Liquidated Damages – Common Law versus Pakistan Law

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Abstract

This article endeavours to define the scope and understanding of liquidated damages across different jurisdictions. This article provides a historical background under English law, and then reviews the contemporary position of the concept of liquidated damages (and other ancillary concepts) in English law. This article also provides a review of Sections 73 and 74 of the Contract Act 1872 in an attempt to define the scope of damages under Pakistani law. After establishing the jurisprudence of damages, it clarifies the extent of recognition of liquidated damages in Pakistan *vis-à-vis* English law by the superior courts and the mechanism in which they are calculated and awarded to litigants.

Keywords: Contracts, Penal Bonds, Penalty, Liquidated Damages, Reasonable Compensation, *Restitutio in Integrum, Terrorem*

Introduction

The conceptual understanding of liquidated damages remains critical to the contracting parties in Pakistan, and its legal controversy has engulfed academics, jurists, and Courts alike. This article endeavours to examine this concept from both the English and Pakistani legal perspectives.

Any discussion on liquidated damages is incomplete, and sometimes inaccurate if its roots are not located in penalty clauses stipulated in penal bonds. This is where a promisor agreed with the promisee to payment of penalty without actual proof if a promise was not fulfilled.[1] Penalty clauses were important to the English legal regime during the medieval era as such clauses were deemed to be a way of life and were applicable in almost all facets, such as buying of weapons, horses, lands, ships and other forms of business dealings in the era.

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[1] A. G. Guest, *Chitty on Contracts* (27th Edn, Sweet & Maxwell 1994) [26-061].

The Middle Ages are equally important for the development of equity, but the law relating to penalty clauses was ignored because penalties were regarded as a viable solution to commercial disputes. It was not until the late 17th Century that an English monarch realized that payment of penalty without assigning breach of promise and requiring actual proof of damage is unconscionable and enacted a special statute[2] to this effect. This unlocked various legal concepts leading to the recognition and development of the concept of liquidated damages. The first part of the article explores the background of the concept under English law and the how the concept evolved over the period of several centuries to be recognized as liquidated damages under English law.

The position under Pakistani law is materially different or, to some extent, lagging due to its persistent adherence to the Contract Act, 1872. At the time when English law was developing various legal concepts, the Contract Act was enacted in the British-ruled sub-continent. This Act endeavoured to provide one window solution to all contractual issues. It obviously could not materially adopt the concept of liquidated damages as the common law on the subject was developing during this period in an attempt to establish the criteria for identifying the nature of a contractual stipulation (i.e., as a penalty clause or a liquidated damages clause) and to effectively settle a mechanism for awarding damages. The law, however, adopted the concept of payment of actual damages (where none was stipulated) and awarded reasonable compensation of an amount so named or penalty stipulated for. The latter requires proof of breach of contract for an award of reasonable compensation. The Contract Act remains unchanged to-date (even after partition); therefore, Pakistani courts have evolved their legal approach by recognizing the need to adopt the concept of liquidated damages in a unique manner. The second part of the article introduces the concept of general and specific damages under Pakistani law followed by a direct comparison and critical analysis of the legal position under both English law and Pakistani law to see the extent to which liquidated damages may, if at all, be recognized in Pakistan.

[2] 8 & 9 Will. 3.

Section I: English Law

(i) Historical Approach

Historically, the theory of liquidated damages finds its basis in English law and developed as a result of penalty clauses in penal bonds. A penal bond was an important document between the 10th and 17th Century, in which a promisor and a promisee used to agree to the payment of a penal sum (primary or *absolute* obligation) as a guarantee to enforce a promise (secondary obligation). Once the secondary obligation was fulfilled, the primary obligation automatically used to become void. But in case of a dispute between the parties, the claimant was entitled to payment of the entire penal sum by merely alleging that the promise was unfulfilled and not required to prove any breach.

In 1697, His Majesty, King William III of England (also known as William of Orange) enacted *8 & 9 Will. 3*[3] (later repealed), which amended the legal position by requiring the claimant to assign and prove breach of the promise (mentioned in the penal bond). Based on such proof, the claimant was entitled to an amount that commensurate the breach and not the entire penal sum (unless it was proved that the entitlement was equal to the penal sum). The English courts quickly adopted this approach in various cases as it was more equitable and justifiable.[4]

The change in law effectively shifted the obligation of the payment of a penal sum from primary to secondary. The new requirement to prove breach (and the resultant loss) for entitlement to the penal sum (in part or full) was, in effect, now a recovery of damages/compensation. This inaugurated two recoverable categories resulting from a breach of a penal bond, namely: (i) recovery of penalty; and (ii) recovery of general damages. During the 18th Century the English courts deliberated on whether a claimant could lodge a claim under both categories. The debate finally settled in the case *Lowe v Peers,*[5] in which Lord Mansfield held that the claimant could choose between the two categories. However, the

[3] C. 11. S.8.
[4] *Bretts v Burch* [1759] 4H & N 506; *White v Sealy* [1778] Doug. 49; *Wilde v Clarkson* [1795] 6TR 303; *Beckham v Drake* [1849] 2 HLC 579.
[5] [1768] 4 Bur. 2225.

judgment was inconclusive in establishing whether a claim under one category precluded the claimant from claiming under the second category.

In the 19th Century, the judgment in *Ashley v Weldon*[6] held that a claimant could only lodge a claim under one category. More importantly, this judgment, by preferring equity over common law, also impliedly held that if the amount named in the penal bond was a genuine pre-estimate of loss, then it would not be a penalty but, rather, constitute as liquidated damages. Thus, the amount named in the penal bond was termed as a 'penalty amount' or a 'pre-estimate of losses' and using the latter, the above judgment, while retaining the first two categories, added a third category, namely 'recovery of liquidated damages' (which required the claimant to sue for *assumpsit* of damages and not a penalty). This, in my view, is the genesis of the concept of liquidated damages which was adopted later in several judgments.[7] In fact, in the judgment of *Wallis v Smith*,[8] Jessel MR called it "*the foundation of the subsequent cases on the subject.*"

(ii) Contemporary Position

The law on liquidated damages considerably developed over the next two hundred years keeping the English Courts busy in deciphering whether a particular clause in the contract was a penalty or a pre-estimated sum of losses, and that which out of these two is enforceable.

The English judgments materially developed a consensus on the definition of liquidated damages which, as of today, is: where the parties to a contract fix an amount like a genuine pre-estimate of the losses arising from the breach of the contract and payable as damages in the event of such breach. Conversely, a penalty is defined as a stipulated sum in the contract, which was like a threat, fixed in *terrorem* of the other party. Both these definitions first appeared in the judgment of *Clydebank Engineering Co. v Jose Ramos Yzquierdo y Castaneda*[9] and conclusively adopted in the

[6] [1801] 2 B&P 346.
[7] *Harrison v Wright* [1811] 13 East 343; *Maylam v Norris* [1845] 14 LJCP 95; *Wall v Rederiaktiebolaget Luggudate* [1915] 3 KB 66.
[8] [1882] 21 Ch.D. 243, C.A at 261.
[9] [1905] AC 6.

rules enumerated by Lord Dunedin in the judgment of *Dunlop Pneumatic Tyre Co. v New Garage and Motor Co*.[10]

With regards to enforceability, the English judgments held that a claimant is entitled to liquidated damages in full, without requiring any proof of actual damage, if the contract enumerates a genuine pre-estimated amount as loss. In the judgment of *Abrahams v Performing Rights Society*,[11] the Court awarded two years notice pay to an employee (for early termination) against the employer because the employment contract genuinely pre-estimated such a loss in case the employee was fired before the expiry of the contractual period. Likewise, in the judgment of *Diestal v Stevenson*[12] the Court awarded liquidated damages stipulated in the contract although the actual loss was far more than the pre-estimated amount mentioned in the contract. The case of *Talley v Wolsey-Neech*[13] adopted a similar approach.

The English judgments have shown a major shift by declining to enforce penalty clauses. In other words, if the court were to declare that the parties had agreed to a penalty clause (as opposed to liquidated damages), then the claimant would not be entitled to the entire penal sum so named in the contract but in fact, subject to proof, would only be awarded compensation which commensurate actual loss. The reason for this is that a penalty is extravagant and unconscionable in comparison with the general loss that could conceivably be proved to have followed from the breach. In *Ashley v Weldon,*[14] a stage manager engaged the services of an actress for an agreed salary and allowances. The contract stipulated that if the actress failed to perform, she would be liable to pay £200 to the stage manager. A dispute arose between the parties, and the store manager brought an action. The Court held that the payment of £200 is a penalty, which is unenforceable. Similarly, another judgment with identical facts, namely *Kemble v Fareen*[15] also declined to award £1000 to the stage manager against the actress because such clause in the contract was held as penalty.

[10] [1915] AC 79.
[11] [1995] ICR 1028 CA.
[12] [1906] 2 KB 345.
[13] [1978] 38 P&CR 45, CA.
[14] (n 6).
[15] [1829] 6 Bing. 141.

The position outlined above about liquidated damages and penalty clauses remains fairly consistent today in the English judgments even though there may be precedents which explore the concepts of un-liquidated damages, injunction and specific performance in the context. More recently, in the judgments of *Cavendish Square Holding BV v Makdessi*[16] and *Parking Eye Ltd v Beavis (Consumers' Association intervening)*,[17] the United Kingdom's Supreme Court reinforced the principles that: (i) the obligation of payment of certain money (as liquidated damages or reasonable compensation) is secondary; (ii) in order to determine whether a clause is a penalty, the courts would objectively interpret them at the time and circumstances of the formation of the contract – but it is settled that an amount which is exorbitant, unconscionable or disproportionate to the loss would be deemed as penalty; and (iii) if the clause in the contract is a genuine pre-estimate of the losses, then the claimant would be entitled to liquidated damages without having to prove actual losses.

Section II: Pakistani law

In Pakistan, contracts are governed by the Contract Act 1872. The British enacted this law in the sub-continent to harmonize various concepts and provide a uniform law of contracts. Prior to its enactment, the history of contract law is vivid and would require a detailed analysis of the traits and customs of the subcontinent but for now, this article will focus primarily on damages.

Although the concept of damages is governed by Sections 73 and 74 of the Contract Act, there are some pertinent questions that need to be addressed here: (i) whether the English legal concept of payment of penalty in full and without proof is recognized under Pakistani law; and (ii) whether common law approach to liquidated damages is envisaged in Pakistani law and if so, to what extent.

(i) Section 73 of the Contract Act

According to Section 73 of the Contract Act (Compensation for loss or damage caused by a breach of contract), when a contract is broken, the

[16] [2015] UKSC 67.
[17] [2015] 3 W.L.R. 1373.

party who suffers by such a breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused. Moreover, such loss must naturally arise 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. Thus, compensation is not allowed for any remote and indirect loss or damage sustained because of the breach.

Accordingly, under Section 73, a party who suffers from a breach of contract is entitled to compensation for loss or damage that naturally arose in the usual course of things. The compensation awarded by the court must be actual and not indirect, remote, or consequential. Consequently, in Pakistan, a party is entitled to actual losses, which must be proved in court. A larger bench of four judges of the Supreme Court of Pakistan in *West Pakistan Industrial Development Corporation v Aziz Qureshi*[18] endorsed the above position and also enumerated the following principles under Section 73:

(i) Compensation is payable for the actual loss or damage caused - the loss or damage must be a proximate result of the breach, and foreseeable by the defendant;

(ii) In estimating the loss or damage, the means which existed of remedying the inconvenience caused by the nonperformance of the contract must be accounted for; and

(iii) The underlying principle to calculate and award damages is *restitutio in integrum*. In other words, the court must award damages which commensurate to restoration of the claimant to the situation which would have prevailed had no injury been sustained (i.e., restoration to the original or pre-contractual position).

The above principles confirm the legislative intent behind Section 73, i.e. that a claimant is entitled to actual loss or damage resulting from a breach of contract that arose in the usual course of things. The above

[18] 1973 SCMR 555.

judgment is also consistent with the earlier precedents laid down in the cases relating to claims of damages in contracts for the sale of goods (claims under Section 56 of the Sale of Goods Act 1930). Similarly, the position also appears to remain consistent today in the judgments of the Supreme Court of Pakistan adjudged after the above judgment.[19]

(ii) Section 74 of the Contract Act

Section 74 of the Contract Act states that when a contract has been breached, 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 damage or loss is proved to have been caused thereby, to receive from the party who has breached the contract a reasonable amount of compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

It must be constructed that in Pakistan, once a contract is breached, the claimant is entitled to a reasonable compensation not exceeding the amount-so-named or the penal sum (i.e., the penalty stipulated for) in the contract.

Section 74 of the Contract Act therefore offers the concept of reasonable compensation in *terrorem* by compelling a promisor (with the threat of consequences i.e., *terrorem*) to comply with the contract in letter and spirit; however, failing to do so would entitle the promisee to a reasonable compensation of the amount-so-named (and not exceeding thereof) or a penalty in the contract (if there is one – in the absence of which, actual damages would be awarded under Section 73).

This concept is not alien but is derived from English law (including English judgments[20]) – the statute of William the III namely, *8 & 9 Will. 3*[21] (as explained above) that required a claimant to assign

[19] *A.Z. Co. v Government of Pakistan* PLD 1973 SC 311; *A. Ismail Jee & Sons Limited v Pakistan* PLD 1986 SC 499; *Syed Ahmed Saeed Kirmani v Muslim Commercial Bank* 1993 SCMR 441; *Azizullah Sheikh v Standard Chartered Bank* 2009 SCMR 276; *Daoud Shami v Emirates Airlines* PLD 2011 SC 282.
[20] *White v Sealy* [1778] Doug. 49; *Wilde v Clarkson* [1795] 6TR 303; *Beckham v Drake* [1849] 2 HLC 579; *Bretts v Burch* [1759] 4H & N 506.
[21] C. 11. S.8.

breach of contract and prove entitlement to the penal sum (in part or full) due to such breach. Under this statute, the claimant was entitled to reasonable compensation from the penal sum named in the penal bond, subject to proof of breach of contract.

With respect to the Pakistani courts' perspective, the judgment of *Province of West Pakistan v Messers Mistri Patel & Co*[22] by a six-member bench of the Supreme Court of Pakistan is an important precedent. Messers Mistri Patel & Co offered the Government of Sindh to purchase four thousand tons of broken rice for PKR 33-4 per bag of 2-1/2 maunds. The Government accepted the offer with additional terms, including that the firm would submit five percent of the total value of the goods in cash or through bank guarantee, and that the firm shall lift the goods within three months of the date of acceptance. In case of a failure to lift the goods, the guarantee would be encashed, and the remaining goods would be disposed of. The firm failed to lift the goods by the stipulated date for commercial reasons resulting in a sale of the remaining goods by the Government, which earned a profit thereon. The Government filed a suit for recovery of damages that amounted to 5% of the total value of goods. The suit was dismissed by the High Court and the Supreme Court for the following reasons:

(i) Section 74 of the Contract Act does not recognize the difference that exists in English law between liquidated damages and penalty;

(ii) Under Common Law, a genuine pre-estimate of damages agreed upon by the parties is regarded as liquidated damages. But a stipulation in a contract in *terrorem* is a penalty. In the case of liquidated damages, the contract is binding upon the parties. In the case of a penalty, however, the Court refuses to enforce it and awards the aggrieved party with a reasonable compensation;

(iii) The award of compensation by the court under Section 74 of the Contract Act will depend upon its finding as to what in the facts and circumstances of the case is reasonable

[22] PLD 1969 SC 80.

compensation subject to the limit of the amount mentioned in the contract; and

(iv) An aggrieved party is entitled to recover compensation from the party who is guilty of the breach of a contract whether or not actual damage or loss is proved to have been caused thereby.

Thus, even though the Government was entitled to forfeit five percent of the contract price in case the firm did not lift the goods within the stipulated period (breach of the contract), the Supreme Court declined to award the compensation as the Government had earned a profit on sale of the remaining goods; and it would be unconscionable for the Government to forfeit the amount so named in the contract by way of penalty. It follows that under Section 74, subject to proof of breach of contract, a claimant is only entitled to receive reasonable compensation of the amount-so-named in the contract or penalty.

Another important judgment is that of *Sandoz Limited v Federation of Pakistan*.[23] The dispute in the case involved an incomplete supply of goods by Sandoz and its agent (less than the contracted quantity of 3000 MT) to the Government of Pakistan by and before the contractually agreed date of 30 June 1977. This initiated disputes between Sandoz, its agent (Agro Marketing Corporation Limited (AMC)), and the Government. When the disputes finally reached the Supreme Court of Pakistan, it interpreted Section 55 (time is of the essence), Section 73 (actual damages) and Section 74 (reasonable compensation) of the Contract Act.

With respect to Section 73 of the Contract Act, the Supreme Court held that it deals with the consequences of the breach of a contract and the basis on which compensation for any loss or damage is to be assessed. In other words, the Supreme Court held that: (i) on breach of a contract, the claimant is entitled to receive from the other party compensation for any loss or damage caused that naturally arose in the usual course of things from such breach; however, such compensation is not for any remote and indirect loss or damage; and (ii) in estimating the loss or damage arising

[23] 1995 SCMR 1431.

from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance- of contract must be taken into account.

As regards Section 74 of the Contract Act, the Supreme Court was of the view that it deals with a contract that provides the amount of compensation in the form of penalty or liquidated damages and in case of a breach, the claimant is entitled, whether or not actual damage or loss is proved to have been caused, to receive from the other party, reasonable compensation not exceeding the amount so named or as the case may be the penalty stipulated for.

Based on the above principles, the Supreme Court, with respect to Sandoz and its agent, calculated and awarded actual loss under Section 73, and disregarded any losses which did not naturally arise or were indirect or remote. On the other hand, the Government's claim for liquidated damages was dismissed altogether by the Supreme Court (even though Clause 19 of the tender documents stipulated payment of liquidated damages at the rate of two percent per month or part thereof on the value of undelivered quantity) because the Government was not able to establish, through evidence, any breach of contract on the basis of which reasonable compensation could be awarded under Section 74 of the Contract Act.[24]

A consistent approach is seen to have been taken by the Pakistani courts in the last six decades, as enumerated in the judgments of *Syed Sibte Raza v Habib Bank Limited*,[25] *Muhammad Yousaf v Abdullah,*[26] *Aslam Saeed & Co. v Trading Corporation of Pakistan*[27] and *Muhammad Arbi v Province of Punjab*.[28] There are various judgments of the high courts on the subject[29] but, for now, the judgments of the Supreme Court

[24] 1995 SCMR 1431 [1459-1461]
[25] PLD 1971 SC 743.
[26] PLD 1980 SC 298.
[27] PLD 1985 SC 69.
[28] 1993 SCMR 2091.
[29] *Atlas Cables v IESCO* 2016 CLC 1677; *Muhammad Karimuddin v Kanza Food Industries Ltd.* 1989 MLD 3900; *Industrial Development Bank of Pakistan v Messrs Baloch Engineering Industry (Pvt.) Ltd.* 2010 CLD 591; *Messrs United Bank Limited v Messrs M. Esmail and Company (Pvt.) Limited* 2006 CLD 394; *Allied Bank of Pakistan Limited, Faisalabad v Messrs Asisha Garments* 2001 MLD 1955; *National Development*

of Pakistan would adequately resolve the matter. In passing, it is worth noting that Pakistani courts have disregarded late payment clauses or penalty clauses (without the element of reasonable compensation) for being unconscionable against the law and the system of Islamic finance.[30] In another judgment,[31] a claimant was denied any form of compensation due to the absence of substantial proof even though he had relied on the doctrine of unjust enrichment.

Section III: Whether the English legal concept of payment of a penalty in full and without proof recognizable under Pakistani law?

Based on a review of the case law in Section II above, it may be argued that Pakistani law neither recognizes the historical position (i.e., payment of penal sum in full and without proof), nor does it recognize the contemporary position (in which the penalty clause is unenforceable and thus questioning its recognition, altogether) under English law.

To the contrary, Pakistani law does not debar the contracting parties from agreeing to a penalty clause within their contract. As is noted in Section 74 of the Contract Act, the phrase "*penalty stipulated for*" clearly certifies its implied recognition in a contract governed by Pakistani law.

Furthermore, Section 74 of the Contract Act devises a mechanism for enforcing the penalty clause in Pakistani law under which a claimant is entitled to a reasonable compensation of the penalty stipulated for, once the claimant has established a breach of the contract. In *Bhai Panna Singh v Bhai Arjun Singh,*[32] Lord Atkin efficaciously interpreted Section 74 by observing that its legislative effect is to disentitle the plaintiff to recover simpliciter the penal sum named in the agreement as due and payable on a breach of contract unless the plaintiff proves a breach of the contract. For

Finance Corporation v Moona Liza Fruit Juices Limited 1999 YLR 500; *Messrs HITEC Metal Plast (Pvt.) Ltd. v Habib Bank Limited* PLD 1997 Quetta 87.

[30] *Muhammad Farooq Azam v Bank Al-Falah Limited* 2015 CLC 1439.

[31] *Arabian Sea Enterprises Limited v Abid Amin Bhatti* PLD 2013 Sindh 290.

[32] AIR 1929 Privy Council 179.

the next ten decades, this position has remained consistent in Pakistani judgments[33] and is unlikely to change but for an amendment in the law.

Section IV: Whether the approach of common law to liquidated damages is envisaged in Pakistani law and if so, to what extent?

Pakistani law does not envisage the approach of common law to liquidated damages. Therefore, without the establishment of the breach of contract, a Pakistani Court is unlikely to award damages that are a genuine pre-estimate of the losses agreed upon between the parties in the contract.

The test envisaged in Section 74 is "*reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.*" If literally interpreted, the phrase "*amount so named*" is not synonymous to "*liquidated damages*" or else the law would have stated "*reasonable compensation of the genuine pre-estimated amount so named."*

The Pakistani courts must be applauded with bravado as they have purposively interpreted the phrase "*amount so named*" by recognizing the need to adopt the concept of liquidated damages. The Pakistani Courts must further be commended because, while they have recognized such need, they have neither adopted common law (to award liquidated damages in full without proof) nor changed the test of awarding reasonable compensation (i.e. requirement to establish a breach of the contract). Therefore, as of today, if two parties were to agree to a liquidated damages clause contractually, the Pakistani courts would recognize the same but will only enforce it by requiring the claimant to prove breach of the contract that entitles him to reasonable compensation of the pre-estimated amount. In this context, the judgment of *Muhammad Karimuddin v Kanza Food Industries Ltd.,*[34] and *Messrs United Bank Limited v Messrs M. Esmail and Company (Pvt.) Limited*[35] may be referred to which recognized liquidated damages in contracts and enforced it as per the mechanism outlined above.

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[33] *Industrial Development Bank of Pakistan v Messrs Baloch Engineering Industry (Pvt.) Ltd.* 2010 CLD 591; *National Development Finance Corporation v Moona Liza Fruit Juices Limited* 1999 YLR 500.
[34] 1989 MLD 3900.
[35] 2006 CLD 394.

The closest Pakistani judgment that recognized the liquidated damages clause in the common law canvas and upheld the claimant's deduction of contractual amounts as liquidated damages is of *Khanzada Muhammad Abdul Haq Khan & Co., v WAPDA.*[36] In this case, WAPDA had awarded construction contracts to the appellant who was unable to complete the work within the stipulated time. The contract provided for liquidated damages, therefore WAPDA deducted a sum of PKR 508,000 from the bills of the appellant. The appellant challenged WAPDA's deduction by initiating legal proceedings, which were dismissed both by the Civil and High Court. In the Supreme Court, a leave to appeal was granted on the question of whether the defendant was required to produce evidence to show the loss caused to it by the plaintiff's breach of the contract, even in those cases in which the plaintiff had agreed to be bound by the defendant's estimate of damages because of the difficulty of assessing the actual damages suffered.

In the main judgment, the Supreme Court held that the contracting parties had determined the pre-estimate of the expected loss and as the appellant had failed to perform his part of the contract, he was therefore obliged to make the payment to the respondents under the terms of the contract. It further held that liquidated damages is not a punishment, and that the parties may by an agreement fix a specified amount as liquidated damages to avoid the difficulty that may be found in settling the actual damages that may accrue against the defaulting party on the breach of contract, as the manifest intention is to get rid of future calculation and disputes. However, according to the Supreme Court, where an amount is mentioned in the contract as a penalty payable on breach of a contract, the parties are entitled to recover actual damages not exceeding the amount mentioned in the contract; but in case of liquidated damages, a party is entitled to recover the same from the opposite party in case of breach of contract. But, where the Court considers that the amount mentioned in the contract as liquidated damages is oppressive, or highly penalized the Court may refrain from granting such amount, and itself determine the amount which is reasonable in the peculiar circumstances of a case.[37]

[36] 1991 SCMR 1436.
[37] *Khanzada Muhammad Abdul Haq Khan & Co. v WAPDA* 1991 SCMR 1436, 1439.

Thus, even though the Supreme Court upheld WAPDA's deduction of the contractual amounts as liquidated damages, it must be noted that WAPDA had proved, through evidence (led during trial before the Civil Court), that the appellant had breached the contract based on which WAPDA was entitled to reasonable compensation of the pre-estimated amount-so-named in the contract. One could argue that the Supreme Court had effectively dismissed the appellant's argument (that WAPDA was required to prove actual loss before deducting liquidated damages), but this is refuted by the recent judgment of the Islamabad High Court in case *Atlas Cables v IESCO,*[38] which referred to the above case in a manner which reconfirms that WAPDA's deduction was justified because it was able to prove that the appellant had breached the contract.

Nevertheless, the contemporary position in Pakistani law remains consistent with respect to liquidated damages, as is envisaged in the judgment of *Saudi-Pak International and Agricultural Investment Company (Private) Limited v Allied Bank of Pakistan and another*.[39] The Court in this judgment held that liquidated damages, as a rule, require positive evidence to show the actual loss suffered by the party claiming the damages and that any fixed amount stipulated in the contract for liquidated damages cannot be recovered if the quantum of actual loss is not proved.

In the end, it is also worth mentioning that the Supreme Court of Pakistan has in its recent judgment of *Space Telecom (Private) Limited v Pakistan Telecommunication Authority*[40] reaffirmed the legal position set out in the *Province of West Pakistan v Messers Mistri Patel & Co., and another*.[41] This includes that a stipulation in contract in *terrorem* is a penalty and an aggrieved party is entitled to reasonable compensation, which is subject to establishing the breach of contract.

Conclusion

To conclude, it follows from the above that English law recognizes penalty clauses but does not enforce them by awarding penal sum in full

[38] 2016 CLC 1677.
[39] 2003 CLD 596.
[40] 2019 SCMR 101.
[41] (n 22).

and without proof. In turn, a claimant is entitled to general damages subject to proof of breach and losses. Further, English law recognizes and enforces clauses stipulating liquidated damages if the amount is a genuine pre-estimate of losses. The claimant is not required to prove an actual loss or damage.

Conversely, Pakistani law does not adopt the position under English law regarding penalty and liquidated damages. In Pakistan, under Section 73 of the Contract Act, a claimant is entitled to actual losses which are not indirect, remote or consequential. Further, under Section 74 of the Contract Act, a claimant is required to establish a breach of the contract to be entitled to reasonable compensation not exceeding the "*amount so named*" or the "*penalty stipulated for.*"

Originally, the phrase "*amount so named*" did not envisage liquidated damages but Pakistani courts have purposively extended its scope by recognizing liquidated damages without setting off the need to prove breach of the contract and actual losses suffered. Penalty clauses, on the other hand, are recognized under Pakistan law but are only enforced when the claimant has proved its entitlement (by establishing a breach of contract) to reasonable compensation not exceeding the penalty stipulated for.