The Malayan Law Journal

EMBEDDING A DUTY TO MITIGATE DAMAGE WHERE A LIQUIDATED DAMAGES OR PENALTY CLAUSE EXISTS

by

PROFESSOR JASON CHUAH
Professor of Commercial and Maritime Law
City, University of London, UK[1]

Much ink has indeed been spilled on the subject of the duty to mitigate and the enforceability of a liquidated damages clause, from all corners of the common law world. It appears that Malaysia is no different — the debate too has taken a degree of prominence as a recent MLJ article by Wang and Lim shows.[2] The question is whether there should exist a duty to mitigate the loss where there is a liquidated damages clause incorporated in the contract. The article does a valiant job elucidating the point that following the Federal Court's decision in *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd*,[3] there now is paved the way for the Malaysian courts to put to rest the line of conflicting authorities[4] on whether there is such a duty to mitigate in the light of a valid liquidated damages clause. At the risk of over-simplification, we should perhaps remind ourselves what was decided in *Cubic Electronic* and the legal context prior to *Cubic Electronic*.

---

1 [redacted] US, EU, Latin America and Africa

2 B. Wang and S. Lim, 'The Duty to Mitigate Losses Post-Cubic Electronics: A Necessity in Claims for Liquidated Damages?' [2021] 3 MLJ cclxxix.

3 *Cubic Electronics Sdn Bhd (in liquidation) v Mars Telecommunications Sdn Bhd* [2019] 6 MLJ 15.

4 Cases in support of the role of the duty to mitigate: *Chase Perdana Sdn Bhd (formerly known as Chew Piau Bhd) v CIMB Bank Bhd* [2010] 1 MLJ 685; *Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd* [2014] 5 MLJ 491. Cases going the other way: *Berjaya Times Square Sdn Bhd v Twingems Sdn Bhd & Anor and another action* [2012] 9 MLJ 510; *Malayan Cement Industries Sdn Bhd v Golden Island Shipping (L) Bhd* [2017] 4 MLJ 490.

THE LEGAL NATURE OF LIQUIDATED DAMAGES CLAUSES

The original position in Malaysian law was espoused in *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy*[5] that there was no conceptual difference between an agreed damages clause and a penalty. Such clauses would be unenforceable unless it is proved that they reflected the actual damage[6] or the reasonably foreseeable damage caused.[7] The exception was where it is difficult or impossible to prove the quantum of the loss.[8] That of course is inconsistent with the English position, then and now.

The original English position being that where the agreed damages clause is not a sum *in terrorem*, reasonable and a genuine pre-estimate of the loss sustained, it would be enforceable as liquidated damages.[9] That was subsequently reframed by the UK Supreme Court in *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Ltd v Beavis*[10] in a more liberal, *laissez-faire* language. The majority held that the distinction between liquidated damages and penalties remains representative of English law but any court must be slow to deny the effect of a liquidated damages clause. As long as there is evident a legitimate [economic] interest for the party to the contract in question, which the clause seeks to protect, such a clause subject to the principle of proportionality should be enforced.

Controversially[11] too the court saw no distinction to be made between consumer and commercial contracts. Thus, in the case joined to *Cavendish*

---

5 *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817; following the Privy Council decision in the Indian case of *Bhai Panna Singh v Bhai Arjun Singh AIR* 1929 PC 179. The Privy Council decision was clearly influenced by the dictum of Lord Thurlow LC in *Sloman v Walter* (1783) 1 Bro CC 418, 419:
'... where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and, therefore, only *to secure the damage really incurred* ...'. (Emphasis added.)

6 See below for a criticism of this requirement.

7 As characterised by *Hadley v Baxendale* (1854) 9 Exch 341 (see for example *Johor Coastal Development Sdn Bhd v Constrajaya Sdn Bhd* [2009] 4 MLJ 445, 459–460)

8 *Selva Kumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 1 MLJ 817; likewise in *Reliance Shipping & Travel Agencies v Low Ban Siong* [1996] 2 MLJ 543, the Court of Appeal stated unequivocally that the words 'whether or not actual damage or loss is proved to have been caused thereby' are limited to those cases where the court would find it difficult to assess damages for the actual damages or loss.

9 *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79.

10 *Cavendish Square Holding BV v Talal El Makdessi; ParkingEye Ltd v Beavis* [2015] UKSC 67.

11 At least to this author. It should further be noted that in certain jurisdictions, albeit civilian systems, such as Germany a distinction is made between consumer and purely commercial contracts. In the latter, liquidated damages clauses are given an appreciable degree of laxity. (§343, 348, German Civil Code BGB).

Square, *Beavis v Parking Eye*,[12] the majority in the Supreme Court held that the imposition of a £85 fine for car owners who overstayed the 'free parking' period, at a commercially operated car park was enforceable against the user. The majority considered that the car park owners had a legitimate commercial interest to protect. I had argued elsewhere[13] that that was an opportunity missed — this position does not take into account the fact that the operator was entitled to claim that amount even when the user had exceeded the time nominally or if the delay returning to their car was not their fault or indeed, had been contributed to by the car park operator's own breach (for example, the area was unsafe causing the car owner to hurt themselves and being thus unable to return to the car promptly). As to the reasonableness of the charge, Lord Toulson, the dissenting judge, commented with concern: '[b]y most people's standards £85 is a substantial sum of money. Mr Butcher reminded the court by way of comparison that the basic state pension is £115 per week'.

An *aside*, therefore — even as the new test by the Federal Court in *Cubic Electronics* is unreservedly endorsed by this author as a step in the right direction for commercial certainty and efficiency, it is hoped that proper concession would be paid to the consumer. As to purely commercial transactions, this author entirely endorses the view that party autonomy and the protection of the identified legitimate interest is the right one. Indeed, even where there is no maximum ceiling set for the amount of liquidated damages that does not necessarily mean that the clause is or should be unenforceable.[14]

Returning to the issue at hand, there is naturally a view that the acceptance of the legitimate interest test by the Federal Court would lead to a better [and more liberal] respect for liquidated damages clauses and inure them from the duty to mitigate. After all, in a host of jurisdictions where the English law distinction between liquidated damages and penalties is followed (as opposed to the former Malaysian interpretation of the scope of s 75 Contract Act

12 *Beavis v Parking Eye* [2015] UKSC 67.

13 See J. Chuah, 'Chapter 3: Contents of the Contract' in M. Furmston (ed), *The Law of Contract* (6th edn, Lexis Nexis 2017).

14 *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2016] EWCA Civ 789 (overruling the lower court's decision on the penal nature of the limitless liquidated damages clause [2015] EWHC 283 (Comm)). For more about this case, see below.

1950)[15] , the principle of mitigation is often and conspicuously excised from the equation when applying a liquidated damages clause.[16]

This author urges caution.

DOCTRINAL ANALYSIS

Adherence to doctrine is of course not a bad thing, especially where commercial efficiencies and legal certainty are at stake. However, there are important nuances in legal doctrine of which we should take heed.

The duty to mitigate is not inconsistent with the *Cubic Electronics'* acceptance of the *Cavendish v Makdessi's test*

At first instance is the question that a liquidated damages clause is only enforceable if it is concerned with the protection of a legitimate economic interest and it is proportionate to that end. Assuming that *Cubic Electronics* has in fact rendered s 75 consistent with this new premise, it is nevertheless the tenor of s 75, that it is intended to be compensatory despite the UK Supreme Court's tacit discomfit with the notion of a 'genuine pre-estimate of the loss'. Our Malaysian Act in s 75 refers to 'reasonable compensation' the penalty is intended to represent. If the loss or damage could have been mitigated (without being an unreasonable yoke for the plaintiff), it might properly be asserted that the liquidated damages clause is not compensatory in nature. Moreover, a loss which is within the plaintiff's control but allowed to escalate by the plaintiff's deliberate action or omission could not properly be deemed the type of 'legitimate interest' worthy of protection. Perhaps this might be illustrated by an example.

For example, the contract requires A to deliver to B, goods in 10 instalments. A cancels the contract after making one instalment as a result of supply chain problems. The liquidated damages clause requires A to pay RM100,000 per instalment not delivered. Market price has actually fallen by 20% but B refuses to source the goods from the ready and open market claiming to be compensated to the full tenor of the liquidated damages clause.

---

15 (Act 136).

16 For the cases in question, see B. Wang, and S. Lim, 'The Duty to Mitigate Losses Post-Cubic Electronics: A Necessity in Claims for Liquidated Damages?' [2021] 3 MLJ cclxxix. Note however some inroads have been made even in English case law to this hallowed rule that mitigation has no role to play when considering a liquidated damages clause. In the Court of Appeal's decision of *MSC v Cottonex Anstalt* [2016] EWCA Civ 789 the fact that the carrier's failure to minimise its loss by minimising the delay caused was relevant to the enforceability of the demurrage clause.

It would be a travesty thus to excise the duty to mitigate from such circumstances purely on the basis that there is a liquidated damages clause.

It would wrong to assume that this flies in the face of *White & Carter (Councils) Ltd v McGregor*.[17] In *White & Carter* the innocent party was entitled to ignore the repudiation of the contract-breaker and proceed to perform, claiming his remuneration in debt rather than limiting himself to damages, notwithstanding that this course might be a great deal more expensive for the contract-breaker. Leaving aside the criticisms[18] of the case, there is one prominent difference to note. In a case like *White & Carter*, the debt in question was a genuine reflection of the contractual loss, unlike the scenario where a liquidated damages clause is in issue.

Moreover, it is a tenable contention that the liquidated damages clause is disproportionate and does not represent a reasonable measure of the economic interest if mitigation would have reduced considerably the actual damage/s. It is submitted that that is not a return to the pre-*Cubic Electronic* test. Here one is not seeking to prove the actual damage but to show the extent (proportionality) or legitimacy of the interest in question.

Lod Hodge's statement of principle in *Cavendish v Makdessi* is worth noting:

> ... 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. Where the test is to be applied to a clause fixing the level of damages to be paid on breach, an extravagant disproportion between the stipulated sum and *the highest level of damages that could possibly arise from the breach* would amount to a penalty and thus be unenforceable.[19] (Emphasis added.)

The words in italics are particularly telling. Ultimately a measure of what is a penalty and thus unenforceable is the difference between the agreed sum and the highest damages which would flow from the breach. That does rather take us back to the conventional law of damages — notwithstanding the highest thresholds reference — of which the principle of mitigation plays a vital role.

And, of course, it should not be forgotten that the duty of mitigation is limited. It remains trite dogma that a plaintiff does not need to take action

---

17 *White & Carter (Councils) Ltd v McGregor* [1962] AC 413.

18 For example, Q. Liu, 'The White & Carter principle: a restatement' (2011) 74(2) MLR, 171; J. Morgan, 'Smuggling mitigation into White & Carter v McGregor: time to come clean?' (2015) 4 LMCLQ 575.

19 [2015] UKSC 67 [255].

beyond that which is reasonable.[20]

Appreciating the difference between due and anticipatory breaches

It is maintained that *even where* positive doctrine is incontrovertible that the duty to mitigate is superseded by the presence of a liquidated damages clause, it is argued that a distinction should be made between breaches that occurred at the time of performance and anticipatory breaches of contract. The prevailing literature and indeed, case law, do not distinguish between the invocation of the liquidated damages clause in the event of an *actual* breach of contract and its use following an *anticipatory* breach. In the case of the former, there might at least be an arguable case in reliance on the current doctrinal developments to suggest that no duty to mitigate could be summoned. However, in the latter, it is argued, the duty to mitigate should apply. In *Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd*[21] one could see why the court might have been swayed by the moral call for a duty to mitigate. There it was obvious that the developer would not be able to perform their part 'as early as 2001-2002' and had made a number of offers to refund the monies paid. Although the judgment did not detail the doctrinal rationale for requiring that the plaintiff undertook to mitigate their loss, there are good reasons why in the case of an anticipatory breach the duty is especially noteworthy. The extent of the *potential or anticipatory* losses are controllable unlike in the event of an actual loss. Anticipatory losses being foreseeable might be better controlled and managed by the plaintiff. Placing the onus on the plaintiff who is better control of the circumstances to manage and mitigate the loss is not excessive. It would be contrary to spirit of the principle of mitigation to allow losses to spiral.

In the case of an actual breach, there is certainly a more convincing case to be made that the duty of mitigation might not be relevant or applicable. Taking an example from the shipping world — assuming that there is a demurrage clause requiring X to pay RM10,000 per diem for incurring additional loading time to a maximum of seven days. If X exceeds laytime by three days (which is a technical breach), it will have to pay Y RM30,000 as liquidated damages under the demurrage clause. It would be unusual that Y would be required to take any action to 'cut' its losses when these losses had already been pre-agreed. Indeed, if it allows the losses to escalate, that would be at its own risk. The time

20 *British Westinghouse Electric and Manufacturing Company Limited v Underground Electric Railways Company of London Ltd* [1912] AC 673.
21 *Balbeer Singh a/l Karam Singh & Ors v Sentul Raya Sdn Bhd* [2014] 5 MLJ 491.

of the breach also crystallises the nature and extent of the loss, to an appreciable extent. That removes any element of foreseeable loss which the plaintiff might be required to control or manage.

Hence, conceptually, there should be no material difference between a breach committed at the contractual due date and an anticipatory breach but the duty to mitigate is much less likely to crop up in the former where there is a liquidated damages clause. One should add, not because of principle but because of the factual circumstances — after all the milk has already been spilt, the eggs cracked. *Nasi sudah jadi bubur.*

The requirement for proof of actual damage a good substitute for the duty to mitigate?

As has been alluded the local legal position, given that parity of treatment applied to liquidated damages clauses and penalties, there is the controversial requirement laid in *Selva Kumar*[22] that proof of actual loss is needed in order to claim the sums denoted in the clause. If contrary to the direction of travel in Malaysian jurisprudence[23] and elsewhere, the requirement for proof of actual damage is to remain, might it be arguable that that would serve the same purpose as the duty to mitigate. And, thus, dispense with the need for a duty to mitigate in cases of liquidated damages clauses.

An example might be apposite.

---

22 *Selva Kumar* [1995] 1 MLJ 817. As to the requirement for proof of actual damage or loss, there is a divergence in opinion. See V. Sinnadurai, *The Law of Contract in Malaysia and Singapore: Cases and Commentary* (2nd edn, Butterworths 1987) 671; A. Phang, *Cheshire, Fifoot and Furmston's Law of Contract* (2nd Singapore and Malaysian edn, Lexis Law Pub 1998) 674; cf. C.F. Lim, 'Enforcement of Liquidated Damages — To Prove Actual Loss?' [1993] 1 MLJ lxxxi; (and again, C.F. Lim, 'Enforcement of Liquidated Damages — A Legal Conundrum Resolved?' [2019] JMJ 70, 84 et. seq.) For what it is worth, this author considers that proof of actual damage is inconsistent with modern shipping practice relating to demurrage clauses — much of the English jurisprudence on the subject points to the need for commercial certainty pursued by these freely negotiated clauses. The law should reflect the respect for freedom of contract and commercial certainty. The rule to control penalties clearly was seen as a tool to protect the weaker bargaining party, often in a consumer contract situation, but is profoundly blunt as a device on modern commercial dealings, often involving parties, sponsors and stakeholders from all over the globe. There is much succour in Lord Woolf's dictum in *Philips Hong Kong Ltd v The Attorney General of Hong Kong* (1993) 61 BLR 41: '[The] court should not adopt an approach to provisions as to liquidated damages which could ... defeat their purpose ... . Except possibly in the case of situations where one of the parties to the contract is able to dominate the other as to the choice of the terms of a contract ...'

23 See the cases referred to and discussed in C.F. Lim, 'Enforcement of Liquidated Damages — A Legal Conundrum Resolved?' [2019] JMJ 70.

P sells a football season ticket valued at RM5,000 to Q. The contract contains an acceleration clause requiring Q to pay the balance in full in the event they defaulted. Q paid for one visit and then stopped attending. P triggered the acceleration clause for payment of the balance in full. The tickets are in great demand and many fans are prepared to pay over the odds to acquire them, including paying 100% in excess. P's loss of value is RM5,000 as represented by the ticket's face value. It might thus be argued that P's actual loss is much less than that because he should have mitigated his loss, and without undue effort.

Another example however shows the kind of contortions one might have to undertake to secure the same outcome.

R services S's boat for RM10,000. R uses a defective bung on the boat. The contract contains a clause requiring R to forfeit the RM10,000 if the boat becomes unusable during a scheduled gala event. The bung can be replaced at the cost of RM10. R notices that the boat leaks during trials, six months before the gala. He does nothing. The boat sinks just before the gala. R claims the full RM10,000. Here the loss of course might be in excess of RM10,000 but for the purposes of evaluating whether the liquidated damages clause is enforceable, is the actual loss to take into account the potential mitigation missed?

In general, the duty to mitigate is only factored in after actual damage or loss has been ascertained.[24] Mitigation is an affirmative defence to be pleaded and proved by the defendant and requires set-off when damages have not been mitigated. In English law, the mitigation policy is applied in the assessment of damages not damage. Hence, despite clever word-play, the actual loss proof requirement may not necessarily replace mitigation.

Hence, although the requirement for actual loss *might arguably* be helpful to mitigate the excesses of a liquidated damages clause,[25] it is far too blunt an instrument and does not resolve the mischief the principle of mitigation of loss seeks to tackle.

Moreover, this author's preferred view is that proof of actual damage in liquidated damages clause is retrogressive and does not reflect modern commercial transactions where certainty and party autonomy are important. To use a blunt requirement such as that to control undue enrichment arising out of a failure to mitigate is like cracking an egg with a sledgehammer.

---

24 *British Westinghouse Electric and Manufacturing Company Limited v Underground Electric Railways Company of London Ltd* [1912] AC 673.

25 See infra for this author's own thoughts on whether such a requirement stands up to scrutiny in the light of modern commercial transactions.

THE ECONOMIC WASTE AND IDLENESS CRITICISM

This final part of the article moves away from a purely legalistic and doctrinal analysis. The principle of mitigation of loss serves as a derogation from the strict *pacta sunt servanda* principle. It is often justified on the basis of discouraging economic waste — indeed, there is clearly something quite unsavoury in a rule such as that in *White & Carter (Councils)* where following an anticipatory breach, the 'innocent' (!) party can ignore the breach and continue to perform their part of the contract knowing that the advertisements on the lamp posts for three years were not going to be accepted by the defendant. Even in the 1950s when that case was decided, the two dissenting judges in the 3-2 Scottish decision held that there was a duty to mitigate the loss. Lord Reid, who supported the majority, nevertheless observed:

> [T]he promisee ought not to be permitted to affirm the contract, perform his side of it and thereby 'saddle the other party with an additional burden with no benefit to himself' when the promisee had 'no legitimate interest, financial or otherwise, in performing the contract rather than claiming damages

Similarly, as Lord Campbell CJ stated in the seminal decision, *Hochster* v *de la Tour*:

> [I]t is surely much more rational, and more for the benefit of both parties, that, after the renunciation of the agreement by the defendant, the plaintiff should be at liberty to consider himself absolved from any future performance of it .... Thus, instead of remaining idle and laying out money in preparations which must be useless, [the plaintiff] is at liberty to seek service under another employer ...[26]

In Lord Campbell's pronouncement we also see the close sister to the anti-waste theory, the abhorrence of idleness. One of the more vivid expressions of the idleness scourge is in the American case of *Howard v Daly*:

> [A] person discharged from service must not remain idle, but must accept employment elsewhere if offered .... The doctrine of 'constructive service' is not only at war with principle, but with the rules of political economy, as it encourages idleness and gives compensation to men who fold their arms and decline service, equal to those who perform with willing hands their stipulated amount of labor.... [N]o rule can be sound which gives him full wages while living in voluntary idleness.[27]

Without mitigation, 'some plaintiffs ... [would] allow avoidable losses to mount,' knowing that full damages would be recoverable in court'; I would

---

26 (1853) 2 El & Bl 678, 690; ; 118 ER 922.
27 61 N.Y. (1875) 373-74.

argue that that moral hazard does not disappear simply because there is a liquidated damages clause. Thus, although, the above dicta are drawn from cases on anticipatory breach and not liquidated damages clauses, mitigation is a matter of general principle.[28]

The economic waste argument must surely hold even more sway today in modern Malaysia and elsewhere. The halcyon days of unadulterated laissez-faire should be behind us. Our common law should respond to three crucial imperatives, in my mind.

First, we need to take heed of sustainability as a normative theme in the way we grow our laws — contract law not excepting. A legal edifice which supports economic waste on the basis of ideology surely is inconsistent with our thinking on sustainability.

Secondly, the gradual acceptance of a principle of good faith. This is neither the place nor avenue for an airing of the principle of good faith. There is emerging literature of the subject in a Malaysian context[29] but it suffices to observe that such a principle too reveals modern society's diminishing veneration of the *laissez-faire* approach. As far as English law is concerned, the good faith argument was largely accepted by Leggatt J in *MSC Mediterranean Shipping Company SA v Cottonex Anstalt*[30] - there, MSC, carried 35 containers of cotton by sea to Chittagong, Bangladesh for the defendant shipper, Cottonex. Under the contract the shipper had 14 days' 'free time' after the discharge of the containers to unpack the cargo and return the containers to the carrier. After the 14-day period the shipper was required to pay 'demurrage' on each container at escalating rates laid down in the contract. The demurrage obligation was to continue until either the shipper redelivered the containers to the carrier, or the carrier unpacked the containers pursuant to its right in the contract to do so, or the contract was terminated. None of these things occurred. The consignees of the cotton refused to take delivery of it and the containers were impounded by customs authorities at the Port of Chittagong, who then refused to allow them to be removed from storage without a court order. The carriers brought a claim against the shippers for unpaid demurrage. By the time Leggatt J gave judgment, in January 2015, the total claimed had exceeded USD1 million! The court held the carrier had no legitimate interest in

28 See for example R.A. Hillman, 'Keeping the Deal Together After Material Breach-Common Law Mitigation Rules, the UCC, and the Restatement (Second) of Contracts' (1976) 47 U. Colo. L. Rev. 553, 568.

29 N. Abdullah, 'Good Faith in Contractual Performance: Chasing a Mirage?' [2022] JMJ 200.

30 *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2015] EWHC 283 (Comm).

affirming the contract after this date. Its sole possible interest was to continue claiming demurrage, but this was 'wholly unreasonable' — 'in effect, to seek to generate an unending stream of free income'. The judge drew on notions of good faith as an implied term in fact to support his decision. That is an important footnote in the evolving good faith narrative in English law despite the fact that the Court of Appeal did not consider it relevant to the present facts.

Thirdly, the object of the law of compensation is to avoid double profits. The argument goes like hence - if a party successfully mitigates its damages but is allowed to recover the same amount as if it did not mitigate its damages (for example, by being given the full liquidated damages amount), it has secured a larger benefit than it is entitled. It may thus in fact be pocketing 'double profits'.

Lastly, it is only natural to consider the tenor of Islamic thought in such matters concerning the Malaysian societal norms. It is uncontroversial to suggest that Islam discourages waste. It is improper thus wilfully to escalate a loss simply to gain, from another, a self-interested benefit unrelated to circumstances in reality.[31] Moreover, that is supported by Islamic law's rejection of the notion of unjustified enrichment — something for nothing.

CONCLUSION

The analysis in this article does not disrupt the right of parties to use liquidated damages clause and indeed, urges that the existing rule in Malaysian contract law requiring proof of actual damage be dispensed with, in line with modern contracting practices. However, a wider societal imperative of discouraging economic waste should feature in how liquidated damages clauses are to be accommodated in legal doctrine. Requiring a duty to mitigate is not onerous. If it does become onerous then it would have been discharged. The duty, as we have seen in case law, does not require doing more than that is reasonable. It is also a much more sophisticated instrument in dealing with unjustified enrichment or gain than a rule calling for proof of actual damage or loss when attempting to summon to action, a liquidated damages clause.

31 See for example the extensive references cited in J. Schacht, 'Islamic law in contemporary states' (1959) 8(2) American Journal of Comparative Law 133.