

## Are There LADs After Death'

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**PRACTICES** Litigation, International Arbitration

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### Introduction

In *Triple Point Technology v PTT Public Company* [2019] EWCA Civ 230, the Court of Appeal considered whether a liquidated damages provision applied where the contractor failed to complete the work. The decision also dealt with disputed payment provisions, the existence (or otherwise) of an implied right to suspend for lack of payment and the perhaps unsurprising challenge (as it is often made) that the liquidated damages clause was an unenforceable penalty.

The case offers not only some salutary reminders that English law applies contracts strictly, but it also gives food for thought as regards the availability of liquidated damages where the employer has terminated the contract prior to (delayed) completion.

The Court of Appeal has distanced itself from what was previously thought the orthodox approach in such situations, after counsel unearthed (apparently at Sir Rupert Jackson's prompting during the hearing) an over 100 years old House of Lords' decision that appears to have largely been forgotten. Not any more!

### The Facts and the Contract

Triple Point, a software company, had contracted with PTT, the Thai state-owned oil and gas company, to install proprietary software for PTT's commodities trading business. Triple Point had a proprietary system which it was to supply for PTT in phases – replacing of PTT's old software with Triple Point's system, followed by expansion and adaptation of Triple Point's proprietary suite, to meet PTT's specific needs.

The contract was concluded after PTT had put the project out to tender. In June 2012, PTT issued 'Terms of Reference'. This was an 'employer's specification'-type document which described the technical features that PTT required. In September 2012, Triple Point submitted its bid. That bid was then discussed in meetings with PTT. From November 2012, Triple Point issued two 'Technical Documents', recording Triple Point's responses to questions PTT had asked in bid discussion meetings. These documents were intended to be 'bid clarifications'. In December 2012, the parties signed a letter of intent. In late January 2013, Triple Point sent PTT a 'License Agreement' and 'Order Forms A, B and C' for phases of the Triple P. In February 2013, the contract was signed.

The final contract had a number of exhibits, which either consisted of or referred to all the documents the parties had exchanged in the preceding months – so the Terms of Reference, Technical Documents, Letter of Intent, License Agreement and Order Forms. Perhaps unsurprisingly, these documents were not always consistent with each other, or the conditions of the contract. One particular inconsistency related to payment dates. Article 18 of the final contract provided for payment of a percentage of the contract price against performance milestones. Order Forms A, B and C, exhibited to the contract, provided for certain other payments to be made on calendar dates, without reference to the completion of any particular works. The contract also

contained a 'precedence clause', stating that the main conditions, including Article 18, took precedence over the exhibits in the event of any conflict.

To read the full article, see the PDF linked below.

[Are-There-LADs-After-Death.PDF](#)