- In Singapore, while a number of High Court decisions have considered *Cavendish* especially in relation to the anterior question as to when the Penalty Rule is engaged, they have, pending clarification from Singapore's apex court, continued to apply the substantive criteria in *Dunlop* in determining whether a purported LD clause is a penalty.

The Court of Appeal's Decision

The Court of Appeal held that the *Dunlop* test remains the law relating to the Penalty Rule in Singapore.

The Court of Appeal preferred the *Dunlop* test over that taken in *Cavendish* because:

- It considered the *Dunlop* test wholly consistent with the focus on the defendant's secondary obligation to pay compensatory (as opposed to penal) damages. It regulates only the remedies available for breach of a party's primary obligations, and not the primary obligations themselves.

- A contractual term which stipulates damages in excess of the pre-estimate of the likely loss must necessarily (on a normative level) be penal, as opposed to compensatory, notwithstanding that its inclusion might have been in a party's commercial interests. Punitive damages generally cannot be awarded for breach of contract.

- The approach in *Cavendish*, on the other hand, is inconsistent with the focus on compensatory damages because it permits the enforcement of clauses which operate upon a breach but are *not* genuine pre-estimates of the likely loss, simply because they are commercially justifiable.

- In addition, the concept of "legitimate interest" in *Cavendish* is very general and can be utilised in a number of ways. Its protean character lends itself to be utilised too flexibly, generating too much uncertainty both before and after entry into the contract concerned and the result reached by the court, which might have the unwanted effect of encouraging litigation. That said, factors such as the parties' relative bargaining power; the purpose of the underlying transaction, and the particular primary obligation which had been breached, which were relevant in *Cavendish* would remain relevant when applying the *Dunlop* test in Singapore.

On the unique facts of this case, the Court of Appeal found that the Respondents had wrongfully repudiated the ERAs and the Appellant had validly terminated the ERAs, with the result that the LD clauses applied.

The Court of Appeal further held that the LD clauses were a genuine pre-estimate of the loss and not penalties as they were not extravagant and unconscionable or out of all proportion to the greatest loss that could arise under the contract. In arriving at this determination, the Court of Appeal took into account the fact that the parties concerned were sophisticated commercial entities.

In the circumstances, the Court of Appeal allowed the appeal and dismissed the cross-appeal.

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DATE	TITLE
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18 March 2021	CaseWatch: Singapore High Court Dismisses S$90m Fraud Claims in Class Action Brought by More Than 1,000 Investors Who Purchased Crude Oil Investments
12 March 2021	CaseWatch: Singapore Court of Appeal Clarifies Requirements on Execution of Deeds
9 March 2021	CaseWatch: UK Supreme Court Rules Drivers Are “Workers” Under UK Employment Statutes

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