



**TERMINATION OF CONSTRUCTION CONTRACTS
AND THE RELATED APPLICATION OF
LIQUIDATED DAMAGES**

الفسخ في عقود التشييد وما يتعلق به من تطبيق التعويض الاتفاقي

by

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Abstract

This dissertation discusses the concept of the termination of construction contract, and the consequences of the termination, particularly, the application of the penalty clause and/or the liquidated damages clause.

Pacta Sunt Servanda. There is no doubt that the fundamental elements of the contract are that it is binding on the parties thereto. Although there may be some types of contracts that are not binding due to its nature, at least the construction contracts fall under the binding contracts' category.

Upon entering into any binding contract, the parties thereto prepare themselves to be able to perform their obligations set out in this contract. This preparation includes the preparation for the required resources, budget, and etc. In long-term binding contracts, the parties further may put the expected revenue and costs as part of their annual financial sheets. Accordingly, the economic situation of the contracting parties changes once they entered into their contact.

This is why the legislators in civil law countries enumerated in the civil code sever consequences for the termination of the binding contracts if the termination was unjustified. The main target of these consequences is to return the contracting parties to their original economic situation before entering into this contract. But, will it be possible to return the parties to their original position before entering into their contract in all types of contracts, including the construction contracts?

The legislators further provide a certain mechanism for the valid termination, and this mechanism is subject to be reviewed by the competent court to ensure the validity of the termination.

If the termination is unjustified, then one of the most important consequences, which is compensation to the other contracting party, will apply.

Usually, the contracting parties include a penalty clause or liquidated damages clause to apply it, should the other party fail to perform its obligations. But, would this clause survive after the termination of the contract, or these clauses will apply only during the performance of the contract. If so, how the compensation could be determined under the United Arab Emirates law and common law?

Abstract (Arabic)

هذه الأطروحة تناقش بشكل عام مبدأ فسخ التعاقد في عقود التشييد والمترتبات الناتجة عنه، وبالأخص تناقش تطبيق غرامة التأخير والتعويض الاتفاقي والتعامل معه في حالات الفسخ.

مما لا شك فيه ان من العناصر الرئيسية للعقد هو إلزام المتعاقدين بما جاء فيه، على الرغم من وجود بعض العقود الغير ملزمة وذلك لطبيعة تلك العقود، ولكن على الأقل فإن عقود التشييد هي عقود ملزمة بطبيعتها وتندرج تحت تصنيف العقود الإلزامية.

قبل الدخول في أي عقد ملزم يعمل المتعاقدين على تحضير أنفسهم لتطبيق الالتزامات المنصوص عليها بالتعاقد وتشمل عملية التحضير تلك تحضير الموارد اللازمة للتنفيذ والميزانيات المطلوبة وخلافة. وفي العقود طويلة الأمد قد يدرج الأطراف بعض العائد والمنفعة المتوقعة في ميزانيتهم السنوية. وعليه فإن الموقف المالي للأطراف يختلف عقب توقيع مثل هذا النوع من التعاقد.

ولتلك الأسباب نص المشرع في الدول التي تتبع القانون المدني على توابع وخيمة لفسخ التعاقد إذا كان ذلك الفسخ فسحا تعسفيا او غير مبررا، والهدف الرئيسي للمشروع هو محاولة ارجاع المتعاقدين لحالتهم الاصلية قبل التعاقد. ولكن هل ينطبق ذلك على عقود التشييد وهل يستطيع الأطراف الرجوع للحالة الأصلية قبل التعاقد؟

كما نص المشرع أيضا على ضوابط وخطوات محده لقبول فسخ العقد، وتلك الخطوات خاضعه لتقدير القاضي للفصل في إذا كانت عملية الفسخ صحيحة أو خلاف ذلك.

إذا كان الفسخ مبررا فإن أحد اهم المترتبات عن الفسخ هو تعويض الطرف الاخر ومن عناصر التعويض هو التعويض عن التأخير في تنفيذ الاعمال.

عادة ما ينص المتعاقدين في العقد على قيمة معينة للتعويض في حالة التأخير او في حالة اخلال أحد المتعاقدين بالتزاماته التعاقدية ولكن هل يظل هذا الاتفاق على التعويض ملزما عقب فسخ التعاقد أو ينحصر تطبيق هذا الاتفاق فقط خلال فترة التعاقد، وإذا انحصر تطبيقه لفترة التعاقد فقط فكيف يتم حساب التعويض في حالة الفسخ في القانون الاماراتي وفي القوانين العامة للدول الأخرى.

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1. Chapter 1: Introduction

1.1. Research Topic

A construction contract is a binding contract by its nature, where parties usually agree on particular conditions to allocate the risks, the obligations, the responsibilities and the liabilities on performing such contract.

Being a complex type of contracts, which require usually a long tendering and negotiation process, termination of that contract is always not an easy decision, the employers hesitate to take such action even there is a clear breach from the contractor's side, the reason behind that is being too hard to start the process of tendering again for a new contractor and again going through the whole process from the beginning.

As being such a hard decision, the employers always think about how to recover the damages they might incur due to such termination decision.

What makes the decision much harder if the project is already in a delay and accordingly termination might induce additional time of intermediate transaction period between the terminated contractor and the new contractor and the recovery of such time and the damage related to the same will be always a matter of question.

Termination of any construction contract is allowed by law, by contract or by mutual agreement, and each type of such termination has its own consequences and way of evaluation for the dues and damages.

This dissertation intends to cover common law and the United Arab Emirates law perspective for parties' rights, obligations, and consequences of termination in construction contracts with particular emphasis on the application of the liquidated

damages and the dissertation will also discuss the FIDIC¹ provisions dealing with the same.

The dissertation will emphasize on the principal of applying liquidated damages for delays before the termination and delays after termination and how common law cases particularly United Kingdom cases and United Arab Emirates court decisions related to the same.

The dissertation will also discuss the different perspective of considering Liquidated Damages clause as a standalone contract enforced even the contract is terminated or as part of the contract terminated by the contract termination and how this is applicable to the standard clause of the FIDIC.

1.2. Research Objectives and Key Questions

The main objective of this research is to examine and question whether termination of a construction contract terminates all other conditions and accordingly void the application of any secondary condition or obligation, as the liquidated damage clause, and the existence of an exception to the rule.

The above will be examined through questioning the application of liquidated damages for delays prior to the termination and delays after the termination.

The applicability of the above will be questioned in conjunction with the FIDIC 1999 red book conditions of construction contract² and the new released 2017 edition³ and the dissertation will discuss the possible modification on the same.

¹ Federation Internationale Des Ingenieurs-Conseils,

² Federation Internationale Des Ingenieurs-Conseils, *Conditions of Contract for Construction for Building and Engineering Works Designed by The Employer* (1st edn, The Fédération Internationale Des Ingénieurs-Conseils 1999)

³ Federation Internationale Des Ingenieurs-Conseils, *Conditions of Contract for Construction for Building and Engineering Works Designed by The Employer* (2nd edn, The Fédération Internationale Des Ingénieurs-Conseils 2017)

The Key questions that need to be answered in this research are as follows:

1. What are the types of termination in construction Contracts?
2. What is Liquidated damages and/or penalty clause in construction contracts?
3. Does the Liquidated damages clause survive after termination?
4. Does the Liquidated damages clause apply for delays prior to termination in case of termination of the contract prior to completion?
5. Does the Liquidated damages clause apply for delays after the termination?

1.3. Research Method

The thesis is designed to examine and investigate a law principle using a qualitative and doctrinal approach as the methodology, which will include a deep research in the construction law books, articles, and publications, in addition to discussion and highlight on the court decisions related to the topic from Common law courts, particularly the United Kingdom and comparing the same with United Arab Emirates law and court decisions

1.4. Research Structure

The Structure of the research will start with an introduction on the types of termination and particularly the termination in the construction contracts which will be covered in chapter two of the dissertation then the next chapter, chapter three, will discuss generally the meaning of liquidated damages clause and how it differs from penalty clause in United Kingdom approach, then will discuss the United Arab Emirates approach.

The research will highlight the application of liquidated damages for two different stages which are: the application of liquidated damages for the period of delays before the termination, and the application of liquidated damages for the period of delay after the termination.

Chapter four will examine the application of the Liquidated Damages in the cases of termination under United Arab Emirates law and common law for the delays before the termination of the contract.

Chapter five will examine the application of the Liquidated Damages clause for the delays after the termination and will examine the United Arab Emirates law approach and common law approach in dealing with the same.

Chapter six of the dissertation will show a sample of one of the well know international forms of contract “FIDIC” and how the Liquidated damages clause can be modified to be applied in different ways.

2. Chapter 2: Termination in construction Contracts:

2.1. Introduction

Each Legal system has its implication on the parties entering into a construction contract. Usually, any construction contract will have a clause for the governing law which governs the relationship between the parties and affects the consequences of that relation.

In Civil law countries and particularly in the United Arab Emirates law, there is a set of laws that are the source of law, the United Arab Emirates is an Islamic Country and its law has its main source of coming from the Shari'a law codified and embodied in the United Arab Emirates Civil and Commercial codes. The United Arab Emirates law is generally influenced by the Egyptian law which is generally influenced by the French and Roman Law⁴

The legal system in England and Wales is a common law system where the judges shall make the analysis for the case in accordance with an existing legislation and the previous cases with similar issues before issuing its judgement. The England and Wales law system was developed since the 14th century and spread throughout the world with the colonial policy of England⁵, which means that several countries adopted that law like Australia, India, Hong Kong, Canada, and many countries in Africa, all are using the common law system.

⁴ David Price and Alhanoof AlDebasi, *Protecting Intellectual Property in the Arabian Peninsula: The GCC states, Jordan and Yemen, Routledge Research in Intellectual Property* (Routledge, 2017)

⁵ John Uff, *Construction Law: Law and Practice Relating to the Construction Industry* (12th edn, Maxwell & Sweet 2017)

It is important to know that although the common law is based on the decisions established by the previous cases, but every case has to be treated based on its circumstances and it is not binding to the judge to follow a previous decision.⁶

Each of the legal systems above has its implication on the contract between the parties and accordingly on the termination and consequences of termination of that contract.

The termination of any contract will lead the contract to its end and none of the contracted parties will be under an obligation to perform the contractual obligations mentioned in that contract. However, the parties will still have the right to claim for the damages based on that termination, but the nature and the value of these damages will depend on many issues, out of which, the way of termination is a key issue.⁷

It is highly important to understand the legal issues behind the termination and to know how to handle the termination threats.⁸

2.2. Termination under United Arab Emirates Laws

In United Arab Emirates Law, there are some articles (Article 872-896) that deal with defining the main obligations between the parties entering into a construction contract, these articles fall under a section headed “Muqawala Contract” of the United Arab

⁶ John Uff, *Construction Law: Law and Practice Relating to the Construction Industry* (12th edn, Maxwell & Sweet 2017)

⁷ Richard J Wittbroadt and Lynsey M. Eaton, ‘Project Suspension: What Owners And Contractors Need To Know – NOW!’ (2009) CMAA, <www.ggltsw.com/LiteratureRetrieve.aspx?ID=38194> accessed on 1 June 2018

⁸ Melissa Brumback, ‘Handling threats of contract termination’ (2006) Ragsdale Liggett PLLC, Raleigh, North Carolina <<https://www.jdsupra.com/legalnews/handling-threats-of-contract-termination-72474/>> accessed on 15 June 2018

Emirates Civil Code (Federal Law No. 5 of 1985). This section is subdivided into four main sections:

1. (Articles 872 – 874) includes the definitions and scope of a Muqawala contract.
2. (Articles 875 – 889) includes the effect of Muqawala contract
3. (Articles 890 – 891) includes the subcontracting principal under the Muqawala contract
4. (Articles 892 – 896) includes the termination of the Muqawala contract

The five Articles relating to the termination of a construction contract extracted from the United Arab Emirates Civil law are as follows:

Article 892:

“A contract of Muqawala shall terminate upon the completion of the work agreed or upon the cancellation of the contract by mutual consent or by order of the court.”

Article 893:

“If any cause arises preventing the performance of the contract or the completion of the performance thereof, either of the contracting parties may require that the contract be canceled or terminated as the case may be.”

Article 894:

“If the contractor commences to perform the work and then becomes incapable of completing it for a cause in which he played no part, he shall be entitled to the value of the work which he has completed and the expenses he

has incurred in the performance thereof up to the amount of the benefit the employer has derived therefrom.”

Article 895:

“A party injured by the cancellation may make a claim for compensation against the other party to the extent allowed by custom.”

Article 896:

“(1) A contract of Muqawala shall terminate upon the death of the contractor if it is agreed that he should perform the work himself, or if his personal qualifications are a material consideration in the contract.

(2) If the contract contains no such condition or if the personal qualifications of the contractor were not a material consideration in the contract, the employer may require that the contract be canceled if the contractor's heirs do not provide sufficient guarantees for the proper performance of the work.

(3) In either event, the value of the works carried out and the expenses incurred therein shall devolve upon the estate in accordance with the conditions of the contract and the requirements of custom.”

Article 892 allows the completion of the construction contract to be one of three scenarios, the first of scenario is the completion of the work agreed, the second scenario is the termination of the contract by mutual consent of the parties and the third scenario is the termination of the contract by a court order.

While the first scenario which is the completion of the work under the contract is clear, the second scenario is not.

The second scenario which talks about parties' agreement to terminate is argued to be one of two possible kinds of agreements: a pre-agreement by the parties to the entitlement of either party to termination by adding a clause or more than a clause in the contract between them, or a post-agreement by the parties after the contract agreement and after the commencement of the execution to terminate the contract.⁹

The third scenario which relates to the court ordering termination can apparently be 'time consuming and costly for both the Employer and the Contractor'¹⁰

In addition to the above articles which relates directly to the construction contracts (Muqawala), there are another general provision which apply to any contractual relationship between the parties, and these provisions shall also be taken into consideration in the termination of the agreements.

The United Arab Emirates apply the freedom of contract doctrine but there are some provisions known as the mandatory provisions, that place additional limitation on parties' agreement¹¹

The United Arab Emirates is an Islamic country and the Islamic law know as Islamic Shariah is the main source of the legal system, which means that it is not the only

⁹ Hirst, M. 'Termination for Convenience Clauses—A Shield or a Sword in times of Economic Downturn' (2010) 27 International Construction Law Review 419.

¹⁰ Heba Othman, 'Termination by an Employer' (2016) Expert Insight <<http://www.cbnme.com/expert-insight/termination-employer-fenwick-elliott/>> accessed on 1 May 2017

¹¹ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell 2016)

source in contrast with the Saudi Arabia law, which provides that the application of the Sahariah law shall be directly applied¹²

In conjunction with the above, the Islamic shariah law shall be read with the other articles of the civil code, for instance, Article 218 of the United Arab Emirates civil code provides that “*A contract shall not be binding on one or both of the contracting parties despite its validity and effectiveness if there is a condition that such party may cancel it without mutual consent or an order of the court.*”

In addition to the above Article 218(2) states: “*Each party may act unilaterally in canceling it if by its nature the contract is not binding upon him or if he has made it a condition in his own favor that he has the option to cancel.*”

The above article is argued to have the meaning that the contract will not be considered a binding contract if there is a right to one party to terminate the same.

To determine whether the termination is lawful, the Dubai Court of cassation judgement in 2007 provided that “*non-binding with regard to one or both of the contracting parties, despite the validity and effectiveness thereof, if such party is given the right to cancel it without the consent of the other or without the order of the court, pursuant to article 218 of the Civil Code*”¹³ and the court decision quoted article 218 of the civil code.

Article 106 of the United Arab Emirates Civil code is also another important article needs to be taken into consideration in the discussion of the termination. Article 106 provides:

¹² Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell 2016)

¹³ Dubai Court of Cassation Judgment 313/2007

“(1) A person shall be held liable for an unlawful exercise of his rights.

(2) The exercise of a right shall be unlawful:

(a) If there is an intentional infringement (of another’s rights);

(b) If the interests which such exercise of right is designed to bring about are contrary to the rules of the Islamic Shari’ah, the law, public order, or morals;

(c) If the interests desired are disproportionate to the harm that will be suffered by others;

(d) If it exceeds the bounds of usage and custom.”

Accordingly, in all the application of the rights and obligations of the parties, the lawful exercise of the rights shall be considered and this applies to the claim for Liquidated damages in the cases of termination.

A further article that shall be considered in the understanding of the act of termination by the parties is the fundamental tenet of United Arab Emirates law obliging the parties to act in good faith, which is enshrined in Article 246(1) of the United Arab Emirates Civil Code thus: *“The contract must be performed in accordance with its contents, and in a manner consistent with the requirements of good faith.”*¹⁴

¹⁴ Claire King, ‘Good Faith: English Law v the UAE Civil Code’ (2017) 24 International Quarterly <<https://www.fenwickelliott.com/research-insight/newsletters/international-quarterly/good-faith-english-law-uae-civil-code>> accessed on 30 June 2017

2.3. Termination under Common Law- particularly in the United Kingdom

In general, the English law as most of the common law countries applies the Freedom of Contract doctrine which is described by Thorpe and Chris¹⁵ as one of the few legal maxims. They said: *“It is entirely up to the parties involved to decide whether to contract, to decide the subject matter and the terms of that contract and to decide whether and in what way those terms are to be recorded. The purpose of the law of contract is not to dictate to people what contracts they enter into, but to enable a party who has made a contract to enforce it in accordance with the original intention of the parties. To put it in more familiar terms, the purpose of the law of contract is to enable a person who has made a deal to hold the other party (or parties) to it.”*

Considering the above doctrine of Freedom of contract, it is for the parties to agree on their contractual rights and the right of Termination under the contract may be well available in addition to the right to terminate under the law, unless the contract excludes that right.¹⁶

Duncan in Hudson’s building¹⁷ said that the termination by operation of law will occur when the guilty party commits a fundamental/ repudiatory breach and the innocent party then by action or by words accepted the repudiation and terminated the contract, and such termination is different than a contractual termination as it does not rely on

¹⁵ C.P. Thorpe and others, *Commercial contracts, a practical guide to deals, contracts, agreement, and promises* (Woodhead publishing ltd 1996)

¹⁶ Iain Drummond, ‘Terminating a contract at common law – do the contractual termination provisions apply?’ (2016) Shepherd and Wedderburn <<https://shepwedd.com/knowledge/terminating-contract-common-law-do-contractual-termination-provisions-apply>> accessed on June 20, 2018

¹⁷ I.N DUNCAN WALLACE, *Hudson’s building and engineering contracts* (11th edn. Sweet& Maxwell 1995)

an express contractual term except if the contract may have chosen to indicate such gravity as a fundamental breach that lead to common law termination.

In *Vinergy v Richmond* case¹⁸ it was discussed whether one of the parties can exercise its rights under the common law and ask for termination without complying with the terms and provisions of the contractual termination. The court decided that the party may seek termination under the law without following the contractual procedure if the termination clause is wide and grant termination in other situations.

If the contract did not include a provision for termination then, a party is entitled to terminate in the event of a repudiatory breach, which may consist of either renunciation, impossibility or a substantial failure to perform by the other party.¹⁹

The completion of the project on the required time, is not necessary a key obligation that lead to termination, but in the same time if a term is not originally of the essence it may be made of the essence if a notice is raised by one party to the other for compliance with that term.²⁰

In the case of most of the construction contracts, the provisions of termination cover the situation that a notice shall be taken in consideration with a care prior to the termination effectiveness.²¹

In some few cases, the time is not of the essence, and the contractor obligation is only to complete the work within a reasonable time. The *Shawton Engineering Ltd v DGP*

¹⁸ *Vinergy International (PVT) Ltd v Richmond Mercantile Limited FZC [2016] EWHC 525*

¹⁹ Edwin Peel, *The Law of Contract*, (13th edn, Sweet and Maxwell 2010).

²⁰ Law of Property Act 1925, s. 41.

²¹ David Chappell, *Building Contract Claims* (5th edn, Blackwell Publishing Ltd 2011)

*International Ltd*²², is one of the cases where the court rejected the claimant argument that the time is for essence and decided that the contractor is not in breach as there is no clause in the contract for extending the completion date and there was several variations and changes in the scope after the completion dates and accordingly the obligation was to finish within a reasonable time. The court questioned the sufficiency of the notice to make the time of the essence and decided that the contractor was not in breach at the time when the notice was issued.

The above position of the court does not mean that if the time of the completion date is lapsed and extra time would be allowed for the party in delay to complete, then the other party cannot issue a notice to put a cap on the new completion date. The position was set out succinctly in the case of *Charles Rickards Ltd v Oppenheim*.²³ where the court said

“It would be most unreasonable if the defendant having been lenient and waived the initial expressed time, should, by so doing, have prevented himself from ever thereafter insisting on reasonably quick delivery. In my judgment, he was entitled to give a reasonable notice making time of the essence of the matter.”

David Chappell²⁴ highlighted that it is unlikely for a construction contracts where a commercial development is involved that the time is not of essence even if the contract did not specify that time is of essence, it is for the employer to make it so, by giving an notice with a reasonable time and making clear that failure to deliver on the required time would be considered a breach.

²² *Shawton Engineering Ltd v DGP International Ltd* [2005] EWCA Civ 1359..

²³ *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616 at 624 per Denning LJ

²⁴ David Chappell, *Building Contract Claims* (5th edn, Blackwell Publishing Ltd 2011).

3. Chapter 3: Liquidated Damages in construction contracts

3.1. Introduction

This chapter will discuss in general the meaning of liquidated damages clause and the different application of the United Arab Emirates law and common law to the same with differing between the Liquidated damages and the penalty.

Liquidated damages are a fixed sum agreed by the parties in their contract as a value of the damages that one party can claim against the other, without the need to prove that damages.

The process of claiming damages through courts is a lengthy and expensive process that requires the claimant to prove the breach and the loss suffered and the relation between the breach and the loss, and even if it is very often clear that there is damage, it is difficult always to prove the value of that damage.²⁵ To avoid this the contracting party may prefer to agree on the value of the damages in their contract that in the event of a particular breach the party in default will pay it to the other, and this is named as the Liquidated Damages.

The common law position in dealing with the Liquidated damages differentiates between the Liquidated Damages and the penalty, where the Liquidated damages are recoverable, and the penalty is not. However, the English courts are reluctant to decide to consider a clause as a penalty and are mostly accepting the agreed term by the party that fixes the level of damages for breach.²⁶

²⁵ David Chappell, *Building Contract Claims* (5th edn, Blackwell Publishing Ltd 2011)

²⁶ Hamish Lal, 'Liquidated Damages' (2009) 25 *Construction Law Journal* No 8, 571

The United Arab Emirates law position is different in considering the Liquidated damages as it does not differentiate between the penalty and the liquidated damages as the excessive value is not an issue in considering the Liquidated Damages application in the United Arab Emirates Law ²⁷

3.2. Liquidated damages under United Arab Emirates law

There is a key article in the United Arab Emirates Law addressing the liquidated damages which is article 390 (2) of the United Arab Emirates Civil transaction code, but this article causes a lot of upset to the practitioners and the parties entering into a construction contract. This article of the law does not work to clarify the relationship between the parties in a construction agreement, but it has an opposite effect.²⁸

Article 390 provides:

“(1) The contracting parties have the freedom to fix the amount of compensation in advance, by making particular provision for this in the contract or in an applicable later agreement, as allowed by the given law of a place and,

(2) The judge has the power if application is made by any party, to modify an agreement of this nature to make compensation meet the loss in a given matter, and any contrary agreement is considered to be void”²⁹

²⁷ Matthew Heywood and Charlotte Holmes, ‘InSite – Construction issues for the Middle East’ (2015) 1 Pinsent Mason, <<https://www.pinsentmasons.com/PDF/Insite-Construction-Middle-East-Newsletter-Issue-1.pdf>> accessed on 1 July 2018

²⁸ Mohd Marican & Sadique Bin Ibrahim, 2014, “THE EFFECT OF ARTICLE 390(2) OF THE UAE CIVIL CODE ON LIQUIDATED DAMAGES CLAIMS IN THE UAE CONSTRUCTION INDUSTRY.” Construction Law in Dispute Resolution (CLDR), retrieved from <http://bspace.buid.ac.ae/bitstream/1234/643/1/110075.pdf>, September 2, 2015.

²⁹ UAE Civil Transaction Law, Article 390

The official commentary on the above article states:

“Entitlement to compensation is a prerequisite for the application of this Article and if compensation is not payable, then the provisions of this Article do not come into operation. If compensation is due and payable and the amount determined by the parties is compatible with the damage sustained, then well and good. However, if it is more or less, then the judge may reduce or increase the figure upon the request of either party, as it is a jurisprudential requirement that the amount of compensation should be equivalent to the actual damage sustained.”³⁰

This section of the law caused additional conflicts and unclarity in dealing with the Liquidated damages in the construction contract and hugely impact the beneficial use of the liquidated damages clauses and limited its advantages.

The law gives the judge the absolute discretion to adjust the parties’ agreement and limit the rights of applying agreed damages or increase the same at his sole discretion. But the burden to prove that the actual damages vary from the agreed liquidated damages rests with the challenging party³¹.

Dubai court of cassation in 2006³², confirmed the above and stated that “*the judge may, in all cases, when requested by any party, amend such agreement to the effect of making the compensation equal to the actual damage, any agreement to the contrary is null and void*”.

It is important to highlight that, the UAE law gives respect to the agreement of the parties, and the burden of proof that the actual damages is different than the agreed damages will fall on the party requesting the judge to adjust such agreement. The

³⁰ James Whelan, UAE Civil Code and Ministry of Justice Commentary (Thomson Reuters, 2010)

³¹ Union Supreme Court, 412/2009, 27 Jan 2010

³² Dubai Court of Cassation in Appeal 222/2005, Judgment issued on 19th June 2006

decision in Dubai Court of Cassation case in 2005³³ stated that “*the LD’s agreement shall shift the burden of proof from the claimant to the respondent but the court is still obliged in all cases to indicate the element of the damages awarded.*”.

It is important here to highlight that the United Arab Emirates law and cases do not distinguish between liquidated damages and penalty and both are considered as agreed damages by the parties that will remain under question, and up to the judge, discretion to adjust if challenged by one of the parties.

3.3. Liquidated damages under common law particularly the United Kingdom

Common law position in relation to liquidated damages differs from United Arab Emirates law somehow. The common law differentiates between the liquidated damages and the penalty in many cases based on the value of the agreed amount of compensation between the parties, while United Arab Emirates cases do not apply this differentiation.

In common law, generally, the ‘claims for LD which represent a genuine pre-estimate of damages are recoverable’³⁴ But if the ‘amount of the LD is found as a matter of fact to be in excess by the courts, it is considered to be a penalty and is not recoverable’³⁵

To decide if the value mentioned in the contract will be considered as liquidated damages or as a penalty, Chief Justice Cox made it clear in the case of *Clydebank v*

³³ Petition No. 63/2005 & 99/2005, the hearing of 26 July 2005

³⁴ *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79 CA, 86-88.

³⁵ *Ibid*, note 31, at p. 12.

*shipbuilding*³⁶ when he said that the liquidated damage is a genuine pre-estimate of the damage while the penalty is payment of monies as in terrorem of the offending party.

The matter in question whether to consider the amount agreed as liquidated damages or a penalty is a matter to be decided based on the inherent circumstances of the particular contract at the time of the contract making not at the time of the breach.³⁷

The case *AMEV-UDC Finance Ltd v Austin & Anor*³⁸ gives emphases on the application of the penalty clause based on the old decision where is the decision says that the clause is a penalty if the amount is 'extravagant, exorbitant or unconscionable'. Wilson JJ and Mason commented on that case by saying 'The doctrine of penalties has pursued such a tortuous path in the course of its long development that it is a risky enterprise to construct an argument on the basis of the old decisions'³⁹

In another case *Azimut–Benetti SpA v. Healey*⁴⁰, the judge emphasized on the parties' negotiation before the signature of the contract. As such, there was a solid justification by the shipbuilder when he gave the following commentary:

'This was a contract for the construction and sale of a very expensive yacht, aptly described in the evidence as a 'super-yacht'. Both parties had the

³⁶ *Clydebank Engineering and Shipbuilding Co v Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6.

³⁷ *Public Works Commissioner v Hills* [1906] AC 368 and *Webster v Bosanquet* [1912] AC 394.

³⁸ *AMEV-UDC Finance Ltd v Austin & Anor* (1986) 162 CLR 170 at 198.

³⁹ Manly, Richard & Bell, Matthew. (2012). Liquidated Damages and the doctrine of penalties: Rethinking the war on terrorem. *The International Construction Law Review*. 29. 394

⁴⁰ *Azimut–Benetti SpA v. Healey*, English High Court: Blair J.: [2010] EWHC 2234 (Comm): 3 September 2010

*benefit of expert representation in the conclusion of the contract. The terms, including the liquidated damages clause, were freely entered into.... in a commercial contract of this kind, what the parties have agreed should normally be upheld*⁴¹

The Judge said “*In the event... the buyer agreed to clause 16.3 as proposed by the builder. In my judgment, the evidence clearly shows that the purpose of the clause was not deterrent and that it was commercially justifiable as providing a balance between the parties upon lawful termination by the builder*”⁴²

⁴¹ Manly, Richard & Bell, Matthew. (2012). Liquidated Damages and the doctrine of penalties: Rethinking the war on terrorem. *The International Construction Law Review*. 29. 386.

⁴² Bell, M., & Manly. Liquidated Damages,399

4. Chapter 4: Application of liquidated damages in cases of termination for delays before the contract termination.

4.1. Introduction

This chapter will discuss the application of the Liquidated Damages for delays after the termination of the contracts, under United Arab Emirates law, and common law, particularly, United Kingdom.

This chapter will shed light on the effect of the termination of any contract on the application of the Liquidated Damages. Will the Liquidated Damages survive following the termination of the contract? Will the wording of the text of the Liquidated Damages clause make a difference in respect of the ability to apply the Liquidated Damages clause after the termination? We will preview some case study in the United Arab Emirates and the United Kingdom in order to answer all the aforementioned inquiries.

4.2. United Arab Emirates law approach in dealing with Liquidated damages after termination for delays before termination.

4.2.1. Liquidated damages for all types of contracts

Generally, any contract includes the obligations and the rights of the contracting parties thereto. One of the obligations is paying Liquidated Damages to the other contracting party in case of breach of the contract in respect of the original obligation to perform the contract or the breach of performing the contract within the agreed timeframe.

In a case filed before the Dubai Court of First Instance⁴³, a purchaser of a villa in Dubai terminated the sale contract with the seller due to the delay in transferring the title deed. The purchaser filed its case to request the court to terminate the sale contract and to oblige the seller to pay the Liquidated Damages clause, in addition to returning the amounts paid by the purchaser. The Dubai Court of First Instance decided to terminate the contract and to award the purchaser the Liquidated Damages, in addition to returning to the purchaser the amount paid to the seller. The seller filed an appeal before Dubai Appeal Court, and it was rejected. The seller filed a cassation appeal before Dubai Cassation Appeal and argued that the Appeal Court misapplied the law when it awarded the purchaser the Liquidated Damages agreed in the contract, as the contract is terminated. The seller pointed out that the Liquidated Damages clause is only workable if the purchaser was requesting the specific performance of the contract, but if the purchaser is requesting the termination of the contract, and the Court of First Instance accepted to terminate the contract, then the Liquidated Damages clause should not be applied, and if the purchaser seeks compensation, then he must evidence the fault, quantum of damages, and the causal link between the fault and damages.

The Dubai Cassation Court accepted the seller's cassation appeal and highlighted that the Appeal Court did misapply the law when it applied the Liquidated Damages clause after the termination of the contract, because by the termination of the contract, the original obligation of performing the contract fall down, and then, all the related minor obligations, such as the Liquidated Damages clause, fall down accordingly.

⁴³ Dubai Cassation Court Judgment # 202 of 2010 civil

Another case was filed before the Abu Dhabi Federal Court of First Instance⁴⁴, whereas a supplier was claiming the other party in a supply contract to pay compensation due to the termination of this contract. The supplier highlighted that the other contracting party terminated the contract without any breach by the supplier and before the supply of the required equipment (air conditions). The supply contract contained Liquidated Damages clause of AED 100,000.00. Therefore, the supplier requested the court to oblige the other contracting party to pay the Liquidated Damages. The Court of First Instance decided to award the supplier the claimed Liquidated Damages an amount of AED 100,000.00. the other party filed an appeal before the Abu Dhabi Federal Court of Appeal, and the appeal court accepted the appeal and accordingly decided to amend the awarded compensation to be AED 20,000.00 instead of AED 100,000.00. the supplier filed a cassation appeal before the Federal Supreme Court to challenge the judgment issued by the Appeal Court as it reduced the amount of the agreed Liquidated Damages, and hence the Appeal Court violated the parties' agreement regarding the due compensation.

The Federal Supreme Court rejected the supplier's cassation appeal, and confirmed that the appeal judgment is correct because the contract is terminated, which means that the primary obligation is fallen down, and then all the related minor obligations, such as the Liquidated Damages clause, fall down accordingly, and thus any compensation claim will be based on the general principles in the law, whereas the court of merits does have the power to determine the due amount of compensation if a fault, damages, and causal link are evidenced.

⁴⁴ Federal Supreme Court Judgment # 302 of 21 judicial year/civil

The conclusion of the abovementioned precedents is that the Liquidated Damages clause will not be applied if the contract is terminated, and if there is any compensation claim, it will be based on the actual damages, if any, after evidencing the fault and the causal link between the fault and the damages.

4.2.2. Liquidated Damages for construction contracts:

The question now is the position of the application of Liquidated Damages clause following the termination of the construction contract. and whether the above precedents for the purchase contracts will apply also to construction contracts or these contracts will have a different position.

There are many precedents issued by the United Arab Emirates cassation courts that provide the inapplicability of the penalty clause and/or the Liquidated Damages clause after the termination of the contract. The rationale behind these precedents that as long as the original obligation to perform the contract falls down after the termination, then all the related minor obligations, such as the Liquidated Damages clause will fall down accordingly.

In a case filed before Abu Dhabi Court⁴⁵, the contractor filed a case before Abu Dhabi Court of First Instance following the termination of the construction contract by the

⁴⁵ Hassan El Tahir & Ahmad Ghoneim, ‘Abu Dhabi Judgment on Delay Damages Highlights Importance of When Contract is Terminated’ (2016) March, Al Tamimi Law Update < <https://www.tamimi.com/law-update-articles/abu-dhabi-judgment-on-delay-damages-highlights-importance-of-when-contract-is-terminated/>> accessed on June 2017

employer. The contractor was claiming, inter alia, the value of work done, prolongation costs, and etc. In the meantime, the employer filed a counterclaim claiming to reserve his right of a compensation claim against the contractor by applying the Liquidated Damages due to the contractor's delay in the project. The Court of First Instance decided that the contractor's case is premature and thus dismissed the case, along with the employer's counterclaim. The contractor and the employer filed an appeal before Abu Dhabi Appeal Court, on which the contractor argued that his case is not premature. The employer also argued that he has the right to request to reserve its right to claim compensation from the contractor due to the delay in the project works, by applying the Liquidated Damages set out in the construction contract. The Abu Dhabi Appeal Court rejected the contractor and the employer's appeals. The contractor filed a cassation appeal before the Abu Dhabi Cassation Court, whereas the Cassation Court accepted the contractor's cassation appeal, and accordingly decided the case is not premature, and thus returned the case to the Appeal Court, which also returned back the case to the Court of First Instance to review the contractor's case against the employer. The Court of First Instance, after appointing engineering experts committee, decided to award the contractor the unpaid value of the work done after deducting the employer's Liquidated Damages. The contractor filed an appeal to challenge the employer's right to claim the Liquidated Damages, however, the Appeal Court rejected the contractor's appeal, and accordingly upheld the judgment issued by the Court of First Instance.

The contractor filed a cassation appeal before Abu Dhabi Court of Cassation, whereas the Cassation Court accepted the contractor's cassation appeal, and highlighted that as long as the employer terminated the construction contract before the completion of the project's works, then, the employer does not have the legal right to apply the

Liquidated Damages anymore. Should the employer seek to claim compensation from the contractor due to the delay in the project works, then, the employer must rely on the tort liability, rather the contractual liability (i.e. Liquidated Damages). In the tort liability, the employer must evidence the fault (i.e. contractor's delay), the quantum of damages, and the causal link between the fault and the damages.

Another case filed before Dubai Court of First Instance⁴⁶, whereas an employer requested, inter alia, to terminate the construction contract and to apply the Liquidated Damages due to the contractor's delay in works, which had not been completed. The court appointed an engineering expert, on which the expert highlighted that the employer is entitled to an amount less than the requested Liquidated Damages amount. The Court of First Instance followed the result of the court-appointed expert and decided to terminate the contract, and awarded the employer the amount as per the expert's report. The employer and the contractor filed an appeal before Dubai Appeal Court, and this court decided to amend the judgment issued by Dubai Court of First Instance in favor of the employer, and accordingly awarded the employer the Liquidated Damages full amount.

The contractor filed a cassation appeal before Dubai Cassation Court, whereas the contractor challenged the judgment issued by Dubai Appeal Court, as the awarded compensation does not represent the actual damages if any, that the employer's suffered. The cassation court accepted the contractor's cassation appeal and highlighted that the Appeal Court should not have had applied the Liquidated Damages as long as the employer requested the Court of First Instance to terminate the contract, and then, the Court of First Instance terminated the construction contract.

⁴⁶ Dubai Cassation Judgment # 402 of 2004 commercial

Instead, the Appeal Court should have had determined the due compensation based on tort liability, on which the employer must evidence the fault, damages, and the causal link between the fault and the damages.

The conclusion of the abovementioned two precedents is that the termination of any contract, including the construction contracts, lead to the inapplicability of the Liquidated Damages, as long the termination took place before the completion of works even if the termination is taking place after the lapse of the agreed completion date and the contractor is already in a delay. This is because the Liquidated Damages is a minor obligation attached to the original obligation to perform the contract. Therefore, if the original obligation to perform any contract, including the construction contract, falls down by termination, then, all the remaining minor obligations, including the Liquidated Damages, fall down accordingly as long as the works were not completed until the date of termination. In these circumstances, the compensation claim must be based on the tort liability. In this liability, there are three essential elements must be evidenced. The first element is the fault of the other contracting party, the second element is the quantum of damages if any, and the third element is the causal link between the fault and the damages. Consequently, the source of the right to claim compensation will be the law, rather than, the contract, which is terminated before the completion of works.

4.2.3. Exception from the general rule:

As noted above, the general rule that the Liquidated Damages clause cannot be enforced following the termination of the contract, and this because the Liquidated Damages clause is minor obligation that follows the original obligation of performing the contract, and hence if this original obligation falls down by terminating the

contract, then the minor obligation of the Liquidated Damages clause falls down, and if there is any compensation claim it must be based on tort liability where the claimant must evidence the fault from the respondent, quantum of damages, and the causal link between the fault and the damages, if any.

One exception from the general rule is when the wording of the Liquidated Damages clause provides that it will come into force after the termination of the contract due to the breach of the other contracting party⁴⁷.

In a case filed before Abu Dhabi Court of First Instance⁴⁸, a developer requested to apply the Liquidated Damages on the sub-developer after the termination of a sale and purchase agreement regarding a plot located in Abu Dhabi. The Court of First Instance appointed experts to determine the party on the breach and the due quantum of damages if any. The court-appointed expert came to the conclusion that the sub-developer was in breach of his contractual obligations, and the developer is entitled to compensation. The amount of compensation determined by the court-appointed expert was less than the amount of the Liquidated Damages. The Court of First Instance evidenced the termination of the contract and awarded the developer the amount of compensation as per the court-appointed expert's determination, and not as per the Liquidated Damages. The developer appeals the judgment issued by the Court of First Instance before the Appeal Court, and the court rejected the appeal and upheld the judgment issued by the Court of First Instance. The Appeal Court stipulated that the

⁴⁷El-Ameir Noor & Ahmad Ghoneim, 'Abu Dhabi Court of Cassation Judgment on Liquidated Damages Clauses after Termination' (2015) Al Tamimi Law Update February <https://www.tamimi.com/law-update-articles/abu-dhabi-court-of-cassation-judgment-on-liquidated-damages-clauses-after-termination/> accessed on 1 June 2017.

⁴⁸ Abu Dhabi Cassation Judgment # 790 of 2013 commercial

developer is not entitled to apply the Liquidated Damages after the contract is terminated, as the original obligation of performing the contract falls down by the termination, and accordingly all the related minor obligations fall down thereafter, including the Liquidated Damages clause. The developer filed a cassation appeal before Abu Dhabi Cassation Court, and challenged the judgment issued by the Appeal Court as it applied the general rule related to the inapplicability of the application of the Liquidated Damages clause following the termination of the contract, although the wording of the Liquidated Damages clause set out in the contract explicitly provides that this clause will be applied after the termination of the contract. Therefore, the parties did agree that this Liquidated Damages clause will be effective only after the termination of the contract.

The Abu Dhabi Cassation Court accepted the developer's cassation appeal and highlighted that if the Liquidated Damages clause provides that it will be a penalty for terminating the contract and not a penalty due to the breach of the contract, then, this Liquidated Damages clause will not be effective, until the contract is terminated, and thus must be applied following the termination.

The conclusion of this precedent that the cassation court differentiated between the Liquidated Damages clause when it is a remedy/penalty for the breach of the contract, and when this Liquidated Damages is a remedy/penalty for terminating the contract based on the other party breach of contract. In the last scenario, it will possible to apply the Liquidated Damages clause after the termination of the contract, as it cannot be applied during the execution of the contract, and thus this is the only exception from the general rule regarding the inapplicability of applying the Liquidated Damages clause following the termination of the contract.

4.2.4. Conclusion:

The United Arab Emirates law approach is clear, the liquidated damages cannot be claimed if the contract is terminated and only actual damages can be claimed under tort liability, however if the contract is drafted to allow liquidated damages as a consequence of termination not a consequence for delay in completion then the liquidated damages can be considered.

4.3. Common Law approach in dealing with Liquidated damages claimed after termination for delays before termination.

English courts for many years follow the doctrine of the freedom of contract, Lord Woolf, for example, stated "*the court has to be careful not to set too stringent a standard and bear in mind that what the parties have agreed should normally be upheld. Any other approach will lead to undesirable uncertainty especially in commercial contracts*"⁴⁹

In a case in 1913 that went on appeal to the House of Lords in British, *Glanzstoff Manufacturing Co v General Accident Fire and Life Assurance Corp*⁵⁰ the employer terminated the contract due to the insolvency of the contractor and appointed another contractor to complete the work, who delayed the completion by six weeks from the original completion date. The court decided that Liquidated damages apply only if the

⁴⁹ *Philips Hong Kong Ltd v Attorney-General of Hong Kong*, (1993) 61 BLR 41, pages 58-9 and (1993) 9 Const LJ 202(PC)

⁵⁰ *British Glanzstoff Manufacturing Co Ltd v. General Accident Assurance Corp Ltd* [1913] AC143

contractor itself completed the works not others, as the control of completing the work on time is moved to the other hands.

The above decision by the court shows that that the liquidated damages cannot be applied if the contractor did not complete the project before the termination of the contract, but if the contract is terminated before the completion of the work, then the liquidated damages cannot be applied for delays that move to the control of others.

In a similar case in 1995, *Bovis v. Whatlings*⁵¹ the court decided that time is related to the contract during the contract exists, but if the contract is terminated due to a breach of whatever nature, time ceases to be relevant and Liquidated Damages thereafter flows from the repudiation resulting in non-performance and the need to provide for substitute performance.

The above case also confirms the position that liquidated damages cannot be applied if the contract is terminated.

Despite the above, in 2010 there is an opposite position reached in another case *Hall v Van Der Heiden*⁵² where the contractor abandoned the site and the employer decided to complete the work by another contractor who delayed the completion by a few months. The court decided that the employer was only able to move to the property when the work was completed by the other contractor and the original contractor's liability to pay Liquidated Damages did not cease until the completion of the works. The court decision added that the contract did not provide that the Liquidated damages cease upon the termination, so the employer is entitled to claim liquidated damages

⁵¹ *Bovis Construction (Scotland) Limited v. Whatlings Contracts Limited* (1995) 75 BLR 1.

⁵² *Hall and Shivers v. Mr. Jan van der Heiden* [2010] EWHC 586 (TCC).

for the whole period of delay. The court decision emphasized that there was no provision in the contract ceasing the application of Liquidated damages by termination and if such provision is there it would reward the contractor for its default.

This decision was made for a contract under the JCT form of contract which does not state that Liquidated damages survive termination. And the decisions are conflicting with the decision taken in *Glanzstoff* case⁵³

In the commentary to the above-conflicted decisions, Daniel brown⁵⁴ states ‘However, if it is correct that the employer may claim general damages where the LAD provisions do not apply⁵⁵, and that the amount of general damages is limited to the figure stated in the contract for LADs⁵⁶, then the figure for LADs will apply in any event’.

The traditional position was restored again in 2010 in the case of *Shaw v MFP Foundations and Pilings Ltd*⁵⁷ where Shaw the employer employed MFP to do some construction works for his home and MDP were delayed in completing for the work and did not replace some defective windows accordingly Shaw terminated the contract and requested for liquidated damages for the delays. The judge held that the Liquidated Damages clause ceased to apply as the contract had been terminated, the judge said "*...after the date of termination the parties are no longer required to perform their primary obligations under the contract and so the contractor's obligation to complete by the completion date no longer remains and the provision*

⁵³ *British Glanzstoff Manufacturing Co Ltd v. General Accident Assurance Corp Ltd* [1913] AC143

⁵⁴ Daniel Brawn, ‘Extensions of time and liquidated damages in construction contracts in England and Wales’ (2012) *International Journal of Law in the Built Environment*, Vol. 4 Iss 1 pp. 75 - 90

⁵⁵ *Following Peak Construction (Liverpool) Ltd v. McKinney Foundations Ltd* (1970) 1 BLR 111.

⁵⁶ *Temloc v. Errill Properties* (1987) 39 BLR 30 (CA).

⁵⁷ *Shaw v MFP Foundations and Pilings Ltd* [2010] EWHC 1839

for liquidated damages, therefore, becomes irrelevant. In its place arises an obligation to pay damages for the employer's losses resulting from the breach of contract, including damages for any loss resulting from any further delay...”.

This decision restored back the traditional legal position where the liquidated damages clause is considered as irrelevant after the termination of the contract due to the termination of the primary obligation to complete the work on time.

In another case in 2014 *Bluewater v Mercon*⁵⁸, regarding a contract for the fabrication of a mooring system for the oil field in the Caspian Sea. The court issued a decision regarding several factual disputes, including but not limited to, the liability for the delay in the project works, and the due damages for the contract's breach. The facts and background of the case refer to Bluewater who entered into a contract with a company in order to “*design, construct and install a towerbased soft yoke mooring system in the Caspian Sea*” Part of the works were given to Mercon as a subcontractor with a lumpsum basis on a remeasured basis and reimbursable basis. Mercon delayed the completion of its works and accordingly Bluewater applied the Liquidated damages. The completion dates were divided into milestones for parts of the works and some of these milestones were delayed before the termination.

One of the most important points that the court decided on is whether Bluewater's had the right to apply the Liquidated Damages for the delays of the milestones delayed before the termination date, or not. The importance of this point is related to the common law position regarding the application of the Liquidated Damages at the time of the termination. In other words, will the common law allow to apply the Liquidated

⁵⁸ *Bluewater Energy Services BV v Mercon Steel Structures BV* Queen's Bench Division (Technology & Construction Court) 30 June 2014

Damages for delays before the termination until the date of termination or the common law will not allow the application of the Liquidated Damages as long as the contract is terminated, and any compensation claims shall be based on tort liability like the civil law?

In this precedent, the court decided that it is a lawful right to apply the Liquidated Damages at the date of termination if the delays were suffered before the termination date.

In 2010, the Connecticut supreme court ruled in *Old colony v Town* case⁵⁹ that the employer is entitled to be compensated based on the agreed liquidated damages for delays incurred before the termination date. The case was for the replacement of a pump station project for the town of Southington, where the contract allows for liquidated damages of \$400 per day and after several problems during the construction including delays in the completion, the town decided to terminate the contract for convenience. The contractor raised a case claiming the unpaid costs for delays and the town filed a lawsuit for the breach of contract by the contractor and requested the liquidated damages. The contractor argued that because of termination the liquidated damages failed but the court decided that the Town is entitled to its liquidated damages. The supreme court affirmed the trial court decision and stated that “*had the parties intended to limit the town to non-default remedies, as [the contractor] suggests, one would expect some sort of limiting language rather than expansive terms.*” The court rejected the contractor’s argument and confirmed that the right for

⁵⁹ *Old Colony Construction, LLC v. Town of Southington* (2015), 113 A.3d 406

liquidated damages arose as soon as the substantial completion date passed and continued until the termination.

4.3.1. Conclusion:

We may conclude that the common law position distinguishes between delays before the termination date if the completion date lapsed before termination and delays if the completion date is still not due on the time of termination.

The decisions, with some exceptions, tend to accept that the liquidated damages can be applied even after the termination of the contract for any delays arose before the termination, either delays to milestones or delays to the completion date, which is different than the civil law position in the United Arab Emirates.

But the decisions are not confined for the delays if the completion date is moved to the control of another contractor after the termination, and the common law position is not clear for delays after termination.

5. Chapter 5: Application of liquidated damages for delays after the termination.

5.1. Introduction

After we discussed above the legal position of the Liquidated Damages clause after the termination of the contract for delays before the termination, we need to discuss the legal position of the Liquidated Damages clause and its application for delays after the termination, and the legal position of the application of the Liquidated Damages.

If the employer appointed another contractor to complete the work after termination of the contract, will the employer be entitled to seek the application of the Liquidated Damages on the old contractor for delays from the original completion date to the new completion date of the works by the other contractor, or only tort liability can be claimed after evidencing the fault, quantum of damages, and the causal link between the fault and these damages?

5.2. United Arab Emirates Law approach in dealing with Liquidated damages for delays after the contract termination.

In 2015 Abu Dhabi Court of Cassation, issued the decision in appeal case 424⁶⁰ where the court decided that if the contract is terminated before the completion of the works then the application of the liquidated damages ceases and any claim for damages shall be made under tort rather than contractual liability.

The above decision applies in principle to the delays after the termination, as the delays after the termination of the contract including the duration required to appoint another contractor and the completion of the work by the other contractor cannot be

⁶⁰ Appeal Case 424 & 483 of 2015

claimed by the employer against the original contractor under contractual liability, but the employer can still seek the damages based on the tort liability.

5.3. Common Law approach in dealing with Liquidated damages claimed after termination for delays after termination.

In the decision of *Hal and Jan*⁶¹, the judge made it clear that liquidated damages can be applied for all the period of delay from the original completion date to the new completion date by the other contractor, but as discussed, this decision contradicts with another decision for *Glanzstoff and General accident Assurance*⁶² where the judge decided that the contractor cannot be blamed for the period of time which is no more under his control.

The above cases show that the common law approach is differing from one decision to the other and there is no clear cut on the application of the liquidated damages for delays after the termination of the contract, however as generally, the common law applies the doctrine of the freedom of the contract, then it would be better for the parties to agree on the mechanism of dealing with the delays after the termination in their agreement to facilitate the decision on this issue.

⁶¹ *Hall and Shivers v. Mr. Jan van der Heiden* [2010] EWHC 586 (TCC).

⁶² *British Glanzstoff Manufacturing Co Ltd v. General Accident Assurance Corp Ltd* [1913] AC143

6. Chapter 6: Application of Liquidated Damages in the standard form of contracts

6.1. Liquidated Damages under the FIDIC form of contracts

The standard form of contracts are widely used internationally, and one of the most famous standard forms of contracts in the construction field is the form of contracts issued by the "*International Federation of Consulting Engineers*", which is an "*international standards organization for the consulting engineering & construction best known for the FIDIC family of contract templates*".

There are different types of FIDIC contracts, such as the red book 1999 for the traditional procurement method, which is design, bid, build. This type of contract the employer engage an architecture to provide the design, and then the employer make a tender to select, among the bidders, the best price and quality, then the selected contractor will build the project under a supervision of an engineer. There is also the yellow book for design and build, on which the contractor provides the design and build the project.

These types of FIDIC contracts have a liquidated damages clause/delay damages clause, which imposes a penalty on the contractor, should he delay the project completion date.

The question now, whether the liquidated damages/delay damages clause set out in the FIDIC 1999 contracts does survive following the termination, or not?

Clause number (8.7) of the FIDIC 1999, red book, provides that:

"If the Contractor fails to comply with Sub-Clause 8.2 [Time for Completion], the Contractor shall subject to notice under Sub-Clause 2.5 [Employer's Claims] pay

delay damages to the Employer for this default. These delay damages shall be the sum stated in the Contract Data

These delay damages shall be the only damages due from the Contractor for such default, other than in the event of termination under Sub-Clause 15.2 [Termination by Employer] prior to completion of the Works. These damages shall not relieve the Contractor from his obligation to complete the Works, or from any other duties, obligations or responsibilities which he may have under the Contract”

And clause 15.4 provides:

15.4 Payment after Termination

After a notice of termination under Sub-Clause 15.2 [Termination by Employer] has taken effect, the Employer may:

- (a) proceed in accordance with Sub-Clause 2.5 [Employer's Claims],*
- (b) withhold further payments to the Contractor until the costs of execution, completion and remedying of any defects, damages for delay in completion (if any), and all other costs incurred by the Employer, have been established, and/or*
- (c) recover from the Contractor any losses and damages incurred by the Employer and any extra costs of completing the Works, after allowing for any sum due to the Contractor under Sub-Clause 15.3 [Valuation at Date of Termination].*

After recovering any such losses, damages, and extra costs, the Employer shall pay any balance to the Contractor”⁶³

The wording of clause 8.7 states that the employer will be entitled to apply the delay damages on the contractor if the contractor delayed the completion date of the project. Thus, this clause discusses the applicable penalty on the contractor during the execution of the contract, and the consequences of the failure to comply with the agreed completion date but in the case that the contract is not termination.

The clause then distinguishes the damages in the event of termination. Clause 15.4 talks about the losses and damages the Employer may claim after the termination and do not refer to the agreed value of delay damages per day specified in clause 8.7.

Therefore, if the contract is terminated, then, the Liquidated Damages clause set out in the FIDIC 1999, red book, will not be applicable anymore as it will fall down after the primary obligation to execute the contract is fallen down by the termination of the contract, as per highlighted before in this thesis.⁶⁴

This means that if a contract under the FIDIC 1999 form of contract, is terminated before the completion of the project’s works, the employer will not be able to apply the Liquidated Damages on the contractor. Instead, the employer will need to rely on the tort liability, on which the employer must prove the contractor’s fault (i.e. delay), the quantum of resulted damages, and the causation link between the fault and the damages.

⁶³ FIDIC 1999, red book

⁶⁴El-Ameir Noor & Ahmad Ghoneim, ‘Abu Dhabi Court of Cassation Judgment on Liquidated Damages Clauses after Termination’ (2015) Al Tamimi Law Update February <https://www.tamimi.com/law-update-articles/abu-dhabi-court-of-cassation-judgment-on-liquidated-damages-clauses-after-termination/> accessed on 1 June 2017.

6.2. Proposed Modification to FIDIC Clause

Having said that, the only way to guarantee that the Liquidated Damages set out in the FIDIC 1999, red book, will survive following the termination of the contract, is to change the wording of the clause to make the delay damages are payable if the contract is terminated due to the contractor's breach of its obligation regarding the completion of the project on the agreed date.

It is worthy to mention that the new release of the FIDIC 2017 Red book⁶⁵ considered the above issue and added in the clause for payment after termination of the following:

15.4 Payment after Termination for Contractor's Default

The Employer may withhold payment to the Contractor of the amounts agreed or determined under Sub-Clause 15.3 [Valuation after Termination for Contractor's Default] until all the costs, losses and damages (if any) described in the following provisions of this Sub-Clause have been established.

After termination of the Contract under Sub-Clause 15.2 [Termination for Contractor's Default], the Employer shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to payment by the Contractor of:

- (a) the additional costs of execution of the Works, and all other costs reasonably incurred by the Employer (including costs incurred in clearing, cleaning and reinstating the Site as described under Sub-Clause 11.11 [Clearance of Site]), after allowing for any sum due to the Contractor under Sub-Clause 15.3 [Valuation after Termination for Contractor's Default];*

⁶⁵ FIDIC® Conditions of Contract for CONSTRUCTION FOR BUILDING AND ENGINEERING WORKS DESIGNED BY THE EMPLOYER Second Edition 2017 ISBN 978-2-88432-084-9

*(b) any losses and damages suffered by the Employer in completing the Works;
and*

(c) Delay Damages, if the Works or a Section have not been taken over under Sub-Clause 10.1 [Taking Over the Works and Sections] and if the date of termination under Sub-Clause 15.2 [Termination for Contractor's Default] occurs after the date corresponding to the Time for Completion of the Works or Section (as the case may be). Such Delay Damages shall be paid for every day that has elapsed between these two dates.

The above new FIDIC clause considered that the termination clause shall refer to the delay damages in the payment after termination but only considered the application of the agreed damages for the period of delay from the original completion date to the termination date and did not consider any left the period of delay that may be suffered after that to the general rule.

The above clause also did not make it clear to survive the termination and Liquidated damages clause after the termination.

The proposed amended draft may take the following form, the modification is added in bold:

15.4 Payment after Termination for Contractor's Default

The application of this clause survives after the termination of the contract.

The Employer may withhold payment to the Contractor of the amounts agreed or determined under Sub-Clause 15.3 [Valuation after Termination for Contractor's Default] until all the costs, losses and damages (if any) described in the following provisions of this Sub-Clause have been established.

After termination of the Contract under Sub-Clause 15.2 [Termination for Contractor's Default], the Employer shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to payment by the Contractor of:

- (a) the additional costs of execution of the Works, and all other costs reasonably incurred by the Employer (including costs incurred in clearing, cleaning and reinstating the Site as described under Sub-Clause 11.11 [Clearance of Site]), after allowing for any sum due to the Contractor under Sub-Clause 15.3 [Valuation after Termination for Contractor's Default];*
- (b) any losses and damages suffered by the Employer in completing the Works; and*
- (c) Delay Damages, if the Works or a Section have not been taken over under Sub-Clause 10.1 [Taking Over the Works and Sections] and if the date of termination under Sub-Clause 15.2 [Termination for Contractor's Default] occurs after the date corresponding to the Time for Completion of the Works or Section (as the case may be). Such Delay Damages shall be paid for every day that has elapsed between these two dates.*
- (d) Delay Damages, for delays after the termination calculated for every day of delay between the date of termination and the date to complete the remaining works. The duration required for the remaining work to be completed shall be determined by the Engineer.**

We believe by this proposed draft for the Liquidated Damages clause, the employer should be entitled to apply the Liquidated Damages on the contractor for the delays following the termination, and thus the employer will not have to rely on tort liability, on which the employer will be obliged to evidence the contractor's fault, quantum of damages, and the causation link between the fault and the damages.

The proposed modification also did not leave the application of the liquidated damages to the delays by others which the contractor has no control on but obliges the Engineer to determine the reasonable duration to complete the remaining work which will be the base of calculating the damages.

The proposed modification as well will encourage the contractor who is already in a delay to complete the work as quick as possible instead of believing that it would be better for him to waiting for a termination by the employer and forcing his liability to pay Liquidated Damages to an end.

7. Chapter 7: Conclusion

The United Arab Emirates and the United Kingdom have different approaches in dealing with the liquidated damages in construction contracts. The United Kingdom differentiate between the liquidated damages and the penalty and such differentiation is left to the judges to decide based on the value of the damage agreed in the contract and its reasonability, but generally if the value is reasonable the judges consider it as a liquidated damage and apply the doctrine of freedom of contract and respect the same.

On the other side, United Arab Emirates law and court cases do not have such differentiation between the liquidated damages and the penalty and irrespective of the value of the agreed damage in the contract it is named as the “agreed damages between the parties”, but the court has the full jurisdiction to adjust this value to match with the actual damages based on a request of one party who then will have the burden of proof to justify that the actual damages differentiate from the agreed value, this weakens the position of applying the doctrine of the freedom of the contract.

In cases of termination, the United Kingdom and common law countries apply in most of the cases the doctrine of freedom of the parties and respect the agreed value of the damages for delays occurred up to the termination date (except if the value is considered as a penalty), but in the same time whether respecting the contract agreed value for the delays after the termination or not is still varying from one judge to another and no clear-cut position can be drawn to the application of the same in the United Kingdom.

On the other side, United Arab Emirate law and the cases are clear on deciding that after termination the agreed contract value for delay damages cannot be considered

and the actual damages only may be claimed, but with exceptional cases if the contract clause is drafted in a way to survive after termination and be considered as an agreed damage for the termination.

This conclusion of the thesis emphasis on the necessity to give high importance to the drafting of the liquidated damage clause and the termination clause to make it clear for both parties how this issue will be treated in case of termination.

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