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**Insights**

# LINING UP COMPLETION OBLIGATIONS AND DELAY DAMAGES IN PROJECT DOCUMENTS

TERRENUS ENERGY SL2 PTE LTD V ATTIKA INTERIOR + MEP PTE LTD [2023] SGHC 333

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## SUMMARY

In this Insight, first published in PLC, Ilan Freiman, Wanjing Goh and Vivica Fu consider the judgment of the Singapore High Court in Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd [2023] SGHC 333 in relation to a solar energy project.



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This article contains some links which are only accessible by PLC subscribers.

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Today, Singapore is one of the most solar-dense cities globally. According to the Singapore Green Plan 2030, it aims to achieve at least 2 gigawatt-peak (GWp) of installed solar capacity by 2030, meeting the annual electricity needs of around 350,000 households.

However, solar energy projects are not without their challenges and a major point for negotiation in this type of project is the delay damages regime. This area is complex and disputes are rife. Therefore, the recent judgment from the Singapore High Court in the case of *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd*, which concerned delay damages is particularly welcome. This case involved the delay in the construction of a solar energy facility, the knock-on effects on its commercial operation and the extent to which general damages for delay can be attributed and imposed. For more information on:

- The judgment of the Singapore High Court, see *Terrenus Energy SL2 Pte Ltd v Attika Interior + MEP Pte Ltd [2023] SGHC 333* .
- Liquidated damages under English common law, see *Practice note, Liquidated damages in construction contracts*.

- Solar energy projects, see *Practice note, Anatomy of a ground-mounted solar power project*.

This article takes a closer look at this judgment and considers the key takeaways.

## THE DELAY DAMAGES CLAIM

The plaintiff, Terrenus Energy SL2 Pte Ltd (Terrenus) employed the defendant, Attika Interior + MEP Pte Ltd (Attika) as the main contractor to construct solar energy facilities at Changi Business Park. In April 2021, the parties entered into a main builder agreement (MBA) under which Attika was required to achieve partial completion on or before 30 June 2021 and practical completion by 31 July 2021.

Before the MBA was signed, Terrenus and a subsidiary of Meta Platforms, Inc. (Meta), entered into what the parties termed a Renewable Energy Purchase Agreement (REPA). Under the REPA, Terrenus was required to achieve a guaranteed capacity by 30 June 2021 (Commercial Operation Date), the same date as partial completion under the MBA.

The project progressed but Attika did not achieve partial completion on time and therefore Terrenus did not meet the Commercial Operation Date under the REPA.

Terrenus issued a claim against Attika under the MBA for liquidated damages and general damages arising from the delays and also argued that Attika was liable for Terrenus's liability under the REPA, with respect to:

- Delay damages for not achieving the Commercial Operation Date; and
- Loss of income it would have received from the sale of power to Meta.

## NO LIABILITY FOR GENERAL DAMAGES

The court held that Terrenus was entitled to liquidated damages under the MBA but not to general damages for delay. This article focuses on the court's decision on general damages, as well as its observations on whether Terrenus was able to claim for its losses under the REPA.

## GENERAL DAMAGES FOR DELAY UNDER THE MBA

The relevant clauses were clauses 17.1.2 and 17.1.4. Clause 17.1.2 provided:

"[Attika] shall pay [Terrenus] 0.1% of Contract Sum per day for each day of delay as liquidated damages."

Clause 17.1.4 provided:

"If [Terrenus] suffers **other** losses and damages which cannot be covered by such liquidated damages, such losses and damages incurred by [Terrenus] shall be deemed as its losses and damages resulting from [Attika's] default and shall be reimbursed by [Attika] to [Terrenus]." [emphasis added]

While Terrenus accepted that they could not double claim for liquidated and general damages, they submitted that the natural reading of clause 17.1.4 was that it entitled Terrenus to recover loss caused by delay that was not covered by liquidated damages under clause 17.1.2.

Attika, on the other hand, submitted that the wording must be read together with clause 17.1.1, which provided that the liquidated damages were in respect of delays. Therefore, they argued that the phrase "other losses and damages" must refer to those that did not stem from Attika's delay, as those losses and damages would already be covered by the liquidated damages provision, which was in line with the well-established position that "a liquidated damages clause is exhaustive as to the compensation" for losses arising from delay.

In this regard, the court agreed with Attika and referred to the decision in *Chan Ah Beng v Liang and Sons Holdings (S) Pte Ltd [2012] 3 SLR 1088*, where the Singapore Court of Appeal held that general (unliquidated) damages can only be claimed in addition to liquidated damages if the subject matter of the former arises from some other breach that does not fall within the ambit of the liquidated damages provision.

In this case, clause 17.1.4 specifically referred to "other losses and damages" which could not be covered "by such liquidated damages", that is, losses or damages not arising from delay. It did not refer to, for example, "additional" losses and damages from delay. Since damages arising from delay were already covered by clause 17.1.2, it did not fall within the category of "other" losses and damages under clause 17.1.4.

As Terrenus's claim for general damages for delay against Attika failed, this was fatal to their claims that Attika was liable for:

- Terrenus's liability for the daily delay damages payable to Meta under the REPA; and
- Terrenus's lost income under the REPA.
- This was because both these losses resulted from Attika's delay.

Nevertheless, the court made observations based on the parties' arguments, summarised below, which are very relevant to current considerations around the construction and commercial operation of energy facilities.

## TERRENUS'S DELAY DAMAGES AND LOST INCOME UNDER THE REPA

One of the key issues before the court was whether the daily delay damages and other losses incurred by Terrenus under the REPA could be recovered from Attika.

## COURT'S APPROACH TO THE REPA

It is worth taking a moment to consider how the court viewed the REPA as this heavily informed the question of whether damages could be claimed against Attika.

While the parties called this agreement a "Renewable Energy Purchase Agreement", and in Terrenus's pleadings they referred to the REPA as a "power purchase agreement" (PPA), the court decided that the REPA was not in fact an agreement for the sale of power but "purely a financial transaction" for the purpose of hedging against energy price fluctuations.

The court held that the function of the REPA did not concern the sale of power as such but instead how the price of power would be calculated. If the market price rose above the fixed price, Terrenus would have to pay Meta the difference and conversely, if market price dropped below the fixed price, Meta would have to pay Terrenus the difference. Essentially, the REPA functioned like a virtual power purchase agreement (VPPA).

## DELAY DAMAGES UNDER THE REPA

Under the REPA, Terrenus was liable to pay daily delay damages at a fixed rate to Meta if it did not achieve the Commercial Operation Date. Terrenus submitted that any such damages payable to Meta ought to have been within the reasonable contemplation of Attika, as Attika must be taken to have known, as the main contractor of a power farm, that the commercial purpose of the project was to sell energy to someone.

Therefore, Terrenus argued that the liquidated damages owed by them to such an energy purchaser arising from a delay in completion would fall within the first limb of *Hadley v Baxendale*, as direct losses arising naturally, or in the usual course of things, or that may reasonably be in the contemplation of the parties when the contract was made. Therefore, a claim for damages (by Terrenus against Attika under the MBA) in respect of the daily delay damages payable by Terrenus to Meta under the REPA, was not too remote.

Attika submitted that Terrenus did not establish causation and their claim was too remote. There was no evidence that at the time of entering the MBA Attika was even aware of the REPA, much less its terms.

The court agreed with Attika making the following key observations:

- Terrenus was not able to show that Attika was the sole cause of Terrenus's liability for the daily delay damages. Even if Attika had achieved partial completion under the MBA, the generated capacity at that time would be less than that required under the REPA and Terrenus

would therefore be in breach of the REPA in any event. Terrenus addressed this issue by applying a discount to the daily delay damages, which the court rejected as arbitrary.

- Terrenus also failed to satisfy the remoteness test under *Hadley v Baxendale*. The daily delay damages under the REPA were not within Attika's reasonable contemplation. Unlike a "typical construction situation" with several tiers of construction contracts, where liquidated damages are owed by an upstream contractor to another upstream contractor or to the developer or employer, Meta and the REPA were in a different position.
- The court commented that the relationship between Terrenus and Meta under the REPA was "unusual" in that "Meta is the purchaser of a service provided by Terrenus and is the counterparty to what was essentially a financial arrangement for price hedging…", instead of being in an employer/contractor relationship. Given this context, it was unlikely to be within the contemplation of Attika that delay damages would be owed by Terrenus to Meta if there was a delay to achieving partial completion under the MBA. Further, there was no evidence that Attika was aware of the terms or liabilities of Terrenus under the REPA, in particular the daily delay damages.

For more information on causation and remoteness of damage under English common law, see:

- *Practice note, Damages for breach of contract: an overview: Legal causation*.
- *Practice note, Damages for breach of contract: an overview: Remoteness of damage*.
- *Hadley v Baxendale (1854) 9 Exch 341*.

## LOSS OF INCOME

Terrenus also claimed for the lost income that it would have received from the sale of power to Meta under the REPA. The court rejected the claim because Terrenus failed to prove causation and satisfy the remoteness test.

Attika argued that even if it had achieved partial completion on 30 June 2012, Terrenus was required to achieve the "Nameplate Capacity" of at least 18 MWp under the REPA and meet certain other pre-conditions by the Commercial Operation Date and that there was no evidence that Terrenus had satisfied these pre-conditions.

Terrenus asserted that it "was very likely" to have reached a commercial agreement with Meta to treat 30 June 2021 as a Commercial Operation Date for 70% of the project and therefore receive income under the REPA at this date. However, in the court's opinion there was no indication that Meta would pay Terrenus any money under the REPA if it failed to meet the Commercial Operation Date and that Terrenus's assertion was "entirely speculative". The calculation of the quantum of loss was also not well substantiated.

## ANALYSIS

Key lessons that can be drawn from this case include:

- The alignment of completion obligations under the REPA and the construction contract should have been considered at the contract drafting stage.

For example, on the same date that the REPA required the solar farm to generate at least 18 MWp, the MBA only required it to generate 13.4 MWp. Even if partial completion had been achieved by the required date under the MBA, Terrenus may still have been in breach of the REPA on the Commercial Operation Date.

The difference in these obligations exposed Terrenus to the risk of non-compliance with the REPA, with continued knock-on effects because the delay damages provisions under the two contracts were also not aligned. The daily delay damages under the REPA were $9,000, while the equivalent damages under the MBA were $5,100 a day (being 0.1% of the contract sum under the MBA).

Even if delay under one contract resulted in a corresponding period of delay under the other contract, Terrenus's liability for delay damages under the REPA would always have been more than it could claim under the MBA.

- Although the REPA was not a construction contract, the contract drafters should have taken care to check that it was back-to-back with the completion milestones under the construction contract. For example, where a contract, such as the REPA, is entered into before construction commences, the employer should include a sufficient buffer period at the construction planning stage to ensure that completion obligations in the REPA can be met.
- Employers may wish to consider providing a copy of the relevant third party agreement or, at least, the key terms to the contractor, with the contractor acknowledging in their contract with the employer that they have been provided with and are aware of the terms of that agreement. The employer may also expressly require the contractor to indemnify the employer against any losses and damages it incurs under a "back-to-back" contract such as the REPA, as a result of delay in the construction and completion of the relevant facility.
- This case also demonstrates the difficulty for an employer in proving that a contractor's breach of the construction contract caused it to suffer recoverable loss under a third party contract such as the REPA. As mentioned above, the court considered that the fact that the REPA was an unusual contract in the context of a typical construction project meant that the contractor was not expected to have knowledge of common provisions of this type of contract, unless they had been specifically brought to the contractor's attention, and as a result Terrenus's losses under the REPA were too remote to be recoverable from Attika under the MBA.

- Finally, this case underlines the importance of careful contract drafting. Here, a one-word difference ("other" rather than "additional") in effect prevented Terrenus from recovering all of its delay related losses from Attika.

## FINAL THOUGHTS

Synthetic or VPPAs are emerging and gaining traction in Asia, driven by sustainability goals, cost competitiveness and supportive policies. While their use is well-established in some markets, stakeholders are continually exploring new jurisdictions for their implementation.

While users are gaining experience in the design and implementation of VPPAs, the devil is often in the details. As *Terrenus v Attika* shows, a lack of planning and oversight of all contracts relating to the same project could lead to undesired consequences. A thorough understanding of the energy sector also allows drafting to be tailored for the specific project and necessary safeguards to be put in place.

### RELATED PRACTICE AREAS

- Commercial Construction & Engineering

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