



MALDIVES LAW REVIEW

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In this ISSUE:

The law on penalty interests in the Maldives

Fathimath Lamaan & Aishath Sheena Mohamed

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THE LAW ON PENALTY INTERESTS IN THE MALDIVES

Fathimath Lamaan & Aishath Sheena Mohamed

This article will explore the recent development of the law on the enforceability of penalty interest clauses in the Maldives, specifically in their inclusion in invoices exchanged between parties in commercial contracts.

It is common for commercial contracts to contain certain secondary obligations, in addition to the primary obligations of the parties that set out specific consequences for breaches of contract. This secondary obligation, flowing from the respective primary obligation will usually be of a pecuniary nature, imposed on the defaulting party by way of a sanction for irregular compliance or non-compliance with the primary obligation. Penalty interest clauses or “*Sharuthu Jazaaee*” serves a similar purpose by facilitating the innocent party to be compensated and to legitimately coerce potential offenders, thereby creating an incentive which encourages the defaulting party to comply with the primary obligations of a contract due to the threat of incurring a penalty.

While the law on penalty interest clauses is a relatively new concept within the Maldivian legal system and is yet to become fully settled law, it remains true of various other contemporary jurisdictions who face similar unpredictability surrounding the law governing such clauses.

The following are the major decisions of the Maldivian courts relating to penalty clauses in commercial contracts in the Maldives.

- *CPS Private Limited v Works Corporation Private Limited (Supreme Court Case No. 27/SC-A/2013)*
- *INT Management Private Limited v Micro Investment Private Limited (Supreme Court Case No. 2015/SC-A/16)*
- *Hub Company Private Limited v Male’ Water and Sewerage Company Private Limited (High Court Case No. 2015/HC-A/340)*
- *Olhuveli Laamu Holdings Private Limited v Ismail Rafeeu (Supreme Court Case No. 2014/SC-A/01)*
- *State Trading Organization PLC v Whiteline Private Limited (High Court Case No. 2015/HC-A/177)*

- *Central Line Private Limited v Loama Maamigili Resort and Spa Private Limited (High Court Case No. 2015/HC-A/326)*

The first Supreme Court decision which affirmed the validity of the penal clauses is CPS Private Limited v Works Corporation Private Limited.

CPS PRIVATE LIMITED V WORKS CORPORATION PRIVATE LIMITED (SUPREME COURT CASE NO. 27/SC-A/2013)

In the appeal of High Court Case No. 2012/HC-A/291, the Supreme Court reversed the decision of the High Court in upholding the interest payment claimed by CPS Private Limited (hereinafter referred to as “CPS”) pursuant to the penalty clause included in the invoice.

The case concerned a claim brought forward by CPS for the recovery of the outstanding principal amount of USD 286,649.23 payable for the works done and material supplied to Works Corporation Private Limited (hereinafter referred to as “Works Corporation”) pursuant to the agreement between the parties and the interest payment of USD 4,130,797.70 calculated at a daily interest rate of 2% for each day of default after 15 days from the date of the invoice.

In reaching a decision, the High Court decided to give effect to the explicitly agreed provision in the written contract that existed between the parties and declared that there no indication to infer an offer and acceptance from the conduct of the parties.

Upon further appeal by Works Corporation, the Supreme Court noted that it was evident that Works Corporation had failed to make the payments due for the invoices within the proscribed period as per the agreement. Yet they further noted the fact that Works Corporation accepted the invoices served by CPS without making an objection within 48 hours as required, and their conduct in making the payment in whatever amount they were capable of paying at the time was sufficient indication that Works Corporation had by their conduct impliedly accepted the invoices with the conditions stipulated therein (i.e. the offer).

It was identified that Works Corporation had always acknowledged the receipt of the invoice without ever contesting the clause (i.e. previous course of dealing), albeit the absence of such a condition in the existing agreement between the parties.

Going by the above reasoning, acceptance of the penalty interest clause resulted in a fresh agreement which was independent of the original contract to be implied.

It is interesting to note that the Judges in this case refrained from laying down a criterion or set a cap on the level at which interest could be charged under such clauses. Nevertheless, it was noted by the Justices hearing the case that it is an established practice in the Maldives to include such penalty clauses as those contained in the invoices in this case, with respect to various financial transactions and is permissible through various sources of Islamic law as long as it does not amount to usury or “*riba*”.

From the point of view of Islamic Shariah, the Supreme Court held that the inclusion of such clauses in a transaction is at the discretion of the parties concerned and is permissible in contracts concerning financial obligations or transactions, if they do not hinder the attainment of the primary obligation or in effect facilitate the attainment of the purpose and objective of the contract.

Accordingly, we can gather from the above that where one party to the contract subjects the existing contract to a term of which the other party disapproves or will be adversely affected in terms of his rights under the contract, it is the obligation of the other party to take whatever steps to prevent this by objecting to such a term. And where he deliberately refrains from doing so, it can be deemed that he had impliedly agreed to such terms.

Subsequent to this decision, the Supreme Court further elaborated on the law on penalty interests in the case outlined below.

INT MANAGEMENT PRIVATE LIMITED V MICRO INVESTMENT PRIVATE LIMITED (SUPREME COURT CASE NO. 2015/SC-A/16)

This was a case filed by Micro Investment Private Limited (hereinafter referred to as “Micro”) against INT Management Private Limited (hereinafter referred to as “INT”) at the Civil Court (Case No. 695/Cv-C/2015) to recover the price of a sand pump hose that was delivered to INT amounting to MVR 132,500 along with a penalty interest of MVR 3,411,875.

The invoice (Invoice No. 2012/MI/113) claimed to have been issued by Micro to INT on 10 September 2012 explicitly instructed the payment to be made within 15 days and for any discrepancies or damage to the goods to be notified to the issuer in writing within 24 hours.

The trial judge held that although Micro had fulfilled their obligation in delivering the goods as per the order, INT was unable to rebut evidence of their failure to pay the price for the good within the time frame stipulated in the invoice which was subjected

to a surcharge of 5% per day of late payment. However, the court did not find it appropriate to impose the liability of such a clause upon INT when the delivery of neither the invoice bearing such a clause nor any other written document to the effect could be proved in the court. Accordingly, Micro was only awarded the principal amount of the goods.

Upon appeal to the High Court, the High Court upheld the decision of the Civil Court, unanimously annulling the part of the verdict which stated that penalty interest could not be charged on the basis that the delivery of the invoice to INT could not be proved.

Thus, while the High Court found the statements of both parties to suffice as proof that the invoices were served to INT and thereby ordered Micro to settle the penalty interest as well, in effect the High Court had agreed with the Civil Court to the extent that as long as the invoices were properly served or delivered to the recipient of the goods or services, such clauses would be valid and upheld.

Upon further appeal, the Supreme Court in reiterating its decision in CPS Private Limited v Works Corporation as outlined above, held that the enforceability of a contract between two parties depends on the satisfaction of the elements of a contract and it must be one created without violating the rules connected to the preemptory rule of public order and decency in good faith.

As such, it was clear that INT would only be responsible to pay according to the penalty clause where the clause had been unconditionally accepted either explicitly or impliedly. On the facts of the case however, there was no evidence to indicate an express agreement to the penalty clause.

The issue for the Supreme Court then was to identify an implied acceptance from the facts of the case. In determining the existence of substantial evidence indicating implied acceptance, it was recognized that grounds for determining this may consist of *inter alia* remaining silent without making any objections about the penalty clause within the prescribed period or silence accompanied with refraining from making the payment during this period.

The first issue at dispute was the date at which the invoice was served to INT as there was no independent and substantial evidence or witness to account for this fact in the absence of a signature by INT on the invoice. As such, it was held that irrespective of the account of Micro that the invoice took effect on 25 September 2012, the fact that INT had not raised any objection with respect to the invoice in question within 24 hours from this date, in its very nature should not be taken as grounds for acceptance of the penalty clause. Accordingly, the Supreme Court reversed the decision of the High Court to award the penalty interest and in doing so, declared that such an award would be contrary to legal and judicial principles in the absence

of sufficient proof of the invoice being served to INT.

Therefore, we can gather from the above that it is of crucial importance that the invoice be duly served in order for any contractual terms stipulated therein to be effective or enforceable. Interestingly it is possible to infer from the obiter of this case that the purpose of the law governing penalty clauses is to award an adequate compensation for the party incurring a loss on account of failure to make the requisite payment and therefore the imposition of an unreasonable amount as the rate at which interest could be charged will not be legally valid from an Islamic Law perspective.

In essence, it should not be used as a tool to strictly penalize the parties at stake or to unjustly enrich one party without a rightful entitlement to the award of damages. In fact, it was noted that case law of many contemporary jurisdictions depicts an attempt to withhold the level of compensation at the amount of the principal amount for which a primary obligation arises within any contract. Thus, this decision was arguably an attempt by the Supreme Court to control the rate at which penalty interest is chargeable, to a minimal. The ruling in this case was distinguished by the High Court in the following decision.

HUB COMPANY PRIVATE LIMITED V MALE' WATER AND SEWERAGE COMPANY PRIVATE LIMITED (HIGH COURT CASE NO. 2015/HC-A/340)

The claim was filed at the Civil Court (Case No. 1463/Cv-C/2014) by Hub Company Private Limited (hereinafter referred to as the "Hub Company") with respect to the recovery of MVR 20,140 payable under their Invoice No. HC/IN/1551 for services provided to Male' Water and Sewerage Company Private Limited (hereinafter referred to as "MWSC") and for the recovery of the accrued penalty interest of 5% per day of late payment until the date of the Civil Court's verdict.

The Civil Court in its decision distinguished the decision of the Supreme Court in INT Management Private Limited v Micro Investment Private Limited and noted that Hub and MWSC had not agreed to a duration in which the payments were to be settled and that there was no evidence to indicate the manner in which both parties had conducted themselves with respect to penalty interest payments in the past and that as such, there was no judicial or legal principle to allow for the penalty interest to be recovered.

Upon appeal, it was noted in the High Court that MWSC had attempted to make the payment for the invoiced amounts despite it being a late payment which again was on account of the discrepancies with the amount in the Invoice and the purchase

order. However, Hub had objected to this payment stating that it shall be accepted only with the accrued penalty interest of 5% per each day of late payment. Nevertheless, the High Court held that the penalty clauses cannot be upheld in the absence of any evidence to indicate that such a term was accepted explicitly or implicitly by MWSC.

Whilst this case was a distinction of the Supreme Court's decision in INT, the Supreme Court explored the law on penalty interests further in their recent decision outlined below.

OLHUVELI LAAMU HOLDINGS PRIVATE LIMITED V ISMAIL RAFIU (SUPREME COURT CASE NO. 2014/SC-A/01)

This was a claim filed by Ismail Rafeeu (hereinafter referred to as "Rafeeu") at the Civil Court, against Olhuveli Laamu Holdings Private Limited (hereinafter referred to as "Olhuveli") seeking payment for the Invoices issued for diesel petrol supplied by Rafeeu to Olhuveli, along with the penalty interest accrued on each of the 4 invoices (a sum of MVR 1,370,100) at a penalty interest rate of 2% for each day of delay after 15 days from the date of the invoices.

The Civil Court (Case No. 1878/Cv-C/2011) held that Rafeeu cannot be awarded the penalty interest. Upon appeal to the High Court, the High Court (Case No. 2012/HC-A/238) reversed the decision of the Civil Court with respect to the award of the penalty interest and held that Rafeeu was entitled to the penalty interest amounting to MVR 3,730,492.

Upon appeal of this decision by Olhuveli at the Supreme Court, the main point on which the Supreme Court had to determine was whether the penalty interest clause was accepted by Olhuveli.

This was in light of the decision of the High Court which recognized that an agreement as to the penalty interest can be identified based on the general customs applicable to similar commercial transactions. It was recognized that the initial agreement between the parties came into existence when the terms offered in the purchase order of Olhuveli was accepted by the conduct of Rafeeu in delivering the goods as per the purchase order. It was further recognized that as a general rule, any purported amendment to the terms of such an agreement which is communicated through means or at a time that was not agreed between the parties beforehand will not constitute as a valid amendment to the terms of the existing agreement. However, the principle established in High Court Case No. 2012/HC-A/292, may allow the conduct of the parties to suffice to bring about valid amendments to an agreement,

where no specific procedure is set to bring about such amendments within the existing agreement.

Accordingly, although a new term that amends the original agreement between the two parties which is included in the documentation sent along with the delivery of the goods or after such delivery, would not constitute a valid offer in the usual circumstances. However by contrast, it would in this instance constitute a valid offer, despite the absence of a written agreement between the parties.

The Supreme Court found that the conditions regarding the penalty interest were included in the invoices sent to Olhuveli upon the delivery of the goods and although the immediate recipients of the invoices were not authorized to accept the terms in the invoices, the application of the test of general practice in similar transactions indicates that the invoices should have reached relevant persons of authority in positions to accept or reject the terms of the invoices. Hence, if the invoices contained a term that was not agreed prior to the transaction, Olhuveli should have acted within the earliest possible time to negate the acceptance of such terms instead of refraining from taking any actions or remaining silent.

Hence, this nullifies the argument of Olhuveli that the penalty clauses were included without prior negotiation or agreement to the clauses on their part.

Furthermore, the general rule in Islamic Shariah remains that silence should not be treated as acceptance. The exception to this rule is that, acceptance may be inferred from the silence where the offeree needs to clearly make his position known and is capable of the same. As such, going by this exception, depending on the nature of the case, general practice in similar transactions or where the circumstances evinces, an offer may be deemed as impliedly accepted where the offeree is aware of the offer but it is not made obligatory for the acceptance to be explicitly communicated.

Subsequent to this decision, the High Court in Case No. 2015/HC-A/177, earlier this year reiterated the principles recognized by the Supreme Court in earlier cases to declare that even if penalty clauses have been incorporated in an invoice which has been effectively delivered, and the terms therein have been accepted by the receiver without any objection to the invoice, the level of compensation sought by such clauses must be proportionate to the actual or anticipated loss incurred by the debtor.

**STATE TRADING ORGANIZATION PLC V WHITELINE PRIVATE LIMITED
(HIGH COURT CASE NO. 2015/HC-A/177)**

The case concerned agreements entered between Whiteline Private Limited (hereinafter referred to as “Whiteline”) to provide services to State Trading Organization Plc (hereinafter referred to as “STO”). Pursuant to these agreements, STO retained fees until all of the agreed works were completed and handed over to the satisfaction of STO by Whiteline. Whiteline filed a claim at the Civil Court against STO for the recovery of the outstanding retention fee and the penalty interest payable pursuant to the two invoices sent by Whiteline to STO for the recovery of the same. Pursuant to these two invoices, any objection to the terms of the invoices or any discrepancies were required to be notified to Whiteline by STO within 48 hours and the failure of payment within 15 days from the date of the invoice, where no such objection was raised, would incur the penalty interest for STO on the retention fee amount at a rate of MVR 2050/ per day of delay.

The Civil Court awarded the principal amount of MVR 45,517 as the outstanding retention fee after deducting for the works not completed by STO. However, only one of the invoices were proven to have been effectively delivered to STO and the court awarded a penalty interest amounting to MVR 1,980,300 for the said invoice.

On the appeal of the Civil Court’s decision by STO, the High Court reversed the part of the decision of the Civil Court which awarded the penalty interest and held that the determination of loss incurred by one party due to the failure of the other party to fulfill their primary obligations under a contract is governed primarily by Section 23 of the Contract Act of Maldives. Pursuant to this, an award of compensation would be limited to the direct loss and foreseeable loss within the contemplation of the parties. It must therefore be proportionate to the actual loss or the contemplated loss incurred by the party seeking compensation.

The decision of the High Court took into account the fact that Whiteline was unable to prove any losses or the basis of such losses that they had incurred due to the failure of STO to repay the retention fees, in accordance with the law and the judicial precedents on the topic.

The High Court further went ahead to apply the principle affirmed in the above case in their decision in Central Line Private Limited v Loama Maamigili Resort and Spa Private Limited (Court Case No. 2015/HC-A/326). In this case, Central Line had charged a penalty interest at the rate of 2.5% per each day of delay in settlement of the invoice amount of USD 4819 issued for the goods supplied by *Central Line to Loama*. The High Court on 5 December 2017 decided on the same line as the previous case of STO that the penalty interest cannot be awarded as the claimant was not able to prove any loss incurred or the basis at which the compensation for the anticipated loss was estimated to be at a rate of 2.5% per day.

With cases like these, the courts now appear to be more restrictive with the award of a compensation encompassing the penalty interest payment, moving towards

limiting the level at which penalty clauses seek to impose liability by requiring the basis for the compensation to be justified and proportionate.

Having discussed the position in the Maldives, by contrast, whilst the European Union offers protection for unpaid commercial parties through the *European Communities (Late Payment and Commercial Transactions) Regulations 2002 (SI 388 of 2002)*, despite the lack of mention of a penalty interest in the contract, invoice or terms and conditions, provided that payment is not made for a commercial contract within 30 (thirty) days, the law on the enforceability of penalty interests is still a developing area in the case law of the majority of jurisdictions.

For instance, it was a long established principle in English law that where clauses amount to a “penalty”, they will be unenforceable. This principle was clarified recently in the UK Supreme Court decision of *Cavendish Square Holding BV v El Makdessi and Parking Eye Ltd v Beavis [2015] UKSC 67*. The UK Supreme Court rejected the traditional test that had withstood the test of time for a 100 years, of whether a clause that takes effect on breach is a “genuine pre-estimate of loss” and therefore compensatory, or whether it is aimed at deterring a breach and therefore penal. The true principle, as established in the judgment, is whether the clause is out of all proportion to the legitimate interest of the innocent party in enforcing the obligations of the counterparty under the contract. If so it will be penal and therefore unenforceable.

The new test for whether a provision is an unenforceable penalty 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.”

As such, the three questions which must be asked in order to analyze whether a clause is enforceable are:

1. Does the innocent party have a legitimate interest in enforcing the clause?
2. Does the clause have an adverse impact that exceeds the innocent party's legitimate interest?
3. Is the clause a primary provision of the contract?

The UK Supreme Court in its judgment stated that where a contract contains an obligation on one party to perform an act and also if he does not perform it he will pay the other party a specified sum of money. As such, the obligation to pay the specified sum is a secondary obligation which is capable of being a penalty. But if the contract does not impose either expressly or impliedly, an obligation to perform the act, but merely provides that if one party does not perform, he will pay the other party a specified sum, the obligation to pay the specified sum is a conditional primary obligation and cannot be a penalty. It was further recognized that the classification of

terms for the purposes of the penalty rule depends on the substance of the term and not mere form and that the circumstances in which a contract was made and the nature of the parties are all relevant in considering the application of the rule.

Contractual clauses aimed at deterring a breach of contract rather than the recovery of compensation may now be enforceable by way of liquidated damages in England and Wales if the innocent party can show they had a legitimate interest in ensuring that the contract was performed. This test is definitely a departure from the previous rules in place with respect to penalty interests but it is not straightforward and academics and the like have opined that there may be more litigation on the horizon in relation to the interpretation of the new test. The same vision remains true for the Maldives.

In light of the cases discussed at the outset, we see a positive approach taken by the courts with respect to the enforceability of penalty interests in the Maldives. Whilst the courts have sought to elaborate on the concept of penalty interests to the extent of whether such clauses have been accepted and delivered to the effected party, it is clear that in the absence of clear principles which outline the proper criteria with respect to what constitutes “adequate compensation” payable to the creditor, such broad decisions with no clear yardstick on the law are prone to be abused by frivolous litigants. As such, in the unlikely possibility of parliamentary intervention, we are yet to see the development of the law on penalty interests through the judicial activism of the judges in the Maldives.



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بهر روز از خود بپرس که آیا در این روز
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ארבעה מיליארד שקלים, מהם 286,649,23 שקלים הוצעו לרכישת נכסיהם של החברות הנ"ל, ו-4,130,797,70 שקלים הוצעו לרכישת נכסיהם של החברות הנ"ל.

730% ו-3,730,492 שקלים הוצעו לרכישת נכסיהם של החברות הנ"ל, ו-2% ו-1,980,300 שקלים הוצעו לרכישת נכסיהם של החברות הנ"ל.

1643.8% ו-2050 שקלים הוצעו לרכישת נכסיהם של החברות הנ"ל, ו-730% ו-1,980,300 שקלים הוצעו לרכישת נכסיהם של החברות הנ"ל.

11.5% ו-17% ו-3,730,492 שקלים הוצעו לרכישת נכסיהם של החברות הנ"ל, ו-2% ו-1,980,300 שקלים הוצעו לרכישת נכסיהם של החברות הנ"ל.

הצעת רכישה של חברת "אנרגי" לרכישת חברת "אנרגי"

הצעת רכישה של חברת "אנרגי" לרכישת חברת "אנרגי" כוללת רכישה של 100% מהחלקה של חברת "אנרגי" הנ"ל, ורכישת נכסיהם של החברות הנ"ל.

הצעת רכישה של חברת "אנרגי" לרכישת חברת "אנרגי" כוללת רכישה של 100% מהחלקה של חברת "אנרגי" הנ"ל, ורכישת נכסיהם של החברות הנ"ל.

הצעת רכישה של חברת "אנרגי" לרכישת חברת "אנרגי" כוללת רכישה של 100% מהחלקה של חברת "אנרגי" הנ"ל, ורכישת נכסיהם של החברות הנ"ל.

הצעת רכישה של חברת "אנרגי" לרכישת חברת "אנרגי" כוללת רכישה של 100% מהחלקה של חברת "אנרגי" הנ"ל, ורכישת נכסיהם של החברות הנ"ל.

הצעת רכישה של חברת "אנרגי" לרכישת חברת "אנרגי" כוללת רכישה של 100% מהחלקה של חברת "אנרגי" הנ"ל, ורכישת נכסיהם של החברות הנ"ל.

