

WFW SCORES UK SUPREME COURT WIN FOR PTT

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Watson Farley & Williams (“WFW”) has successfully represented PTT Public Company Limited (“PTT”) – Thailand’s state-owned oil and gas company – before the UK Supreme Court in the case of *Triple Point Technology, Inc v PTT Public Company Ltd*, which has important implications for the applicability of liquidated damages provisions and hence for all construction contracts drafted under English law. The appeal was heard in November 2020 in front of Lord Hodge, Lady Arden, Lord Sales, Lord Leggatt and Lord Burrows.

Liquidated damages are a vital remedy for employers in the construction sector, with standard-form construction and engineering contracts (FIDIC, NEC, JCT etc.) including such provisions to provide a specified rate of damages for delay in completion of work by a contractor. Such provisions are generally understood to apply up to the date when the contract is terminated or abandoned.

The underlying matter behind this case concerned a multi-million-dollar dispute between PTT and US counterparty Triple Point Technology, Inc. (“Triple Point”) in respect of claims and counterclaims arising in relation to a failed project for the design, implementation and ongoing support and maintenance of a software system for PTT’s commodity trading and risk management, the contract for which was drafted under English law.

Having successfully represented PTT at first instance in the Technology and Construction Court in 2016 and in the Court of Appeal in 2019, WFW continued to advise them on their appeal to the Supreme Court.

The Court of Appeal’s judgment had caused significant uncertainty in the constructions sector as it appeared to abandon what had been considered the orthodox position in favour of a new approach that would give contractors an incentive not to complete works in order to avoid paying liquidated damages for any delays it had caused.

Fortunately, the Supreme Court re-confirmed the previous approach as correct, observing that the Court of Appeal's approach was a "radical re-interpretation of the case law on liquidated damages clauses" and had been wrong. The Supreme Court concluded that, save where a clause clearly states otherwise, it should normally be expected that a liquidated damages clause will apply for any period in delay up to the date of termination, but not beyond. The Court was also asked to re-examine the lower courts' decision on a limitation of liability provision and allowed PTT's appeal in respect of the same, finding that the contract included a carve-out to the limitation of liability provisions in circumstances where Triple Point had been found to be in negligent breach of contract.

The cross-border WFW Dispute Resolution team that represented PTT from 2016 onwards was led by Bangkok Partner Ratthakarn Boonnua and London Partner Rob Fidoe, with support from Senior Associate Dr Stephanie Garner and Associate Emily Sadie. James Howells QC and Dr Nicholas Maciolek of Atkin Chambers acted as counsel for PTT before the courts.

Ratthakarn commented: "We're delighted to have represented PTT successfully throughout this long and challenging dispute. Our final victory before the Supreme Court is especially welcome given its implications for those who regularly contract using standard-form or bespoke wording and wish to have certainty as to how reliance on liquidated damages provisions will be interpreted by the English courts in the event of delay. This is therefore not simply a victory for PTT but, we believe, the construction industry as a whole".

Rob added: "This decision brings welcome clarity to the applicability of the orthodox approach to the interpretation of liquidated damages provisions and to the protection of accrued rights at termination, issues of general importance in English law. It also reinforces well-recognised principles relating to the interpretation of limitation of liability provisions, including the general principle that clear words are needed to restrict valuable rights and the overarching view that the English courts will interpret the words used by the parties fairly to give effect to the bargains and allocation of risks that commercial parties choose to make".

Triple Point was represented by Kobre & Kim (London and New York) and Paul Darling OBE QC, 39 Essex Chambers.

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