

DIVERGENCE & CONVERGENCE:
**CONTRACTUAL PENALTIES AND
LIQUIDATED DAMAGES**
ENGLAND, SINGAPORE, MALAYSIA

Joshua Teng & Kailash Kalaiarasu

7th December 2021

INTRODUCTION

- Agreed damages clause = provision for the remedies (a sum or stipulation) available to either party upon breach by the other
- We examine 3 jurisdictions and their landmark decisions
 - England – *Dunlop & Cavendish*
 - Singapore – *Denka Advantech*
 - Malaysia – *Selva Kumar & Cubic*
- Convergence & Divergence = Application of the rule & underlying policy justifications

DICHOTOMY → ENGLAND:
LEGITIMATE INTERESTS

ENGLAND

- **Historical origins:** equitable jurisdiction to relieve a party from defeasible bonds - the penalty rule continued to develop at common law in the context of damages clauses
- **The traditional *locus classicus*:** *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* (HoL)
- **The modern restatement:** *Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis* (UKSC)

DUNLOP – THE LOCUS CLASSICUS

Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd

Dunedin's (false) dichotomy

- ‘essence of a **penalty** is a payment of money stipulated as **in terrorem** of the offending party’
- ‘the essence of **liquidated damages** is a **genuine covenanted pre-estimate of damage**’

Question of construction – at the time of making the contract *not* at the time of breach

REDUCED PRICES OF DUNLOP TYRES

Motorists can now purchase the best tyres on Australian roads at a figure that represents the utmost economy in tyre upkeep.

**PRICE LIST
DUNLOP CORD TYRES
(Standard Tyres)**

MILIMETRE SIZES				INCH SIZES			
Size No.	Markings	Approx. Weight (LBS.)	Approx. Weight (KGS.)	Size No.	Markings	Approx. Weight (LBS.)	Approx. Weight (KGS.)
208	8 0 0	4 5	2 0	10	3 0 0	12 0	5 5
210	8 0 0	5 0	2 3	11	3 0 0	13 0	6 0
212	8 0 0	5 5	2 5	12	3 0 0	14 0	6 5
214	8 0 0	6 0	2 7	13	3 0 0	15 0	7 0
216	8 0 0	6 5	3 0	14	3 0 0	16 0	7 5
218	8 0 0	7 0	3 2	15	3 0 0	17 0	8 0
220	8 0 0	7 5	3 4	16	3 0 0	18 0	8 5
222	8 0 0	8 0	3 6	17	3 0 0	19 0	9 0
224	8 0 0	8 5	3 8	18	3 0 0	20 0	9 5
226	8 0 0	9 0	4 1	19	3 0 0	21 0	10 0
228	8 0 0	9 5	4 3	20	3 0 0	22 0	10 5
230	8 0 0	10 0	4 5	21	3 0 0	23 0	11 0
232	8 0 0	10 5	4 7	22	3 0 0	24 0	11 5
234	8 0 0	11 0	5 0	23	3 0 0	25 0	12 0
236	8 0 0	11 5	5 2	24	3 0 0	26 0	12 5
238	8 0 0	12 0	5 4	25	3 0 0	27 0	13 0
240	8 0 0	12 5	5 6	26	3 0 0	28 0	13 5
242	8 0 0	13 0	5 8	27	3 0 0	29 0	14 0
244	8 0 0	13 5	6 0	28	3 0 0	30 0	14 5
246	8 0 0	14 0	6 2	29	3 0 0	31 0	15 0
248	8 0 0	14 5	6 4	30	3 0 0	32 0	15 5
250	8 0 0	15 0	6 6	31	3 0 0	33 0	16 0
252	8 0 0	15 5	6 8	32	3 0 0	34 0	16 5
254	8 0 0	16 0	7 0	33	3 0 0	35 0	17 0
256	8 0 0	16 5	7 2	34	3 0 0	36 0	17 5
258	8 0 0	17 0	7 4	35	3 0 0	37 0	18 0
260	8 0 0	17 5	7 6	36	3 0 0	38 0	18 5
262	8 0 0	18 0	7 8	37	3 0 0	39 0	19 0
264	8 0 0	18 5	8 0	38	3 0 0	40 0	19 5
266	8 0 0	19 0	8 2	39	3 0 0	41 0	20 0
268	8 0 0	19 5	8 4	40	3 0 0	42 0	20 5
270	8 0 0	20 0	8 6	41	3 0 0	43 0	21 0
272	8 0 0	20 5	8 8	42	3 0 0	44 0	21 5
274	8 0 0	21 0	9 0	43	3 0 0	45 0	22 0
276	8 0 0	21 5	9 2	44	3 0 0	46 0	22 5
278	8 0 0	22 0	9 4	45	3 0 0	47 0	23 0
280	8 0 0	22 5	9 6	46	3 0 0	48 0	23 5
282	8 0 0	23 0	9 8	47	3 0 0	49 0	24 0
284	8 0 0	23 5	10 0	48	3 0 0	50 0	24 5
286	8 0 0	24 0	10 2	49	3 0 0	51 0	25 0
288	8 0 0	24 5	10 4	50	3 0 0	52 0	25 5
290	8 0 0	25 0	10 6	51	3 0 0	53 0	26 0
292	8 0 0	25 5	10 8	52	3 0 0	54 0	26 5
294	8 0 0	26 0	11 0	53	3 0 0	55 0	27 0
296	8 0 0	26 5	11 2	54	3 0 0	56 0	27 5
298	8 0 0	27 0	11 4	55	3 0 0	57 0	28 0
300	8 0 0	27 5	11 6	56	3 0 0	58 0	28 5
302	8 0 0	28 0	11 8	57	3 0 0	59 0	29 0
304	8 0 0	28 5	12 0	58	3 0 0	60 0	29 5
306	8 0 0	29 0	12 2	59	3 0 0	61 0	30 0
308	8 0 0	29 5	12 4	60	3 0 0	62 0	30 5
310	8 0 0	30 0	12 6	61	3 0 0	63 0	31 0
312	8 0 0	30 5	12 8	62	3 0 0	64 0	31 5
314	8 0 0	31 0	13 0	63	3 0 0	65 0	32 0
316	8 0 0	31 5	13 2	64	3 0 0	66 0	32 5
318	8 0 0	32 0	13 4	65	3 0 0	67 0	33 0
320	8 0 0	32 5	13 6	66	3 0 0	68 0	33 5
322	8 0 0	33 0	13 8	67	3 0 0	69 0	34 0
324	8 0 0	33 5	14 0	68	3 0 0	70 0	34 5
326	8 0 0	34 0	14 2	69	3 0 0	71 0	35 0
328	8 0 0	34 5	14 4	70	3 0 0	72 0	35 5
330	8 0 0	35 0	14 6	71	3 0 0	73 0	36 0
332	8 0 0	35 5	14 8	72	3 0 0	74 0	36 5
334	8 0 0	36 0	15 0	73	3 0 0	75 0	37 0
336	8 0 0	36 5	15 2	74	3 0 0	76 0	37 5
338	8 0 0	37 0	15 4	75	3 0 0	77 0	38 0
340	8 0 0	37 5	15 6	76	3 0 0	78 0	38 5
342	8 0 0	38 0	15 8	77	3 0 0	79 0	39 0
344	8 0 0	38 5	16 0	78	3 0 0	80 0	39 5
346	8 0 0	39 0	16 2	79	3 0 0	81 0	40 0
348	8 0 0	39 5	16 4	80	3 0 0	82 0	40 5
350	8 0 0	40 0	16 6	81	3 0 0	83 0	41 0
352	8 0 0	40 5	16 8	82	3 0 0	84 0	41 5
354	8 0 0	41 0	17 0	83	3 0 0	85 0	42 0
356	8 0 0	41 5	17 2	84	3 0 0	86 0	42 5
358	8 0 0	42 0	17 4	85	3 0 0	87 0	43 0
360	8 0 0	42 5	17 6	86	3 0 0	88 0	43 5
362	8 0 0	43 0	17 8	87	3 0 0	89 0	44 0
364	8 0 0	43 5	18 0	88	3 0 0	90 0	44 5
366	8 0 0	44 0	18 2	89	3 0 0	91 0	45 0
368	8 0 0	44 5	18 4	90	3 0 0	92 0	45 5
370	8 0 0	45 0	18 6	91	3 0 0	93 0	46 0
372	8 0 0	45 5	18 8	92	3 0 0	94 0	46 5
374	8 0 0	46 0	19 0	93	3 0 0	95 0	47 0
376	8 0 0	46 5	19 2	94	3 0 0	96 0	47 5
378	8 0 0	47 0	19 4	95	3 0 0	97 0	48 0
380	8 0 0	47 5	19 6	96	3 0 0	98 0	48 5
382	8 0 0	48 0	19 8	97	3 0 0	99 0	49 0
384	8 0 0	48 5	20 0	98	3 0 0	100 0	49 5
386	8 0 0	49 0	20 2	99	3 0 0	101 0	50 0
388	8 0 0	49 5	20 4	100	3 0 0	102 0	50 5
390	8 0 0	50 0	20 6	101	3 0 0	103 0	51 0
392	8 0 0	50 5	20 8	102	3 0 0	104 0	51 5
394	8 0 0	51 0	21 0	103	3 0 0	105 0	52 0
396	8 0 0	51 5	21 2	104	3 0 0	106 0	52 5
398	8 0 0	52 0	21 4	105	3 0 0	107 0	53 0
400	8 0 0	52 5	21 6	106	3 0 0	108 0	53 5
402	8 0 0	53 0	21 8	107	3 0 0	109 0	54 0
404	8 0 0	53 5	22 0	108	3 0 0	110 0	54 5
406	8 0 0	54 0	22 2	109	3 0 0	111 0	55 0
408	8 0 0	54 5	22 4	110	3 0 0	112 0	55 5
410	8 0 0	55 0	22 6	111	3 0 0	113 0	56 0
412	8 0 0	55 5	22 8	112	3 0 0	114 0	56 5
414	8 0 0	56 0	23 0	113	3 0 0	115 0	57 0
416	8 0 0	56 5	23 2	114	3 0 0	116 0	57 5
418	8 0 0	57 0	23 4	115	3 0 0	117 0	58 0
420	8 0 0	57 5	23 6	116	3 0 0	118 0	58 5
422	8 0 0	58 0	23 8	117	3 0 0	119 0	59 0
424	8 0 0	58 5	24 0	118	3 0 0	120 0	59 5
426	8 0 0	59 0	24 2	119	3 0 0	121 0	60 0
428	8 0 0	59 5	24 4	120	3 0 0	122 0	60 5
430	8 0 0	60 0	24 6	121	3 0 0	123 0	61 0
432	8 0 0	60 5	24 8	122	3 0 0	124 0	61 5
434	8 0 0	61 0	25 0	123	3 0 0	125 0	62 0
436	8 0 0	61 5	25 2	124	3 0 0	126 0	62 5
438	8 0 0	62 0	25 4	125	3 0 0	127 0	63 0
440	8 0 0	62 5	25 6	126	3 0 0	128 0	63 5
442	8 0 0	63 0	25 8	127	3 0 0	129 0	64 0
444	8 0 0	63 5	26 0	128	3 0 0	130 0	64 5
446	8 0 0	64 0	26 2	129	3 0 0	131 0	65 0
448	8 0 0	64 5	26 4	130	3 0 0	132 0	65 5
450	8 0 0	65 0	26 6	131	3 0 0	133 0	66 0
452	8 0 0	65 5	26 8	132	3 0 0	134 0	66 5
454	8 0 0	66 0	27 0	133	3 0 0	135 0	67 0
456	8 0 0	66 5	27 2	134	3 0 0	136 0	67 5
458	8 0 0	67 0	27 4	135	3 0 0	137 0	68 0
460	8 0 0	67 5	27 6	136	3 0 0	138 0	68 5
462	8 0 0	68 0	27 8	137	3 0 0	139 0	69 0
464	8 0 0	68 5	28 0	138	3 0 0	140 0	69 5
466	8 0 0	69 0	28 2	139	3 0 0	141 0	70 0
468	8 0 0	69 5	28 4	140	3 0 0	142 0	70 5
470	8 0 0	70 0	28 6	141	3 0 0	143 0	71 0
472	8 0 0	70 5	28 8	142	3 0 0	144 0	71 5
474	8 0 0	71 0	29 0	143	3 0 0	145 0	72 0
476	8 0 0	71 5	29 2	144	3 0 0	146 0	72 5
478	8 0 0	72 0	29 4	145	3 0 0	147 0	73 0

DUNLOP: DUNEDIN'S 4 TESTS

- a) 'It will be held to be penalty if the sum stipulated for is **extravagant** and **unconscionable** in amount in comparison with the **greatest loss that could conceivably be proved to have followed from the breach**'
- b) 'It 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'

DUNLOP: DUNEDIN'S 4 TESTS

- c) 'There is a **presumption** (but no more) that it is 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''
- d) 'It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise **pre-estimation almost an impossibility**. On the contrary, that is just the **situation when it is probable that pre-estimated damage was the true bargain between the parties.**'

DUNLOP: LORD ATKINSON

- Focused on the *purpose* behind inserting the agreed damages clause
 - ‘**object of the appellants in making this agreement**, [...] to prevent the disorganization of their trading system and the consequent injury to their trade in many directions. [...] The very fact that this sum is to be paid if a tyre cover or tube be merely offered for sale, though not sold, shows that **it was the consequential injury to their trade due to undercutting** that they had in view. They had an **obvious interest to prevent this undercutting**, and on the evidence it would appear [...] impossible to say that that interest was incommensurate with the sum agreed to be paid’
- True purpose = pre-estimation of the ‘interest in the due performance of the contract’ and that it was ‘not stipulated for merely in terrorem’

DUNEDIN vs ATKINSON

	Lord Dunedin	Lord Atkinson
Policy / rationale	Compensatory principles – central theme in the dichotomy and 4 tests	Broader, commercial justification behind the clause - focused on Dunlop's broader business and the injury to the trade beyond the litigating parties
Treatment of facts	<p>'the damage apprehended by the appellants owing to the breaking of the agreement was an indirect and not a direct damage'</p> <p>'damage as a whole from such a practice would be certain, yet damage from any one sale would be impossible to forecast'</p>	<p>The damages in Dunlop were of 'of such an uncertain nature that it cannot be accurately ascertained'</p> <p>BUT premised on the difficulty of ascertaining the overall damage done to the appellants' trade and business</p>

CAVENDISH – THE MODERN RULE

Cavendish Square Holding BV v Makdessi and ParkingEye Ltd v Beavis

- Lord Neuberger and Lord Sumption:

‘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.’

ParkingEye
car park management

2 hour max stay

Customer only car park
4 hour maximum stay for Fitness Centre Members

Failure to comply with the following will result in a Parking Charge of: **£85**

- Parking limited to 2 hours (no return within 1 hour)
- Park only within marked bays
- Blue badge holders only in marked bays

ParkingEye Ltd is solely engaged to provide a traffic space reservation scheme. We are not responsible for the car park surface, other visitor relations, damage or loss to or from motor vehicles or user's safety. The parking regulations for this car park apply 24 hours a day, all year round, irrespective of the site opening hours. Parking is at the absolute discretion of the site. By using the car park, motorists agree to comply with the car park regulations. Should a motorist fail to comply with the car park regulations, the motorist accepts that they are liable to pay the Parking Charge and that their name and address will be requested from the DVLA. Parking Charge Information: A reduction of the Parking Charge is available for a period, as detailed on the Parking Charge Notice. The reduced amount payable will not exceed £75, and the total amount will not exceed £100 prior to any court action, after which additional costs will be added.

This car park is private property.

ParkingEye Ltd
Telephone 0844 247 2981
PO BOX 565, Chorley, PR6 6HT

Car park monitored by ANPR systems

- Lord Mance

‘What is necessary in each case is to consider, **first**, whether any (and if so what) **legitimate business interest** is served and protected by the clause, and, **second**, whether, assuming such an interest to exist, the **provision made for the interest** is nevertheless in the circumstances **extravagant, exorbitant or unconscionable.**’

- Lord Hodge (Lord Toulson concurring)

‘the correct test for a penalty is whether the **sum or remedy stipulated** as a consequence of a breach of contract is **exorbitant or unconscionable** when regard is had to the **innocent party’s interest in the performance of the contract.**’

CAVENDISH: REFRAMING THE PENALTY RULE

- The scope of the penalty rule is focused on defining what is ‘penal’
- Critical of the Dunedin dichotomy – which were not natural opposites
 - *‘prisoner of artificial categorisation’ as a ‘result of unsatisfactory distinctions: between a penalty and genuine pre-estimate of loss, and between a genuine pre-estimate of loss and a deterrent’*

CAVENDISH: REFRAMING THE PENALTY RULE

- Introduces a different element of proportionality to that in *Dunlop*
 - By reference to a *legitimate interest* that is to be served through the performance of a contract
 - Not solely the *greatest loss* that could conceivably flow from the breach or within parties' contemplation at the time of entering into the contract

CAVENDISH: REFRAMING THE PENALTY RULE

- Departure from the compensatory approach by Dunedin –instead an approval and expansion of the broader commercial justification approach
 - Drawn from Lord Atkinson in *Dunlop* and the more recent English authorities (see Colman J's decision in the *Lordsvale* case)
- Acknowledged that there remains a continuing but narrower role for Lord Dunedin's approach ('straightforward damages clause' cases)

SINGAPORE: THE ORTHODOX POSITION

SINGAPORE

- Unlike India and Malaysia, Singapore did not codify its law of contract by statute. Primarily governed by common law principles.
- ***Xia Zhengyan v Geng Changqing (2015) SGCA*** – Lord Dunedin’s principles in *Dunlop* ‘constitute the backbone of all analysis on this topic’ in Singapore
- ***Leiman, Ricardo v Noble Resources Ltd (2020) SGCA*** – parties argued that Singapore should adopt the ‘modified’ test formulated in *Cavendish* but left the question open.

DENKA ADVANTECH – THE DUNLOP ORTHODOXY

Denka Advantech Pte Ltd v Seraya Energy Pte Ltd

- Examined the scope and development of the ‘penalty rule’ across various jurisdictions
- SGCA expressly declined to follow the test in *Cavendish* and endorsed instead Lord Dunedin’s statement of the principles in *Dunlop*

The image shows the Denka logo, which consists of the word "Denka" in a bold, blue, sans-serif font. The logo is centered within a white rectangular area that has a thin white border.

DENKA ADVANTECH – AFFIRMING DUNLOP

- Scope of the penalty rule is governed by the compensatory principles in remedies for breach of contract (i.e. secondary obligations)
 - ‘prevent [the] imposition of a remedy that is clearly disproportionate to the loss suffered as a result of the breach’
 - ‘the broad policy underlying an award of contractual remedies must always be to compensate, and not to punish’

DENKA ADVANTECH – AFFIRMING DUNLOP

- Lord Dunedin's principles are aligned to the compensatory scope of the penalty rule
 - 'the test as to whether or not the contractual provision concerned provided a genuine pre-estimate of the likely loss is wholly **consistent with the fact that the focus is on the secondary obligation on the part of the defendant to pay damages by way of compensation**'
 - 'a contractual provision which stipulates for an amount of damages to be paid in the event of breach that is more than the pre-estimate of the likely loss must **necessarily be (on a normative level) penal, as opposed to compensatory, in nature** [...]'

DENKA ADVANTECH – REJECTING CAVENDISH

- The legitimate interests test goes beyond compensating the innocent party - contractual remedies should only be compensatory in nature
- A clause which does not represent a genuine pre-estimate of loss is necessarily one that is penal in nature
 - ‘has no role to play at the level of legal principle – except to the extent that the “legitimate interest” concerned is coterminous with that of compensation’

ENGLAND vs SINGAPORE

	Cavendish	Denka Advantech
Test	Legitimate interest - proportionality	Dunedin's rules – genuine pre-estimate of loss
Policy / rationale	<ul style="list-style-type: none"> • Broader commercial justification / legitimate interests approach • • The penalty-liquidated damages dichotomy is not helpful • • Not all cases are covered by compensatory interests – this can be a subset of the broader approach 	<ul style="list-style-type: none"> • Scope of the rule is governed by fundamental tenets of contract law → secondary obligations and compensatory remedies • • Genuine pre-estimate of loss ~ compensatory interests BUT • Legitimate interests > compensatory interests

MALAYSIA:
AWARDING 'REASONABLE COMPENSATION'

MALAYSIA: s75 CONTRACTS ACT

Section 75, Malaysian Contracts Act 1950

Compensation for breach of contract where penalty stipulated for.

*When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damages or loss is proved to have been caused thereby, to receive from the party who has broken the contract **reasonable compensation not exceeding** the amount so named or, as the case may be, the penalty stipulated for.*

MALAYSIA: s 75 CONTRACTS ACT IN CASELAW

- **The early cases:** *Maniam v State of Perak*; *Wearne Brothers (M) Ltd v Jackson* – reliance on *Bhai Panna Singh v Bhai Arjun Singh*
- **The Selva Kumar approach:** *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy*; *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd*
- **Difficulties with Selva Kumar:** *Lebbey Sdn Bhd v Tan Keng Hong*; *Yap Yew Cheong v Dirga Niaga (Selangor Sdn Bhd)*
- **The Cubic restatement:** *Cubic Electronics Sdn Bhd v Mars Telecommunications Sdn Bhd*

MALAYSIA: THE EARLY CASES

Maniam v State of Perak

- Section 75 ‘cuts through the most troublesome knot in the common law doctrine of damages’.
- However, *Maniam* held that ‘in our law in every case if a sum is named in a contract as the amount to be paid in case of breach **it is to be treated as a penalty.**’

Wearne Brothers (M) Ltd v Jackson

- *Bhai Panna Singh*: the effect of section 75 is to disentitle the plaintiff to recover *simpliciter* the sum fixed in the contract. The plaintiff *must prove the damages they have suffered, unless the sum named is a genuine pre-estimate of loss.*

MALAYSIA: THE EARLY CASES

Observations

- Requirement to prove the damages at odds with section 75 'whether or not actual damages or loss is proved to have been caused thereby'.
- Construction of s 75 does not require an agreed damages clause to be 'treated as a penalty in every case'. Court's interference not predicated upon the agreed damages clause being a 'penalty'.

*Ratio of **Wearne Brothers (M) Ltd v Jackson***

- Better understood to be that a genuine pre-estimate of damages for depreciation contemplated by the parties at the time when they entered into an agreement... did not appear to be unreasonable or disproportionate to the nature and extent of depreciation.
- In other words, that the agreed damages clause did not specify an 'unreasonable' sum as payment / compensation for breach.

MALAYSIA: THE *SELVA KUMAR* APPROACH

Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy

- Extended / entrenched the position that proof or evidence of **actual damage or loss** is **required** in order to justify an award of ‘reasonable compensation’ under section 75.
- Differentiated between contracts where ‘reasonable compensation’ is difficult to assess vs where readily assessed through ‘settled rules’ i.e. *Hadley v Baxendale* (section 74 Malaysian Contracts Act 1950).
- Limited reading of ‘whether or not actual damage or loss is proved to have been caused thereby’ (s 75) only to cases where assessment difficult.
- Where ‘reasonable compensation’ is difficult to assess = **proof of actual loss or damage unnecessary**.
- In all other cases, failure to adduce evidence of actual loss or damage = nominal damages awarded.

MALAYSIA: THE *SELVA KUMAR* APPROACH

Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd

- Malaysian Federal Court affirmed and entrenched *Selva Kumar*.
- A plaintiff seeking compensation from the party in breach in enforcement of an agreed damages clause would have to prove ‘**actual damages or reasonable compensation...**in accordance with the principles set out in *Hadley v Baxendale*.’
- Such proof only dispensed with in cases where assessment was difficult / where there was no known measure of damages employable.

Observations

- Requirement of proof of ‘actual loss / damages’ at odds with s 75.
- Assessment at time of breach rather than at the time of entry into contract.

MALAYSIA: DIFFICULTIES WITH *SELVA KUMAR*

Lebbey Sdn Bhd v Tan Keng Hong

- High Court employed a literal interpretation to s 75 Contracts Act 1950.
- High Court observed: ‘parties have agreed to liquidated damages if one party breaches the [contract], whether or not actual damage or loss is proved to have been caused hereby, the complaining party will be entitled to reasonable damages not exceeding the amount agreed to by the parties as liquidated damages.’
- High Court interpreted *Selva Kumar* as dealing with an agreed damages clause which was ‘unreasonable’. However, in *Lebbey*, the imposition of liquidated damages at the level of 12% was found to be reasonable. The breaching party had also stipulated a rate of 12% for late delivery on the part of the innocent party.

MALAYSIA: DIFFICULTIES WITH *SELVA KUMAR*

Yap Yew Cheong v Dirga Niaga (Selangor) Sdn Bhd

- The purpose of an agreed damages clause was recognised: to smoothen the evidential path of the injured party in the light of the exacting exercise for the injured party to prove his monetary damages against a contract-breaker incentivised to resist and challenge very iota of evidence advanced.
- The effect of *Selva Kumar* = an injured party will be deprived of benefitting under a liquidated damages clause, namely recovery of actual loss without proof.
- In interpreting an Act of Parliament, there was the need to give effect to the will of Parliament no matter what the consequences would be, and not by construing the Act of Parliament by reference to authorities from other jurisdictions.

MALAYSIA: DIFFICULTIES WITH *SELVA KUMAR*

Observations

- Approach taken in *Lebbey* and *Yap Yew Cheong* consistent with statutory wording in section 75 in comparison with *Selva Kumar*.
- Closer to the stated purpose of an agreed damages clause by Lord Davey in *Clydebank Engineering and Shipbuilding Co Ltd v Dan Jose Ramos Yzqueirdo y Castaneda*, i.e. that it was:

‘perfectly irrelevant and inadmissible for the purpose of shewing the clause to be extravagant... to admit evidence... of the damages which were actually suffered by the Spanish Government... It was for the very purpose of excluding that kind of evidence that the parties determined to have the damages liquidate in this manner by naming a specific sum, and it appears to me that the learned counsel have been doing the very thing which the parties intended to prevent by the way in which they have framed their contract.’

- Unfortunately, reference to distinction between penalty clause and liquidated damages clause still made in *Yap Yew Cheong*.

MALAYSIA: THE *CUBIC* RESTATEMENT

Cubic Electronics Sdn Bhd v Mars Telecommunications Sdn Bhd

- Federal Court was cognisant of the difficulties arising from *Selva Kumar* and attempted to correct the course from *Selva Kumar*.
- Clarified that there was ‘no necessity for proof of actual loss or damage **in every case** where the innocent party seeks to enforce a damages clause.’
- ‘Legitimate interest’ and ‘proportionality’ = **relevant considerations** in determining the measure of **reasonable compensation** under s 75.
- To be adjudged by a common sense approach & comparison of amount payable under the agreed damages clause vs the loss that might be sustained by reason of breach ought not to be significantly different
- Innocent party to prove breach of contract + applicable agreed damages clause. Party in breach to prove unreasonableness. That this was in line with the commercial / policy purpose of agreed damages clauses.

MALAYSIA: THE *CUBIC* RESTATEMENT

Observations

- Correct in holding that proof of actual damage or loss suffered should not determine the enforcement or otherwise of the agreed damages clause.
- However, maintained that ‘proof of actual loss is not the sole conclusive determinant of reasonable compensation **although evidence of that may be a useful starting point.**’
- In doing so, *Cubic* did not clearly demarcate between the analytical approach under s 74 Contracts Act vs s 75 Contracts Act.
- The former is an assessment for loss / damage suffered at the time of breach; the latter for reasonableness of compensation adjudged at the time of entry into the contract.

MALAYSIA: FURTHER ISSUES

- Strictly compensatory interests or other legitimate interests?
- Jurisdiction to adjust (i.e. reduce) award of damages to level of 'reasonable compensation' & process for assessing 'reasonable compensation'

MALAYSIA: COMPENSATORY VS LEGITIMATE INTERESTS

- S 75 Contracts Act 1950 ought not to be confined to strictly compensatory interests – room for taking into account legitimate interests.
- Use of the word ‘compensation’ in s 75 does not refer to ‘compensatory principle’ but to ‘payment of money as a consequence of breach’.
- ‘Compensatory principle’ contained in separate provision (i.e. s 74) and **not in the use of the word ‘compensation’** but in what the ‘compensation’ is said to be for (e.g. naturally flowing from breach / contemplation of parties / not in cases of indirect loss or not too remote).
- If *Dunlop* is accepted as a correct decision, there is a question of whether the interests / losses protected in *Dunlop* are naturally flowing from the particular instances of breach alleged / sufficiently direct.

MALAYSIA: COMPENSATORY vs LEGITIMATE INTERESTS

Section 74, Malaysian Contracts Act 1950

Compensation for loss or damage caused by breach of contract.

*(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, **compensation** for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.*

*(2) **Such compensation** is not to be given for any remote and indirect loss or damage sustained by reason of the breach.*

MALAYSIA: JURISDICTION TO ADJUST / REDUCE TO 'REASONABLE COMPENSATION'

- No need to invoke 'penalty rule' in order to justify adjustment – power to do so expressly provided by s 75 Contracts Act.
- Court is **not faced with a binary choice** of whether to enforce or to decline to enforce agreed damages clause in totality.
- Court has jurisdiction to refuse to enforce the agreed damages clause **as stipulated** **but** award 'reasonable compensation' up to the stipulated sum.
- However, owing in part to the *Selva Kumar* approach that was prevalent for more than 20 years, there are no cases where this jurisdiction to reduce the award to 'reasonable compensation' has been exercised.

MALAYSIA: JURISDICTION TO ADJUST / REDUCE TO 'REASONABLE COMPENSATION'

- Reasonableness ought to be adjudged at the time of entry into the contract, not at the time of breach (*Wearne Brothers*).
- However, owing to undue reliance on *Hadley v Baxendale* / s 74 Contracts Act to justify the award of 'reasonable compensation', this requirement has not been uniformly clear.
- Process for determining 'reasonable compensation' in Court ought to be a relatively truncated process i.e. not a full assessment.
- Determining the level of 'reasonable compensation' may be an iterative process.

MALAYSIA: JURISDICTION TO ADJUST / REDUCE TO 'REASONABLE COMPENSATION'

- Parties must be understood to be contracting on the basis of the underlying default statutory rules / opting into the s 75 scheme if there is an agreed damages clause.
- In doing so, the parties enter the bargain below:

Innocent Party	Defaulting Party
Obtains a valid / enforceable stipulation (up to 'reasonable compensation')	Agrees to pay reasonable compensation
Obtains / Agrees to truncated process and obtains dispensation of proof of actual loss	Obtains / Agrees to truncated process and agrees to dispensation of proof of actual loss
Agrees to irrevocably limit the compensation recoverable by it.	Obtains an irrevocable limitation on its liability to pay compensation.

MALAYSIA: JURISDICTION TO ADJUST / REDUCE TO 'REASONABLE COMPENSATION'

- **Iterative process** of determining 'reasonable compensation'.
- Analytically, the court picks a sum (e.g. the named sum) and asks the question whether the sum is disproportionate to the legitimate interest sought to be protected by contract / agreed damages clause or whether the sum is 'unreasonable'.
- If the answer is **NO**, then the sum may be awarded.
- If the answer is **YES**, then the court could rely on the positions / evidence of parties advanced in the course of adversarial litigation to pick a second, lower sum (having regard to the legitimate interests pleaded / advanced in evidence).
- The process is repeated until the answer is **NO**, and that sum is awarded as 'reasonable compensation'.

CONVERGENCE & DIVERGENCE

TEST CASE: *PARKINGEYE*

- Mr Beavis overstayed in a car park that was managed (but not owned) by ParkingEye.
- The car park had notices which displayed that the parking would be free for the first two hours but anyone who overstayed would be charged £85.
- ParkingEye sued to recover the sum.

	England	Singapore	Malaysia
Test	Legitimate interests	Genuine pre-estimate of loss	Reasonable compensation
Relevant facts / evidence	(i) Manage the efficient use of parking space (ii) To provide an income stream to ParkingEye	(i) ParkingEye was not the owner of the land – suffered no real loss	(i) Manage the efficient use of parking space (ii) (Proof of actual loss?)
Burden of proof	Claimant	Claimant	Defendant (to show unreasonableness)
Consequence & relief	Enforceable - £85 recoverable	Penalty and unenforceable – nominal damages	If reasonable, <u>up to</u> £85 recoverable
Policy & justification	Focus on what constitutes a penalty	Focus on scope of contractual remedies	Broad scope – corresponds with the reasonableness ‘sliding scale’

THANK YOU



THE HERMENEUTICS OF THE CONCEPT OF MISREPRESENTATION

ADDRESSING THE QUAGMIRE OF
'COMPENSATION' IN CASES OF
MISREPRESENTATION UNDER INDIAN
AND ENGLISH LAW

Gautam Mohanty and Gaurav Rai



Introduction

- Compensation and Damages not for breach but for misrepresentation
- English law and Indian Law on Compensation or damages available to the aggrieved parties in a contract in which consent was induced by fraud or misrepresentation
- English Law Fraudulent/Negligent Misrepresentation different from Innocent Misrepresentation
- Indian Law on damages same for fraudulent and innocent misrepresentation. Damages provided under Section 19 of the Indian Contract Act, 1872.
- Relationship between compensation for misrepresentation and Liquidated damages clause under Indian Contract Act, 1872

English law on Damages for Fraud and Misrepresentation

Representation - A preliminary statement not a term of the contract which has provided inclination to enter into the contract is a representation.

If the representation is false, relief against misrepresentation – rescission – no right to claim damages as there is no breach of contract.

Preliminary statement becomes a term of the contract if the other party guarantees it to be true in which case the party will have a right to claim damages for breach of contract or claim relief for misrepresentation.

Relief for Misrepresentation

Misrepresentation Act, 1967

Innocent Misrepresentation / Negligent Misrepresentation

English law on Damages for Fraud and Misrepresentation

- **Derry v. Peek [1875] 14 App Cas 337** - Fair, honest and bonafide statement on the part of the defendants and by no means exposes them to an action for deceit.
- **Section 2(1) of the Misrepresentation Act, 1967** – Damages not available for innocent misrepresentation – Discretion of the Court to award damages in lieu of rescission. Damages for Negligent misrepresentation same as fraudulent misrepresentation
- Damages for Innocent misrepresentation available if the misrepresentation becomes a term of the contract

Fraudulent Misrepresentation

English law on Damages for Fraud and Misrepresentation

- **Doyle v. Olby [1969] 2 All. E.R 119** - Broader than damages available for breach of contract – allows consequential damages.
- Damages to be calculated with a view to restitute the party to the financial position it would have been if the representation was true.
- **Section 2(1) - Misrepresentation Act, 1967**
- **Section 11(1) - Unfair Contract Terms Act, 1977**
Cannot exclude liability due to misrepresentation
- **Smith New Court Securities v. Scrimgeours Vickers [1996] UKHL 3**
- Re-affirmed Doyle v. Olby
- In addition to the reparation directly flowing from the transaction, the plaintiff is entitled to recover consequential losses caused by the transaction
- Date of Transaction Rule

Indian law on Damages for Fraud and Misrepresentation

Fraud

- Section 17 of the Indian Contract Act, 1872

Misrepresentation

- Section 18 of the Indian Contract Act, 1872

Voidability of Contracts made without free consent

- Section 19 of the Indian Contract Act, 1872

Indian Law of Damages for Fraud and Misrepresentation

Sorabshah Pestonji v. Secretary of State for India - AIR 1928 Bom 17

- No need to go into English Authorities - Damages for fraud and misrepresentation to be governed by Section 19 of the Indian Contract Act, 1872

Trojan & Co. v. Nagappa Chettiar – AIR 1953 SC 235 –

- Limits of Damages under Section 19 of Indian Contract Act, 1872
- Difference in price paid v. price it would have received
- Reliance on Derry v. Peek
- Date of Transaction Rule

Daiichi Sankhyo v. Malvinder Mohan Singh and Ors. 2018(1) Arb LR 492 (Delhi)

Indian Law of Damages for Fraud and Misrepresentation

Pre-Contract Misrepresentation

- Daiichi bought shareholding of Ranbaxy from the promoters.
- Pre-Contract Misrepresentation – Nature and extent of investigation by Department of Justice of US into Ranbaxy.
- Reliance on Trojan & Co. to determine method of quantification of damages
- Quantification of Damages – Reliance on subsequent transaction to determine actual value of shares on the date of purchase.
- Loss awarded must natural and direct. Remote damages cannot be awarded.

Indian Law of Damages for Fraud and Misrepresentation

NHAI v. Pune Sholapur Road Development Company 2019 (2) Arb LR 382.

Representation as a term of the Contract.

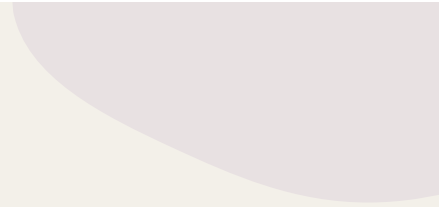
- Representation that the land belonged to NHAI
- Contractors realise that the land belongs to the Wildlife Board
- Wildlife Board denied permission to construct a road passing through a sanctuary
- Contractors claim damages under Section 19
- NHAI argues a liquidated damages clause would limit the damages that should have been given for delay in transfer of right of way for construction of the road.
- Arbitral tribunal held that the liquidated damages clause did not cover the damages arising out of the misrepresentation and hence not applicable. Awarded damages under Section 19.

Indian Law of Damages for Fraud and Misrepresentation

Applicability of liquidated damages to breach of representation clause in the contract

- Whether compensation available under Section 19 is equivalent to damages for breach of contract.
- Whether a liquidated damage clause could limit damages due breach of representation
- Section 1 of the Indian Contract Act, 1872
- Mandatory and directory provisions of the Indian Contract Act, 1872
- Section 28(3) of the Arbitration and Conciliation Act, 1996

Thank you





ENFORCEMENT OF FOREIGN ORDERS
AND
PARTY AUTONOMY: INDIA, ENGLAND
AND USA

BY: MS. ADYA SURBHI AND MS. YASHU BANSAL

- *What is the meaning of conducting global trade?*
- *What motivates businesses to go beyond jurisdictions?*
- *How are disputes arising in international commerce handled?*
- *Why is the enforcement mechanism a deterrence in the path of International Commercial Contracts?*



Overview

- ▶ Enforceability of foreign jurisdiction clauses
- ▶ Implementation of Foreign Orders: Critical Issues
- ▶ Conclusion and solutions

Party Autonomy



- ▶ ***What is the principle of party autonomy?***
Party autonomy is the freedom to choose the jurisdiction applicable to disputes
- ▶ ***How can party autonomy be exercised?***
Parties may mutually agree to their choice of forum for disputes in the relevant contract.
- ▶ ***What are the deciding factors?***
Bilateral ties, reciprocity between nations, process of enforcement of foreign orders, timelines for dispute resolution.

International Commercial Contracts – Jurisdiction Clauses

- ▶ Are foreign jurisdiction clauses valid and recognized in India?
 - ▶ Section 20 of CPC – Institution of suits in natural jurisdiction
 - ▶ *Hakam Singh vs. M/s. Gammon (India) Ltd.*- Jurisdiction cannot be conferred on such a court which otherwise does not have jurisdiction.
 - ▶ Section 28 of Indian Contracts Act, 1872 – foreign jurisdiction clauses do not amount to restraint of legal proceedings and are not void.
- ▶ *Modi Entertainment Network and another vs. WSG Cricket Private Ltd* – The court recognized that the parties may choose either country's jurisdiction or even a neutral jurisdiction for dispute settlement.

Challenges: Anti-suit injunction

- Injunctions passed against the proceedings initiated at a foreign jurisdiction
 - *Modi Entertainment Network and another vs. WSG Cricket Private Ltd* – Principles related to anti-suit injunction – principle of comity and tool to ensure delivery of justice;
 - *ONGC vs. Western Company of North America* – anti-suit injunctions may be granted when foreign proceedings are oppressive in nature
 - *Man Roland Druckmaschinen AG vs. Multicolour Offset Ltd. & Another* – The Supreme Court of India refused to interfere in a commercial agreement where the parties had mutually agreed to Germany being the jurisdiction for dispute settlement. The rationale behind this is that the court will not be party to a breach of an agreement.

Challenges: Anti-anti-suit Injunction

- ▶ Injunctions where the court restricts the party from proceeding with an anti-suit injunction order or application before an offshore court
 - *Devi Resources Ltd. vs. Ambo Exports Limited* – such injunctions shall be granted in rarest of cases to prevent gross injustice .

"Thus, despite no law providing for an anti-suit or an anti-arbitration injunction, the general equitable jurisdiction of granting an injunction encompasses the authority to grant an anti-suit or anti-arbitration injunction or even an anti-anti-suit injunction. But such an injunction is issued only in the most extreme of cases where the refusal of the injunction may result in palpable and gross injustice in the meanest sense."

Interdigital Technology vs. Xiaomi Corporation & Ors.

An international commercial contractual dispute between US tech-giant Interdigital and Chinese multinational Xiaomi



Wuhan Court (June, 2020) : Xiaomi had filed a suit for the application of global FRAND rates for acquiring licenses in the SEPs in the technology



Delhi High Court (July, 2020) : Interdigital filed a patent infringement suit against Xiaomi to prevent the alleged use of the technology without due authorization wherein it provided licenses at FRAND rates



Wuhan Court (September, 2020) : Anti-suit injunction order passed against proceedings in Delhi High Court



Delhi High Court (May, 2021) : India's **first anti-enforcement injunction** granted in favour of Interdigital on the grounds of the order being oppressive in nature

Case
Study



Enforcement of Foreign Orders in India

- ▶ Recognition of nations as ‘reciprocating territories’
- ▶ ‘Reciprocating territories’ vs. bilateral treaties
- ▶ Retrospective vs prospective
 - *Manoj Moolekkudi Subramanyan vs. Rajesh Palliparambil Ravi* – No retrospective effect shall be given to such notifications. Section 44A of CPC mentions procedure to recognize ‘reciprocating territories’.

Singapore; UAE; UK and Northern Ireland



EXTRAORDINARY

PART II—Section 3

PUBLISHED BY AUTHORITY

No. 262] NEW DELHI, THURSDAY SEPTEMBER 1, 1955

MINISTRY OF LAW

NOTIFICATION

New Delhi, the 1st September 1955

S.O. 1867.—In exercise of the powers conferred by Explanation 1 to section 44A of the Code of Civil Procedure, 1908 (Act V of 1908), the Central Government hereby declares the Colony of Singapore to be a reciprocating territory for the purposes of the said section and the Supreme Court of the Colony of Singapore to be a superior Court with reference to that territory.

[No. F. 29-III/52-L.]

R. S. GAK, Dy. Secy.

MINISTRY OF LAW AND JUSTICE

(Department of Legal Affairs)

NOTIFICATION

New Delhi, the 17th January, 2020

G.S.R. 38(E).—In exercise of the powers conferred by Explanation 1 to section 44A of the Code of Civil Procedure, 1908 (5 of 1908), the Central Government hereby declares, United Arab Emirates to be a reciprocating territory for the purposes of the said section and the following Courts in United Arab Emirates to be superior Courts of that territory, namely:-

(1) Federal Court-

- (a) Federal Supreme Court;
- (b) Federal, First Instance and Appeals Courts in the Emirates of Abu Dhabi, Sharjah, Ajman, Umm Al Quwain and Fujairah;

(2) Local Courts-

- (a) Abu Dhabi Judicial Department;
- (b) Dubai Courts;
- (c) Ras Al Khaimah Judicial Department;
- (d) Courts of Abu Dhabi Global Markets;
- (e) Courts of Dubai International Financial Center.

[F. No. J-14014/1/2015-Judl.]

RAJVEER SINGH VERMA, Addl. Secy.



EXTRAORDINARY

PART II—Section 3

PUBLISHED BY AUTHORITY

No. 51] NEW DELHI, SUNDAY, MARCH 1, 1953

MINISTRY OF LAW

NOTIFICATION

New Delhi, the 1st March, 1953

S.O. 398.—In exercise of the power conferred by Explanation 1 to section 44A of the Code of Civil Procedure, 1908 (Act V of 1908), the Central Government hereby declares the United Kingdom of Great Britain and Northern Ireland to be a reciprocating territory for the purposes of the said section, and the High Court in England, the Court of Session in Scotland, the High Court in Northern Ireland, the Court of Chancery of the County Palatine of Lancaster and the Court of Chancery of the County Palatine of Durham to be superior courts of that territory.

[No. F. 34-I/52-L.]

K. V. K. SUNDARAM, Secy.

“We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home...”

▶ Requirements for the Enforcement of Foreign Orders

- Submission of the certified copy of the relevant decree
- Conclusive Proof: A certificate stating the extent to which the decree has been satisfied or adjusted

▶ Should the court require any further evidence?

- No, in cases where the foreign decree was passed on merit, no further evidence is required.
- *Lakhpur Rai Sharma vs Atma Singh* – The Court refused to interfere with the findings and judgement of the foreign Court and it was conclusively held that a certificate stating complete satisfaction with the decree shall not require any further evidence.

Section 13 CPC - Grounds for Refusal to Enforce



- ▶ Judgement being pronounced by a court of incompetent jurisdiction;
R.M.V. Vellachi Achi vs. R.M.A. Ramanathan Chettiar – The lack of jurisdiction of the Singapore court in relation to the individual capacity of the party was highlighted.
- ▶ Judgement not given on the merits of the case;
Gurdas Mann vs. Mohinder Singh Brar – An ex-parte judgement which reflected lack of merits was refused to be enforced.
- ▶ Judgment as obtained is against natural justice;
Lalji Raja & Sons vs. Firm Hansraj Nathuram – In contrast to the above judgement, the Court took a holistic view of the matter to uphold that the principles of natural justice was followed despite ex-parte hearing.

Grounds for Refusal



- ▶ Judgement has been obtained by fraud;
Satya vs. Teja Singh – Misleading the court to believe that it has sufficient jurisdiction amounted to fraud and enforcement was refused on the grounds of fraud.
- ▶ Adoption of incorrect international law or ignorance of applicable domestic laws.
- ▶ Judgement sustains a claim founded on a breach of any law in force in India.

Hague Convention on Choice of Court Agreement

- ▶ Targeted to increase global cooperation in relation to agreements with exclusive choice of courts
- ▶ Clearly defines ‘designated courts’
- ▶ Mandates the exercise of designated jurisdiction unless contrary to domestic laws
- ▶ Mandates recognition and enforcement of foreign judgements and orders
- ▶ Issues and Challenges
- ▶ Sets out grounds for refusal to enforce foreign judgments

United Kingdom and USA

▶ **The Administration of Justice Act, 1920 (“AJA”) and The Foreign Judgments (Reciprocal Enforcement) Act, 1933 (“FJA”) (UK)**

While the AJA is the domestic law for the administration of foreign judgments, as applicable for British owned territories, the FJA established reciprocal ties between nations, like India and Pakistan, for the enforcement of foreign orders.

The AJA provided the judgment debtors with the right to defend against foreign judgements on the ground that the judgement is subject to appeal in the foreign territory. The FJA, however, reversed the same and gave the courts the discretionary power to stay or adjourn an enforcement proceeding which is subject to appeal in the originating territory.

▶ **Uniform Foreign Money Judgments Recognition Act, 1962 and Uniform Foreign-Country Money Judgments Recognition Act, 2005 (USA)**

The 1962 Act was the first attempt to codify provisions related to enforcement of foreign judgements, such as grounds of refusal. It also aimed to bring in enforcement of US judgements in foreign countries.

The 2005 Act was a slightly modified and renamed version of the 1962 Model Act. It introduced the specific procedure to be undertaken for the enforcement of foreign judgements in the USA and it placed the burden of proof with regard to the judgement being enforceable, on the party enforcing a foreign judgment.

USA

- Judgement was issued by an incompetent court with insufficient jurisdiction
- Judgement being passed in a partial judicial system
- Procedure of passing the judgement being against the due principles of law
- Lack of fair opportunity of hearing to the defendant
- Judgement being obtained by fraudulent means
- Judgement being against the principles of natural justice
- Judgement being contrary to US public policies and US constitutional principles
- Judgement being inconsistent with a prior judgement, on same matter between the same parties

UK

- Lack of sufficient jurisdiction in terms of English conflict of law rules
- The absence of defendant at the foreign jurisdiction
- Lack of consent of defendant to the foreign jurisdiction
- Judgement being inconclusive in nature
- Lack of merits
- Possibility of reopening the case I foreign jurisdiction
- Judgement being obtained by fraudulent means
- Judgement being contrary to public policy or human right laws
- Judgment being contrary to the natural principles of justice
- Judgement being inconsistent with a prior judgement, on same matter between the same parties

Arbitration as a Solution

- ▶ Right of parties to choose arbitration
- ▶ Do courts interfere with agreements with arbitration clauses?
 - No, courts in India, USA and UK have refused to breach agreements which refer to arbitration as dispute resolution mechanisms
 - *Tyco Valves & Controls Distribution GMBH vs. Tippins Inc.* – A foreign judgment was refused to be enforced since the agreement clearly set out arbitration to be dispute resolution mechanism

Solution for Better Enforcement of Foreign Judgements

Strengthening mutual trust by recognizing nations as 'reciprocating territories'

Well defined grounds of refusal of foreign orders from reciprocating territories

Mutual efforts for recognition and enforcement - *Advantages:*

- Closer view into the procedural and substantive laws applied by the foreign court
- Opportunity to discuss grounds of refusal
- Possibility of remediation at foreign court
- Reduced timelines for action



Thank you