

**A COMPARATIVE ANALYSIS BETWEEN THE
APPLICATION OF LIQUIDATED DAMAGES UNDER
ENGLISH LAW AND UAE LAW**

مقارنة تحليلية لكيفية تطبيق غرامات التأخير في ظل القانون الإنجليزي والقانون
الإماراتي

by

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ABSTRACT

Delay is one of the most common breaches in the construction field, and, over the years, construction professionals have come accustomed to remedy this breach through the application of liquidated damages. This dissertation studies the concept of liquidated damages under two different legal systems: the English Common Law and the UAE Civil Law.

The research methodology adopted is analytically comparative focusing on the practical applicability of the concept within each legal system where the findings are highly based on legal cases from both legislative systems. Other concepts that directly affect the application of liquidated damages (such as: Time for Completion, Extension of Time, Act of Prevention, and Sectional Completion) are also studied thoroughly in this dissertation in a way that identifies the contractual link between the term in study and liquidated damages, as well as analyses the basis of these contractual links.

Both systems agree on the essence of liquidated damages being an agreed pre-estimate of the damage that the employer could potentially suffer from due to the contractor's delay; and so, both systems will not allow the application of liquidated damages if the courts find out that the sum applied is intended to penalize the contractor rather than compensate the employer for his loss.

While the English Law is clear on the non-requirement of proving the loss suffered in order to apply liquidated damages, the UAE Law takes the same position only with public contracts. For private contracts, the UAE Courts have repeatedly required for the loss to actually occur, the contract's default to be present, and the contractor's default must be the cause of the provided

loss. In general, both legislations also agree on the application of liquidated damages on the main contractor when the delay is due to a nominated subcontractor's default.

On a different note, if the liquidated damages were found by the English courts to be so extravagant that it imposes a penalty on the contractor, the courts will nullify the clause and suffice with only rendering it inoperable. The English courts have refrained from modifying the parties' contracts with reference to the principle of Autonomy. However, as the UAE law gives the courts the power to change contracts and the judges, though not often, will use it if necessary.

This research also goes briefly into the means of estimating the liquidated damages amount, its recovery, and ways of avoiding its application.

المخلص

التأخير هو أحد أكثر الخروقات التعاقدية شيوعاً في مجال البناء والمقاولات، حيث أصبحت غرامات التأخير هي الحل المعتاد والأكثر تطبيقاً من قبل مهندسي المشاريع. تم البحث من خلال أطروحة الماجستير هذه في مفهوم وعملية تطبيق غرامات التأخير في ظل نظامين قانونيين مختلفين، هما القانون العام الإنجليزي والقانون المدني لدولة الإمارات العربية المتحدة.

تعتمد منهجية البحث على المقارنة التحليلية لغرامات التأخير في ظل كلاً من القانون الإنجليزي والقانون الإماراتي، مع التركيز على كيفية التطبيق العملي للمفهوم داخل للمفهوم حيث تستند النتائج إلى حد كبير على القضايا القانونية من كلا النظامين التشريعيين. تسلط أطروحة الماجستير هذه الضوء على مفاهيم تعاقدية أخرى تؤثر بشكل مباشر على تطبيق غرامات التأخير، منها: وقت الإكمال والتمديد الزمني وأفعال المنع وإتمام الأعمال المقسمة، بحيث تم البحث في الروابط التعاقدية بين هذه المصطلحات وغرامات التأخير، بالإضافة إلى تحليل أساس هذه الروابط التعاقدية وأسباب تأثيرها على إمكانية تطبيق غرامات التأخير.

كلا النظامين القانونيين يتفقان على جوهر بند غرامات التأخير المطبقة في عقود المقاولات، حيث يمثل هذا البند مثابة الاتفاق المسبق بين طرفي العقد على مبلغ تقديري يعتبره الطرفان كنوع من أنواع التعويض الذي يدفعه المقاول للعميل عوضاً عن الضرر الذي يحل به نتيجة التأخير في استلامه للأعمال. لذا يتفق كلاً من القانون الإنجليزي والقانون الإماراتي في مسألة عدم تطبيق غرامات طائلة بمبالغ تتعدى الأضرار الفعلية التي تكبدها العميل، وإن وجد بند لغرامات التأخير بهذه المبالغ الخارقة للعادة في العقد المبرم بين الأطراف فإن النظامين يعاملان هذا البند بمثابة القصاص أو العقاب الذي يفرضه العميل من المقاول وذلك ليس من صلاحيات العميل، إنما يعد فرض العقوبات أمر معني بالقانون والجهات التشريعية المختصة. يكمن الاختلاف في تطبيق هذه القاعدة بين النظامين بأن القانون الإنجليزي سوف يلغي بند غرامات التأخير في العقد كلياً ولن يجري أية تعديلات أخرى على العقد استناداً على قاعدة استقلالية الأطراف المتعاقدة في منظومة القانون الإنجليزي، في حين أن المحاكم الإماراتية قد تغيّر من مبلغ غرامات التأخير بالزيادة أو النقصان لتجعل الغرامة كفيلة بتعويض العميل عن خسائره فقط، إن استدعى الأمر إلى ذلك.

يعد موقف القانون البريطاني واضحاً في موضوع عدم حاجة العميل لإثبات الضرر الواقع عليه ليتمكن من تطبيق الغرامات على المقاول في حال تأخيرته، ويشاركه القانون الإماراتي هذا الموقف ولكن في حالة العقود الحكومية فقط، بينما حكم القضاة في دولة الإمارات العربية المتحدة في مراتٍ عدة بضرورة وجود ثلاثة عوامل لتطبيق غرامات التأخير على المقاول في العقود الخاصة، وهي وقوع الضرر على العميل، وجود خطأ المقاول، وإثبات علاقة سببية بين الاثنين. بشكل عام يتفق القانونين الإنجليزي والإماراتي على كيفية تطبيق غرامات التأخير على المقاول الرئيسي إن كان التأخير بسبب مقاول باطن تم تعيينه من قبل العميل.

تتطرق هذه الأطروحة كذلك إلى وسائل تقدير قيمة غرامات التأخير واستردادها وطرق تجنبها.

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I dedicate this work to my mother, Layla, and my sister, Nada.

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CHAPTER 1: INTRODUCTION

It is no surprise that construction projects are complex and are often delayed beyond the set completion date. This is precisely what makes construction delays a matter of many disputes, and a lot of professionals devote their careers to it. Similarly, liquidated damages is a concept widely discussed in the construction industry, and it is also a matter of great importance, because these projects often involve huge amounts of money and big investments. Therefore, claiming a percentage of these amounts, would not come without a fight. liquidated damages clauses were introduced into construction contracts in efforts to avoid long litigation processes amongst other reasons which are discussed herein this dissertation.¹ Different legal systems, understandably, view the issue of liquidated damages differently, depending on the set of laws that has been established, within the jurisdiction, to deal with construction matters.

There are many differences between the common legal system which is applied in countries such as: England and Wales, and the civil legal system which is applied in countries such as: France, Germany, and Spain. The differences arose due to the historical formation of each system and that affects how each legal system looks at certain issues. This dissertation will mainly focus on how each system views and applies the principle of liquidated damages and other relevant issues in the construction industry.

Furthermore, this research paper will define liquidated damages, and it will go to the root of what qualifies a sum to be considered as such. It will discuss the reasons of inclusion of such a

¹ Ronald Thomas, Gary Smith, and Daniel Cummings, 'Enforcement of Liquidated Damages' (1995) 121(4) Journal of Construction Engineering & Management 459

term, its importance, the purpose it serves and its advantages. It will also layout the requirements necessary to the formation of the liquidated damages clause; as well as the considerations at the estimation stage of the liquidated damages amount, methods of deducting the amount, remedies, and means of avoiding its implementation. Liquidated damages application is affected by many principles such as the type of contract (i.e., private or administrative), whole or sectional completion, delay of third parties or subcontractors, all of which are considered and thoroughly discussed here in this paper.

There are several contractual clauses that are critical and shall be studied in conjunction with liquidated damages clauses at the contract drafting stage. A good example here would be the extension of time clause, as it gives effect to liquidated damages. In other words, liquidated damages cannot be claimed in a contract that does not allow for an extension of time, and in some cases the whole clause will be deemed inoperable and nullified by the courts. The reasons for this are further detailed later on in this dissertation which will also address some of the major misconceptions in regard to this controversial matter.

All in all, this research paper provides a comparative analysis between the application of liquidated damages under the English Common Law and the UAE Civil Law, being two vastly different legal systems, with different historical backgrounds and different principles.

CHAPTER 2 : RESEARCH METHODOLOGY

This thesis was conducted based on academic research and a comparative study between the English Law in the United Kingdom and the UAE Civil Law. The student used the university's academic resources available in the university library as well as the e-library to obtain the documents referenced in this research paper, as well as other articles issued on websites and online sources. Moreover, legal resources were referenced such as the federal laws, civil codes, and acts of parliaments. This dissertation depended heavily on legal case reports, especially when it comes to deriving conclusions in relation to application of delay damages and other relevant concepts and the views of each jurisdiction.

CHAPTER 3 : BRIEF ABOUT CIVIL AND ENGLISH COMMON LAW

A legal system is the system that defines the means and ways of coming about the rules of which transactions, rights and responsibilities are carried out amongst the general public or private parties. Legal systems set the procedures for enforcing the law. There are many legal systems around the world, which may be carried either on an international or national level. The international law, for example, governs matters which take place among different countries on an international level. On the other hand, when addressing national legal systems there are many; however, three legal systems shine brighter than the rest, and these are: the Common, Civil and the Religious Law. Some countries often adopt one legal system, but other countries may also implement a mix of two.²

3.1 Civil Law

In general, civil law is a legal system which is based on the principle that there shall be a comprehensive and codified set of rules and laws that shall apply on all citizens. These sets of rules will target certain specific issues aimed at establishing general principles that allow judges and decision makers to achieve fair and consistent results. Roman law is considered the cornerstone which civil law was based upon. In addition, many Civil Law countries based their civil laws on the French Civil Code.

² Available at <https://www.akdlawyers.com/what-is-the-legal-system/> accessed on 25 May 2022 at 22:17

3.1.1 UAE Law

The UAE, like most of the Gulf countries with the exception of Saudi Arabia, have based their Civil law on the Egyptian Civil Code which is derived from the French Civil Laws, and that is the reason there is a significant and noticeable similarity between the civil codes of all of these countries.³ The civil law gives great importance to the written law and the mandatory provisions as it can have a substantial impact on the legitimacy of the agreement in place.⁴ The Federal Judiciary is one of the five federal authorities in the UAE government, based on Article 45 of the UAE constitution. Therefore, the judges of the Federal Judiciary are completely independent and follow no other authority or power other than the rules of the law and their conscience. This is clearly addressed in Article 94 of the UAE constitution which provides that justice is the base of rule and judges shall perform their duties in light of that, and no one shall have power over them.⁵

There are two main judicial systems in the UAE: the Federal Judiciary which has the Federal Supreme Council as its highest authority, and the local judiciary which operates at the local government level of each separate Emirate. The UAE constitution gives right to each Emirate to either follow the federal judiciary system or participate in its own local judicial system. The capital, Abu Dhabi, has practised its right at having a local judicial system by maintaining Abu Dhabi Judicial Department. Similarly, Dubai is practicing its own local judicial system within

³ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell, 2016) 6-7

⁴ Lukas Klee, *International Construction Contract Law* (2nd edn, John Wiley & Sons Ltd 2018) 55

⁵ UAE Constitution, Articles 45 & 94

Dubai Courts, and so is Ras Al Khaimah in RAK Courts. The courts in these three emirates practice their jurisdictions in matters that are not governed by the federal judiciary as set in the UAE constitution. All of the other Emirates, on the other hand, follow the federal judicial system.⁶

While the civil law is the applicable law adopted in the United Arab Emirates, as discussed previously, common law is practiced within the premises of Dubai International Financial Centre (DIFC) making the UAE one of very few countries which have both systems running in parallel.⁷

3.2 English Common Law

The English legal system was uniquely developed over hundreds of years; it is still developing until date, and it will continue to do so. The democratic parliament that stands today to make the law did not exist at some point in the history of the United Kingdom, now it does, this in itself represents a living example of the growth in the English legal system.⁸ King Henry the second started with applying one ‘common’ set of rules throughout the country which was implemented by the judges all across; their decisions were recorded and subsequent judges followed them in efforts to maintain consistency, creating a combined database of rulings which was later called the common law.⁹ Common law is a legal system where judges are given the

⁶ Available at [https://u.ae/en/about-the-uae/the-uae-government/the-federal-judiciary#:~:text=Dhabi%20Judicial%20Department-.Mixed%20legal%20system,\(the%20system%20of%20law\)](https://u.ae/en/about-the-uae/the-uae-government/the-federal-judiciary#:~:text=Dhabi%20Judicial%20Department-.Mixed%20legal%20system,(the%20system%20of%20law)) accessed on 16 February 2021 at 22:51

⁷ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell, 2016) 6-7

⁸ G Slapper and D Kelly, *The English Legal System 2013-2014* (14th edn, Taylor & Francis Group 2013) xi

⁹ E Macintyre, *Essentials of Business Law* (5th edn, Pearson 2015) 28

power to make the law through their judgments by interpretation and is often also referred to as Case Law, considering how a judgement in one case can become the basis of another judge's ruling in a different case with similar circumstances and could be seen as law, and that is the reason behind the name Case Law.

Upon applying the common law legal system, defaults arose, and those who sought remedy and justice were able to appeal to the Chancellor, who was the highest ranking legal official, and request his intervention. Over time this system developed and judges who were under the chancellor's control were delegated to act on his behalf. This system was known as equity.¹⁰

Moving onto the main topic of this dissertation, there are several key differences between the Civil Law and the English Common Law when it comes to construction matters, such as: unilateral termination, consideration, the principle of quantum merit... etc. While liquidated damages is a concept that is accepted in both legal system, there are several differences in the way this concept is applied in each jurisdiction, this dissertation will shed the light on a number of the key distinctions. The prime difference in regards to liquidated damages is that the English Law does not enforce penalty clauses. In the UAE, like several other Middle Eastern Countries, Courts do not distinguish between liquidated damages and delay penalty. This is primarily an issue of translation and language; in many situations both terms are used interchangeably.¹¹

¹⁰ E Macintyre, *Essentials of Business Law* (5th edn, Pearson 2015) 28

¹¹ Reg Thomas, *Construction Contract Claims* (Palgrave, 2001) 5-6

CHAPTER 4: DEFINITION & HISTORY OF LIQUIDATED DAMAGES

Over centuries, it was long established that it made good commercial sense to allocate a provision in contracts to deal with the most common and most probable breach: delay. This is how the liquidated damages clause originated in standard forms of construction contracts. In this industry, inserting a liquidated damages clause has become a routine; it is rather unusual to find a construction contract which lacks such a provision. According to Brian Eggleston, the Shorter Oxford English Dictionary dates the earliest record of a liquidated amount to the year 1574; however, it was defined back then as ‘ascertained and fixed amount’. In his book, Eggleston also refers to the famous *Holme v. Guppy* case which took place in 1838 and was the first case to shed light on the Act of Prevention principle which will also be discussed later in this paper in Section 6.3. Eggleston differentiates between liquidated and unliquidated damages by highlighting that liquidated damages are fixed before the breach occurs and need not be proved.¹²

Liquidated damages, in short, is a contractually binding pre-agreed sum of money which the contractor will be liable to pay to the client or the employer, should the works carried out be delayed beyond the completion date. Construction contracts will often include for this explicit term, detailing certain aspects such as: the amount to be paid for every day of delay and the liquidated damages limit... etc.

¹² Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 2

There are several characteristics that shall exist to enable and enforce a liquidated damages clause. While some of the characteristics are concerned with the nature and reasoning of liquidated damages, other characteristics are purely set by the applicable law which is the case in Section 4.3 Proving Loss under UAE Law. These characteristics are be outlined in detail in the below section.

4.1 Agreement:

Under UAE law, a construction contract is not concluded unless the parties agree on a Time for Completion, i.e., a contract term, contract duration or a completion date. This is a requirement for the conclusion of a construction contract under the UAE Civil Transactions Code which is discussed in Article 874.¹³ Even if the parties fail to agree on the duration of the contract or fail to address the issue of Time for Completion, time will not be at large. The courts in the UAE have decided that in such a case the works will have to be performed within a reasonable time. Article 264(2) of the CTC specifies that the parties shall not only restrict themselves by the expressed provisions of the contract and shall interpret the contract in line with the applicable law, customs, and nature of trade. This law provision supports the argument of performing the job within a reasonable time.¹⁴

The Court of Cassation in Abu Dhabi took the same position in *Case No. 501/4 dated 19 September 2010*. The Court decided that the real estate company may not appeal that the delivery date of the apartment (in question) is open even if the contractual completion date has not been

¹³ UAE Civil Law, FED Law No. 5 OF 1985, Article 874

¹⁴ UAE Civil Law, FED Law No. 5 OF 1985, Article 264

set. The Court added that the principle of good faith applies here and extends beyond the expressed terms of the contract. The good faith principle implies that the works shall be delivered within a reasonable duration.¹⁵

UK law has a similar view on the matter as described in Keating on Construction Contract. If a time for completion is not decided in the contract, a reasonable time for completion will be implied normally. The facts will determine what is the reasonable time for completion; facts which are not in the control of the party who is performing the services described in the contract, i.e., the contractor. This means that if the circumstances are foreseeable and expected, in other words, within the contractor's control, where a reasonable contractor could have anticipated the circumstances causing the delay, then this does not fall under the above-mentioned category and the contractor will be responsible for such delay. Furthermore, in absence of an express contractual term for time of completion, the contractor shall maintain his due diligence to achieve reasonable progress. On the other hand, the contractor shall not be obliged to complete before the agreed time. In *GLC v. Cleveland Bridge and Engineering* (1984), the contractor's obligation is to complete the works within set milestones. The contract also stated that the contractor shall execute the works with due diligence and expedition. The court decided that in spite of the expedition clause, the contractor is under no obligation to finish before the deadline; he is merely obliged to execute the works with enough diligence to meet the scheduled milestone completion dates.¹⁶

¹⁵ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell, 2016) 123-125

¹⁶ Stephen Furst, *Keating on Construction Contracts* (8th edn, Sweet & Maxwell 2006) 303-304

4.2 Genuine Pre-estimate

In some jurisdictions, the nature of applying the delay damages shall be assessed and that is what determines if it is enforceable or not. A good example to describe this principle is the English Common Law, where a liquidated/delay damages clause cannot be applied for the purpose of penalizing the contractor. In other words, delay damages are pre-agreed by pre-assessing or estimating the damages and/or cost which the employer will suffer as a result of the contractor's failure to fulfil his obligation and complete the works on time. The key factor here is that an actual estimate must take place of real losses suffered. An employer shall not apply damages as a way to punish the contractor when he has not encountered any real, materialistic loss. The common law courts treat the delay damages clause as a means of compensating the employer for his damages and refuse to enforce a penalty imposed on the contractor by his employer. While Courts in the UAE share the same definition of delay damages, there aren't any records of cases nullifying the delay damages clause for this reason. In addition, nowhere in the law is there a clear distinction drawn between a penalty and damages.¹⁷ In fact, the UAE courts translate the term "liquidated damages" to the Arabic phrase which translates literally to "delay penalty".

Pre-estimating the sum of liquidated damages at the time the contract is made through a formula which is applied on the total contract value, seems perfectly reasonable. Having said that, it is almost impossible to assess the exact loss or damage at such an early stage of the project.¹⁸

¹⁷ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell, 2016) 6-7

¹⁸ Stephen Furst, *Keating on Construction Contracts* (8th edn, Sweet & Maxwell 2006) 309-311

4.3 Proving Loss

Judge Davies held in the case of *BFI Group of Companies Ltd v. DCB Integration System Ltd* (1987), that it was irrelevant to consider whether there was any loss; the Liquidated Damages provisions worked automatically once a breach was established.¹⁹ This is a point on which the English Common Law and the UAE Civil Law differ immensely.

While the common law stance stands clear and solid on the above-mentioned principle, the UAE courts have ruled differently at several incidents. In *Commercial Appeal Case No. 719/2017*, the Court rejected an Employer's claim for delay damages for several reasons amongst of which, that the Employer deserves no delay damages as he suffered no damages. He also highlighted that the construction contract is back-to-back, where if there are no liquidated damages applied on the main contractor, then there will be no liquidated damages applied on the subcontractor. The Judge applied this rule on this case, where the client did not apply any delay damages on the employer; hence, the employer is not entitled to apply any delay damages on the contractor.²⁰

The civil courts in the Emirates have repeatedly applied delay damages based on three (3) conditions:

- 1) Default;
- 2) Damage suffered by the aggrieved party; and
- 3) Causation relationship between the default and the damage

¹⁹ Brain Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 76-77

²⁰ Commercial Appeal No. 719/2017 Dubai Courts

This precisely describes the major and fundamental difference between the UK Common Law and the UAE Civil Law. The above conditions were also laid out in the *Commercial Appeal Case No. 478/2013*, where the court finally denied the main contractor his claim of delay damages for mainly two (2) reasons, the first: it being responsible partially for the delay, which is highlighted thoroughly in the Section 6.3 Acts of Prevention, and the second: is because the main contractor did not submit proof of damage to the court.²¹ The same conditions are more accurately elaborated in *Appeal Case No. 154/24 dated 7 June 2003*, where the Judge has laid out the three (3) conditional elements of delay damages applicability in private construction contracts which is based on the religious principle of “No Harm; No Damage”. The law looks at delay damages as nothing but a compensation for the damage incurred; therefore, it shall be proven if suffered.²² This will be discussed in more detail in the Section 5.2 Non-commercial Loss.

4.4 Views of the UAE Civil Law

Article 390 Paragraph (1) of the Civil Transactions Code reads: “*The contracting parties may fix the amount of compensation in advance by making a provision therefore in the contract or in a subsequent agreement, subject to the provisions of the law.*”²³ While this is a general provision, it can also be implemented on the principle of liquidated damages. The UAE law looks at the liquidated damages provision as a mean to compensate the employer if his project is not performed in a manner that makes it fit for purpose, or if its completion is delayed by the

²¹ Commercial Appeal Case No. 478/2013 Dubai Courts

²² Appeal Case No. 154/24 dated 7/6/2003

²³ UAE Civil Law, FED Law No. 5 of 1985, Article 390

contractor. Inarguably, such defects in performance will cost the employer some losses one way or another; the liquidated damages clause here are introduced to compensate such loss.²⁴

4.1.1 Courts Intervention in Extension of Time Clauses/Liquidated Damages

Article 390 of the CTC also gives courts the right to modify the amount of delay damages called for in the contract and make it equal to the actual loss encountered by the aggrieved party. This article is mandatory and any agreement otherwise is considered nil and void. The power conferred onto the courts is to vary the compensation amount to what is reasonable and just, not the penalty. Nevertheless, the burden of proof lies on the claimant; and hence, it would be up to him to prove that the difference between the pre-agreed damages and the actual loss is great, to an extent that makes the application of the contract inequitable. Only then will the claimant be in a position to get the court to interfere in his case. This is affirmed by *Dubai Cassation No. 138/1994 dated 13 November 1994*.²⁵

Federal Supreme Court Case No. 103/24 dated 21 March 2004; as well as, *Federal Supreme Court Case No. 742/23 dated 16 May 2004*, confirmed that Article 390 of the CTC is conditional to two (2) main principles. The first being that the obligor is at fault, and the second pertains that the obligee having sustained loss. Provided these conditions are fulfilled, Article 390 allows a judge to reduce the delay damages to become proportionate to the actual loss.²⁶

²⁴ Justin Ede, 'Liquidated Damages' Available at <https://www.tamimi.com/law-update-articles/liquidated-damages/> accessed on 6 March 2021 at 16:18

²⁵ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell, 2016) 6-7

²⁶ Ibid

It is not unreasonable for a judge to have the power to increase the delay damages to equate the loss if it is significantly more than the contractually agreed damages, just like in the case of decreasing damages described above. Afterall, Article 390 of the UAE Civil Code does not limit the variation of the damages to the less. The provision generally gives the right to the judge to vary the contract, which can be interpreted as both decreasing the damages or increasing it. While it is common practice in the region to cap the delay damages at ten percent of the contract sum, UAE law does not forcefully limit the damages if the parties choose not to apply a cap in their agreement. *Dubai Court of Cassation in case no. 138/1994 dated 13 November 1994*, has reversed the decision of the Court of Appeal which held that the delay damages shall be capped at 10 percent pursuant to the norm and common practice. A classic case in which the sanctity of the contract is respected by UAE Courts. On the other hand, in other gulf countries the amount of delay damages may be increased only if the employer can prove that the contractor is guilty of gross negligence or fraud; both of which cases are highly unlikely to happen.²⁷

4.5 Views of the Common Law

4.5.1 by the rules of Hadley v. Baxendale

The basis of assessing the damage in common law was originated in the case *Hadley v. Baxendale* (1854) which has set out two golden rules to be considered when trying to determine the consequential damages that follow a breach of contract. The first rule implies that the loss, reasonably and naturally, occurred from the breach of the contract, whereas the second rule being that the parties could have reasonably foreseen the loss as a result of the breach at the time

²⁷ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell, 2016) 6-7

the contract was entered into. Once these two conditions are established then the loss would qualify to be a consequential damage under the rule of *Hadley v. Baxendale* case. The below quote is taken out of Judge Baron Alderson's judgement.

*'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'*²⁸

It is also clear that the common law stands firm on its position of no requirement of proof of loss when it comes to application of liquidated damages. This is out laid in his honours, Lord Upjohn, comments on the *Suisse Atlantique* case, for the benefit of both parties:

'the party establishing breach by the other need prove no damage in fact; the other must pay that, no less and no more.' A party wishing to avoid liquidated damages and argue for no loss or a smaller sum would attempt to find some other breach of an implied or express term to hang the delay on. A party seeking to uphold the clause would be trying to disprove that another breach was the cause of the delay'.²⁹

²⁸ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 44-45

²⁹ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 54

CHAPTER 5: ESTIMATION OF LIQUIDATED DAMAGES AMOUNT:

5.1 Commercial Loss

Since liquidated damages at its core is a genuine pre-estimate of the loss, such arrangements can be calculated in practice especially when it comes to the construction of commercial projects. These projects generate revenue and profit; therefore, certain known expected losses would be considered, such as:

- a) loss of profit;
- b) rent of alternative venues;
- c) additional supervision and/or administration cost;
- d) business disruption costs... etc

All of the above are factors which clearly fall into the rule which suggests that a nonbreaching party is entitled to any damages which arise naturally from the breach and which could have been reasonably foreseen by the parties at the time of entering the contract.³⁰

5.2 Non-Commercial Loss

Non-commercial projects, on the other hand, have a slightly different twist to them. As non-commercial projects such as government projects do not actually bring in any specific type of revenue to the owner, some have assumed that there is no actual loss there since there is no loss of profit. This point of view is not entirely correct, because while a Government-Employer may not lose profit, he at the very least loses cost for extended supervision services, financing

³⁰ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 105-106

charges, extended accommodation amongst other costs that could take place due to the interruption of his expected operation. In consideration of all of this, the UK English law has long ago recognized the difficulty in attaining an accurate pre-estimate of loss and so the ‘genuine’ attempt will be sufficient effort and shall be accepted by parties as liquidated damages early in the contracting stages. Therefore, Eggleston explains that while there is no legal obligation to prove the loss suffered, then there it shouldn’t matter how much was lost, or if there was any loss at all. This concept had been established long back and reiterated in the case of *Clydebank Engineering & Shipbuilding Co. Ltd. v. Yzquierdo Y Castaneda* (1905) where the parties agreed that four warships were to be built and the “penalty for later delivery shall be at the rate of £500 per week for each vessel”. When the delivery of the warships was delayed, the Court held that the sum stipulated in the contract in fact qualified to be a sum for liquidated damages rather than a penalty. The Contractors disputed that since the warship made no money, the sum was not an actual loss and so, the sum was deemed to be considered a penalty. Lord Halsbury denied this position and ruled that it was a bold assertion to say that there is no damage to be incurred for the late delivery of a warship since it does not bring in money to the task force. The mere existence of this vessel has great value to the country for its ability to be used in times of need. Granted, it is hard to accurately assess the damage the absence of such an asset would be in money value, but that does not disregard the impact of loss it would bring. Similarly, the Judge in the case of *Multiplex Constructions Pty Ltd v. Abgarus Pty Ltd* (1992) has ruled that it

is incorrect to regard that public works cannot result in damages to the relevant authority if construction delay occurs simply because it yields no cash flow and/or profit.³¹

The UAE Civil Law takes the same stance when it comes to public construction contracts (i.e., government construction contracts), and the reason for that is because in situations where the general public is concerned, the law here looks at the delay damages sum as a financial penalty for an actual and assumed damage that is due as soon as the delay is proven to be, because of the contractor's negligence or default by which the general public is deprived of benefiting from the public realm. These are the thoughts of the UAE Courts in the *Civil Appeal Case No. 465/2011*.³²

³¹ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 104

³² Civil Appeal Case No. 465/2011

CHAPTER 6: IMPORTANT CONTRACTUAL TERMS AND CONCEPTS THAT HAVE A DIRECT RELATION WITH LIQUIDATED DAMAGES APPLICABILITY

6.1 Time for Completion

Like everything else in the construction industry, completion is a term that carries many meanings and can be anticipated in different ways. Completion is also a term that carries great significance for upon its occurrence, certain elements under the construction contract are triggered, such as:

1. Risks related to the works are transferred from the contractor to the employer
2. The defects liability period starts
3. The employer's right to possess the site
4. End of employer's right to damages for late completion

Construction contracts shall allow for intermediate payments even if it was based on a lump sum, and the employer may not withhold payment if the contractor failed to complete the projects on time. Lateness in completion, if occurred, shall first be studied and if it turns out to be a breach of term, which means that it does not go to the root of the contract, the employer shall not be entitled to withhold payment for the price of contract. He will, on the other hand, be entitled to withhold a certain amount for the defects in works or the omissions which is equivalent to the cost of making such defects good. This concept will also apply to the matters of substantial performance, the value of rectifying the defects or the value of uncompleted works will be assessed and compared with the total cost of the contract. Following this concept, if the

contract is found to be substantially performed then the employer will be entitled to deduct and/or claim for the cost of rectifying the defects.³³

6.2 Extension of Time

It is extremely essential to understand the link and the direct relationship that exists between the liquidated damages clause and the extension of time clause. The insertion of an extension of time term in a construction contract is crucial to maintain the integrity of the program throughout the life span of the project. It also facilitates a way for the employer to cause delay without jeopardizing the program and other relevant contractual elements; not to mention, it certainly protects the contractor from being liable towards the employer and paying the liquidated damages sum.³⁴

Reg Thomas adopted the opinion that, in construction contracts, an extension of time clauses is introduced for the benefit of the employer rather than the contractor. He argues that once an employer causes any delay, the contractor will no longer be bound to complete the Works by the agreed time for completion if there was not a provision for extension of time. Hence, the inclusion of such a provision protects the employer's right to claim for liquidated damages in cases of delay within his control. Thomas supports his argument with the case of *Holme v. Guppy* (1838), where the employer was not able to claim liquidated damages from the contractor in a contract which lacked an extension of time provision, because four (4) weeks of the delay

³³ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 190-191

³⁴ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell, 2016) 131

were caused by the employer while one (1) week was caused by the contractor.³⁵ The common law as it stands, requires the existence of an extension of time clause to give effect to the liquidated damages clause.

Just like Reg Thomas, John Adriaanse also seems to be of the opinion that the primary purpose of an extension of time clause is to preserve the employer's right to claim for liquidated damages, but it just so happens to also protect the contractor in the case of an act of prevention from the employer's side. Acts of prevention will be discussed later in this paper.

His Honours Judge Fay QC OR encapsulated the types of delay in *Henry Boot v. Central Lancashire New Town Development Corp (1980)*:

“The broad scheme of these provisions is plain. There are cases where the loss must be shared, and there are cases where it should be wholly borne by the employer. There are also those cases which do not fall into either of these conditions and which are the fault of the contractor, where the loss of both parties are wholly borne by the contractor. But in those cases where the fault is not that of the contractor the scheme clearly is that in certain cases the loss is to be shared: the loss lies where it falls”

The summary of the 3 schemes mentioned in the above judgement are described below:

1. Where the delay is caused by the employer and he will bear the loss, in such case the contractor will be granted an extension of time and compensated for any additional works which he will have to carry out. The employer in turn will not be in a position to claim any liquidated damages.

³⁵ Reg Thomas, *Construction Contract Claims* (Palgrave, 2001) 12

2. Where the delay is caused by the contractor and he will be liable to pay the pre-agreed liquidated damages sum to the employer.
3. Lastly, when the delay is not the fault of any party and so the contractor is granted an extension of time but is not paid extra than the contract sum or for the extended duration.

There are of course certain prerequisites that shall be completed to give rise to an extension of time clause, such as serving notice immediately once the contractor feels that there is a chance of delay, specifying the reasons of delay and the events relevant to the delay.³⁶

Speaking of extension of time, the process of drafting the extension of time clause itself is very risky, and it is very important that the contract drafters take into consideration the interests of all parties. Onerous contracts might seem to be in the interest of the employer at first; however, enforcing these contracts which held the contractor liable for all delays, even the ones outside his control, led the cautious contractors to include a very high-risk margin and drastically increase their bid prices. The careless contractors, on the other hand, went bankrupt. Neither one of these scenarios serve the benefit of the employer nor the construction industry as a whole. Providing an extension of time clause for the delays which are within the control of the contractor also seems to create problems. Imprecise and general extension provisions are of no use to the employer either.³⁷ In *Wells v. Army and Navy Co-operative Society Ltd* (1902) 8 6 LT 764, Wells (i.e. the contractor) had agreed to perform the works within one (1) year from the commencement date of the contract. The contract included for an extension of time which read:

³⁶ John Adriaanse, *Construction Contract Law* (3rd edn, Palgrave Macmillan 2010) 188-190

³⁷ Reg Thomas, *Construction Contract Claims* (Palgrave, 2001) 12

“unless the said works should be delayed by reason of any alteration or addition in or to the works authorized as aforesaid, or in the case of combination of workmen or stikes, or by the default of the sub-contractors whom [Wells] was obliged to employ, or other causes of delay beyond the contractor’s control. Satisfactory proof of all which was, at the time of the occurrence, to be afforded to the Board of Directors [the Society], who were to adjudicate thereon and make due allowance therefore, if necessary and whose decision was to be final...”

Wells did not achieve the contractual target completion date and upon submitting the case to adjudication, the decision held that Wells was entitled for an extension of three (3) months and that further delay is subject to liquidated damages. The contractor argued that he was prevented from completing the works by the acts of the Society (i.e. the employer) and their consultant for delayed access to site and late receipt of drawings amongst other reasons. The court found that the extension of time while drafted generally in order to include all delays, makes no mention of the default of the employer nor does it cover it. Hence, the way the clause is written does not relieve the Society from their obligation towards the contract, and does not entitle them for liquidated damages. The Society appealed this decision; however, the court held that the prevention principle applied, supporting the previous court’s decision.³⁸

Although the Wells’ case set the first stone for the path of decisions for all the similar cases that followed it; drafters of civil engineering contracts continued to draft such general clauses in their contracts. Be that as it may, in efforts to improve the formation of the term they started to

³⁸ Alfred Arthur Hudson, *Hudson’s Building Cases*, vol 2 (4th edn, Sweet & Maxwell, 1914) 346 Available at https://mosaicprojects.com.au/PDF-Casewatch/1047_Wells-v-Army_and_Navy.pdf accessed on 15 February 2020 at 14:21

include lists of causes of delay by the employer for which an extension of time shall be granted to facilitate the employer's claim of liquidated damages. Nonetheless, if the term in the contract does not expressly mention the particular reason for which the employer was delayed, his rights to liquidated damages will be lost.³⁹

In another case, based on the 1963 edition of the JCT contract, between *Rapid Building Group Ltd v. Ealing Family Housing Association Ltd* (1984) 2 9 BLR 5, the contractor was not given full possession of the premises on due date. As a result, the contractor was delayed in completing the works. The architect extended the completion date in the certificate he issued for what he saw is a reasonable time for completion, which did not align with the contractor's actual completion of the works. Based on the architect's determination, the employer applied the liquidated damages for the period beyond the completion date stated in the completion certificate. The court held that the 1963 JCT form of contract did not provide for an extension of time for the employer's failure to give access to the site; accordingly, the employer shall not deduct liquidated damages for his own delay.⁴⁰

6.2.1 Assessment of Entitlement to Extension of Time

6.2.1.1 English Law

Pacta sunt servada is Latin for the famous formula "Agreements shall be kept" which is argued to be the oldest principle in international law; and of which the bindingness and sanctity of the

³⁹ Reg Thomas, *Construction Contract Claims* (Palgrave, 2001) 13-14

⁴⁰ Ibid

contract has originated.⁴¹ Accordingly, the agreements will dictate the rightfulness of extension. There are several circumstances that will affect a contractor's entitlement to an extension of time, such as:

- Failure to provide the contractor with access to the site at the right time will render the employer to forfeit any right to claim for delayed completion later on.⁴²
- Without setting a specific time for completion date then there would be no way for the employer to claim for liquidated damages; as leaving the completion date for reasonableness of the employer could be open to interpretation.⁴³

If an employer causes the contractor's delay or acts in a way that prevents the contractor from achieving the completion date then the contractor becomes eligible for an extension of time. If the employer fails to extend the contract duration, he forfeits his right to claim for liquidated damages. He cannot then deduct the number of days in which he was delayed and claim the rest from the contractor, this would cause the whole liquidated damages clause to fail. The employer would only then be left with the option of claiming for general damages which, of course, are not as convenient as liquidated damages because it actually needs to be proven.⁴⁴

6.2.1.2 UAE Law:

⁴¹ Available at <https://www.britannica.com/topic/pacta-sunt-servanda> accessed on 15 November 2021 20:52

⁴² John Murdoch and Will Hughes, *Construction Contracts: Law and Management* (3rd edn, Spoon Press 2000) 163

⁴³ John Murdoch and Will Hughes, *Construction Contracts: Law and Management* (3rd edn, Spoon Press 2000) 182

⁴⁴ John Murdoch and Will Hughes, *Construction Contracts: Law and Management* (3rd edn, Spoon Press 2000) 186

The UAE Civil Law does not provide a mechanism for the assessment of the contractor's entitlement to an extension of time; neither for a commercial contract nor a construction (muqawala) contract. Just like Common Law, the rights and obligations related to this matter can be found in the parties' agreement. The Courts will also depend on the rights and obligations arising out of the Contract through an expert which it will appoint.⁴⁵

The UAE Civil Transactions Code gives the right to a judge to vary unfair contractual provisions. It says that the contract shall strictly comply with the requirements of justice and any agreement contrary to that shall be null and void. Therefore, the court has the power to modify an agreement in a way that seeks justice.⁴⁶

In case of delay caused by a nominated subcontractor; the employer takes the liability of the delay of his nominated subcontractor and hence, will not be entitled to any liquidated damages. This is based on the judgments issued by UAE courts. On the other hand, in the case of a domestic subcontractor, the contractor who appointed him will bear the responsibility for the delay as he will be liable towards the employer for those of whom he chooses to entrust with the work which he was supposed to carry out. The Judge ruled in Dubai Cassation No. 266/2008 dated 17 March 2009 dismissing an employer's claim for liquidated damages:

“This appeal is dismissed because it is established by the jurisprudence of this court that the basis for the liability of the main contractor shall be for the delay caused by the subcontractors that the original contractor has selected or appointed; however, if they have been selected by the employer or his consultant, then any delay in completion caused

⁴⁵ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell, 2016) 125-129

⁴⁶ UAE Civil Law, FED Law No. 5 of 1985, Article 248

by them shall be the liability of the employer and not the main contractor who shall not be liable for the delay fine if the contractor can prove that his failure towards his obligation in delivering the building on the date specified by the contract is due to causes beyond his control.”⁴⁷

6.3 Act of Prevention

According to Lord Blackburn in *Mackay v. Dick* (1881), the prevention concept arises from an implied term that each party will perform its obligation and will cooperate and allow the other party to fulfil its obligation as well, even if this is not expressly written in the contract. Similarly, Lord Justice Vaughan Williams in the case of *Barque Quilpue Ltd v. Bryant* (1904) also portrayed that there is an implied term that each of the parties shall not do anything to prevent the other party from performing its role under the contract. He also added that such a term is enforced by law in all contracts.⁴⁸ This obligation is in line with the requirements of the principle of good faith.

A prevention act is not always as clear as physically stopping the contractor from doing his job; sometimes it is so subtle as instructing a variation or additional work. In support of this opinion, Lord Esher, Master of the Rolls, ruled that the principle of prevention as laid out in Condition L(6) of Comyn’s Digest applies in the case of *Dodd v. Churton* (1897) where the employer’s 2 weeks delay lost him his right to claim for 25-weeks’ worth of liquidated damages. The employer had instructed additional works in a contract that gave no right for an extension for

⁴⁷ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell, 2016) 142

⁴⁸ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 131-144

the alteration of a contract or instruction of additional work. The instruction led to delayed completion by 25 weeks. While the additional works were assessed to have reasonably been completed in 2 weeks, the employer was no longer eligible for liquidated damages because of the additional works. Lord Esher also provided that expecting the works to be completed on the previously agreed upon completion date after issuing new works puts an unreasonable burden on the contractor.⁴⁹

The primary reason the liquidated damages clause was invalidated in the famous cases of prevention such as: *Holme v. Guppy* and *Dodd v. Churton* mentioned above, is because the subject contracts did not allow for extension of time. As mentioned previously in this dissertation several times, the construction industry is complex and because of issues related to the coordination between various stakeholders amongst many other reasons, it is highly likely for a variation to arise or additional works to come up in the midst of the project, and it is only fair to allow the contractor enough time to carry out such additional tasks. This is exactly why extension of time clause is so essential to our topic as it has a direct relationship with the application of liquidated damages. Without an extension of time clause time would automatically become at large as soon as a prevention act occurs. According to Lord Justice Salmon in the well-known case of *Peak Construction (Liverpool) v. Mckinney Foundations Ltd* (1970) the liquidated damages clause shall always be paired with the extension of time clause, and it is unreasonable for an employer to insist on liquidated damages for a delay that is partially

⁴⁹ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 131-144

due to his own fault. The above-mentioned rulings would have certainly taken a different route should the contracts have actually been extended for the employer's delay. In such a case, then the employer would have probably been able to claim the liquidated damages sum from the contractor for his delay after the revised contractual completion date.⁵⁰

On that account, contrary to common belief, an extension of time serves the employer's benefit just as much as it benefits the contractor, as it reserves his right to claim liquidated damages. Without the possibility to extend the contract duration, the only relief the employer would have in a case where the contractor is delayed would be to sue for general damages which, of course, need to be proved. Nevertheless, prevention acts are not just limited to instructing additional works; therefore, they still stand as one of the major obstacles to applying liquidated damages.⁵¹

6.4 Time at Large

The term 'Time at Large' refers to the circumstances where the contractual completion date for performing the works described in the agreement becomes ineffective, i.e. null. The principle in its essence depends on the argument that a contractor or the service provider is relieved of his obligations towards the contract, which is to perform the whole of the works by the contract completion date. In order for this to apply, there must be a preventing act caused by the employer which in return stops the contractor from performing his obligations. This was actually a valid

⁵⁰ Ibid

⁵¹ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 131-144

argument since the contracts in the cases which established the time at large concept, did not facilitate a way to change or extend the completion date.⁵²

6.4.1 Common Law

Time at large remains an open topic of discussion in cases where the extension of time clause is inoperable. Ambiguous liquidated damages clauses can certainly be construed as an act of prevention. Such provisions should be clear and accurate in a way that makes its application in fact achievable. Inserting a vague clause in the agreement defeats the overall purpose of it; it is not possible to apply liquidated damages based on a clause that does not explain how the deducted sum can be calculated. A liquidated damage clause shall clearly state the damage suffered by the Employer for each day of delay.⁵³

The principle of time at large found its grounds in Common Law jurisdictions; and as such, it is understandable that the Common Law is more accepting of its application. This does not necessarily mean that it is an easy path for a contractor if he decides to pursue it; especially since most, if not all, present standard forms of contracts include an extension of time clause.⁵⁴ This means that the end date of the contract will be recalculated based on the extension, and the damages, though at a later stage, will still stand, and time will not be ‘at large’ anymore.

⁵² John Bellhouse and Paul Cowan, Common Law “Time at Large” Arguments in a Civil Law Context (2007) 23(8) Construction Law Journal

⁵³ John Bellhouse and Paul Cowan, Common Law “Time at Large” Arguments in a Civil Law Context (2007) 23(8) Construction Law Journal

⁵⁴ Ibid

Moreover, courts and/or tribunals are usually reluctant to accept the argument of time at large unless there are very strong legal grounds for the submitted claim.⁵⁵

According to Michael Grose, common law courts refrain from altering contractual extension of time mechanisms; instead, in order to achieve equity and fairness they render the clause itself unenforceable; hence, time rests at large.⁵⁶

6.4.2 Civil Law

As one may expect, the application of the Time at Large concept is a lot more challenging to apply in a Civil Law jurisdiction than in Common Law. In order to apply the principle under Civil Law, there shall be a relevant legal provision in the substantive law itself on which the argument can be based on. For example, the French Civil Code, allows for the implementation of time at large by act of prevention specifically in Article 1147.⁵⁷ The UAE Civil Transactions Code, in Article 284, gives the right to a judge to reduce the penalty enforced by an agreement, if he sees that the penalty is unreasonable.⁵⁸ Civil Law courts, specifically in the UAE, prefer to find a solution to settle the dispute over the delay by interpreting the time and delay damages contractual provisions in light of the law. Although the CTC gives power to the court to decide on contractual time and delay matters, this power is supervisory and, in principle, the contract remains the law of the parties. Nevertheless, the UAE courts are not afraid to use the power

⁵⁵ Ibid

⁵⁶ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell, 2016) 129-130

⁵⁷ French Civil Code of 1803, Article 1147

⁵⁸ John Bellhouse and Paul Cowan, Common Law “Time at Large” Arguments in a Civil Law Context (2007) 23(8) Construction Law Journal

which is given to them by the Civil Code to achieve a fair resolution in a contractual work frame that is obvious to be unjust.⁵⁹ While such amenities in the law might differ from one state to another; once broken down they all root back to the same basic fundamental philosophy of fairness and equity.

From an opposing point of view, Keith Pickavance suggests that opening up the opportunity to a court and/or tribunal to decide on the completion date protects the operability of the extension of time clause as well as the right of both the employer and the contractor. The option of resorting to a fair third party to decide on the matter of contractual end date, provides the parties with an alternative mechanism of assessing the claim, and in effect, correcting the errors in the decision of the contract administrator, should there be any. In the same sense it reserves the employer's right to recover his damages. Pickavance also adds that liquidated damages can be applied through a contract which sufficiently details the extension of time clause and provides appropriate means of its application; regardless of whether the contract administrator grants the extension or not.⁶⁰

In general, for a time at large provision to take place certain requirements must be present. Firstly, the contractual date is not decided upon by the parties. This case includes the circumstances where the contractor is delayed due to a fault of the employer and was not granted an extension of time. Ultimately, it is the contractor's right to know the new contractual ending date within a reasonable time from his submitted claim, just as much as it is his right to extend

⁵⁹ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell, 2016) 129-130

⁶⁰ John Bellhouse and Paul Cowan, Common Law "Time at Large" Arguments in a Civil Law Context (2007) (23)8 Construction Law Journal

the contract duration. In other words, it is the contractor's right to receive a decision on his submission. The failure of an employer or the contract administrator to assess the claim in due course deprives the employer from his right to claim for his liquidated damages. The second factor which could activate the time at large argument, is failing to apply the extension of time clause. Most contracts provide an extension of time provisions; yet, many do not clearly express the amount of the deduction to be done for the delay, or it do not provide for a mechanism of calculating the liquidated damages. The clause must be operable or else time would be considered at large should a delay occur. An employer that inserts a clause conditioning his own approval on granting an extension of time and then perversely rejecting the time claims submitted to him is rendering the clause in itself inoperable; hence, relieving himself from his rights to apply liquidated damages.⁶¹

*“If anything, the general civil law notions of good faith and unconscionability (which do not exist as such in English law) may actually make “time at large” arguments easier to pursue in civil law jurisdictions and may even permit additional legal arguments beyond the normal range permitted under common law principles.”*⁶²

6.5 Time of the Essence

If 'Time of the Essence' principle is inserted in the contract, and the contractor fails to meet the contractual completion date, then he is in breach of a condition of the contract. This not only exposes him to damages, but also gives right to the employer to terminate the contract.

⁶¹ Ibid

⁶² John Bellhouse and Paul Cowan, Common Law “Time at Large” Arguments in a Civil Law Context (2007) (23)8 Construction Law Journal

Additionally, the employer may also seek remedies if such is expressly called for in the contract.⁶³

Generally, time is not considered of the essence if the contract does not expressly say so. In such cases, the contractor is often only obliged to complete the works within reasonable time; this matter, should a conflict arise, is then decided by a court who would, perhaps, assign an expert to assess what a reasonable time is for the size of the project, its importance and whether or not its circumstances imply that time is of the essence. It is vital that both sides of the contract understand the importance of the realistic and proper assessment of a project programme at the initial stages of project planning and once the delay occurs. Both parties shall face the ramifications of delay and understand that insisting on the contractual date when it is clear that it will not be met due to no fault of the contractor, can also have its consequences. For example, the contractors may end up losing a great deal of money in order to accomplish the job.⁶⁴

Having said that, there are generally 3 cases in contracts where time becomes of the essence:

1. Express provision in the contract, which is the case explained above.
2. If it is implied from the circumstances of the project, that it shall end at a certain date and should this date be passed, the whole project will no longer serve its purpose.
3. If the employer (or his agent and/or representative) serves a notice to the contractor making time of the essence; nevertheless, the new given date for completion shall be rational in a

⁶³ Stephen Furst, *Keating on Construction Contracts* (8th edn, Sweet & Maxwell 2006) 305

⁶⁴ John Adriaanse, *Construction Contract Law* (3rd edn, Palgrave Macmillan 2010) 172

way that provides the contractor reasonable time to complete.⁶⁵ This shall be before the contractual completion date within a considerable duration.⁶⁶

⁶⁵ John Adriaanse, *Construction Contract Law* (3rd edn, Palgrave Macmillan 2010) 172

⁶⁶ Stephen Furst, *Keating on Construction Contracts* (8th edn, Sweet & Maxwell 2006) 307

CHAPTER 7: IMPORTANCE OF LIQUIDATED DAMAGES CLAUSES

It is understandable to assume that the employer is the one benefiting from inserting a liquidated damages clause in the contract, considering that it is the party that will be compensated and the sum will be paid by the Contractor. However, many scholars have argued that the insertion of such a term serves both parties. It is worth mentioning that a significant aspect of a liquidated damages clause is to limit the liability of the contractor.⁶⁷ In addition, capping liquidated damages could deprive the aggrieved party from recovering all of their loss.⁶⁸

According to Eggleston, Liquidated damages are advantageous for both contracting parties because of the certainty it provides to the consequences of the breach. Not to mention, it saves great cost and effort which is put into calculating and proving the endured loss.⁶⁹

Lord Justice Diplock highlights the advantages of liquidated damages in the case of *Robophone Facilities Ltd. Blank (1996)*:

“The court should not be astute to descry a penalty clause in every provision of a contract which stipulates a sum be payable by one party to the other in the event of a breach by the former. Such a stipulation reflects good business sense is advantageous to both parties. It enables them to envisage the financial consequences of a breach; and

⁶⁷ Stephen Furst, *Keating on Construction Contracts* (8th edn, Sweet & Maxwell 2006) 309-311

⁶⁸ Danielle O’Brien, ‘Liquidated Damages in Construction Contract/Disputes’ Available at <https://www.lexology.com/library/detail.aspx?g=c3311a94-4957-4c28-97fa-10309dca2981&utm_source=Lexology+Daily+Newsfeed&utm_medium=HTML+email+-+Body+-+General+section&utm_campaign=Lexology+subscriber+daily+feed&utm_content=Lexology+Daily+Newsfeed+2020-08-26&utm_term=) accessed on 11 June 2022 at 13:37

⁶⁹ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, WBiley-Blackwell A John Wiley & Sons Ltd 2009) 41

*if litigation proves inevitable it avoids the difficulty and the legal costs, often heavy, of proving what loss has in fact been suffered by the innocent party”*⁷⁰

7.1 Clause Drafting:

In efforts to resolve a certain dispute, the court will mainly look at the contract’s expressed terms and conditions which the parties have agreed to. This practice is carried out by the judicial system considering that the contracting parties are authorized and knowledgeable. Parties cannot simply avoid their obligation to the contract by claiming that there has been a linguistic error in the terms and conditions, courts do not accept this argument as normally official documents are handled with much care and go through a thorough screening process and various quality checks.⁷¹

In *Trollope & Colls Ltd v. North West Metropolitan Regional Hospital Board* (1973) Lord Pearson explained that the courts will not change the terms of a contract even if it saw that a different clause would be suitable in their case or would serve the parties better. The court’s job is to interpret the parties’ intention from the clauses as set in the contract and not change it. If the express clauses are clear they will be applied, it is just that simple. Implied terms will be considered only if the court feels like it was the true intention of the parties based on the

⁷⁰ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, WBiley-Blackwell A John Wiley & Sons Ltd 2009) 41

⁷¹ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 156-169

expressed terms available in the contract, and such terms must be reasonable, necessary for the business to be conducted and it shall not contradict with any expressed term in the contract.⁷²

When discussing the drafting of liquidated damages clauses as well as extension of time, it is important to highlight the rule of *Contra Proferentem*, which entails that the words of a written contract shall apply more strictly against the party who inserted them. This can also apply in cases where there is an ambiguity in the wording and/or the language of the contract. Because of the legal connection between extension of time and liquidated damages, both clauses must be treated with intense care at the time of drafting. Often, inadequate modifications made to standard forms of contracts can render liquidated damages clause inoperable under rules of penalties or even prevention. An excellent example of this would be the case of *Bramall & Ogden Ltd v. Sheffield City Council* (1983), in which the judge had ruled against the employer's eligibility to deduct the liquidated damages sum. The contract was based on the JCT standard form and had included a sum for liquidated damages in the contract appendix for a value of £20 per week for each uncompleted dwelling. It also included a clause that allowed for a reduced sum to be released upon partial possession; however, there was no provision for sectional completion. The court agreed with the contractor's defence that the contract did not allow for sectional completion; hence, the employer has partially possessed the property.⁷³ This, in turn, conflicted with the liquidated damages part of the contract appendix. The court relied on the

⁷² Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 156-169

⁷³ Royal Institution of Chartered Surveyors - RICS 'Cases - Bramall & Ogden v Sheffield City Council' Available at https://www.isurv.com/directory_record/3869/bramall_and_ogden_v_sheffield_city_council accessed on 17 September 2020 at 10:17

contra proferentem concept in this case. Nonetheless, the modern view on contra proferentem is widely different now than it was at the time of that case.⁷⁴

The nature and the applicability of a liquidated damages clause depends on the construction of the clause itself. The drafting of the clause may limit the entitlement of the claimant, to the exhaustive remedy for the breach of delay and nothing more than just that. Meaning, the claimant will not be able to claim for general damages, and for such reasons it has been argued, as mentioned above, that the purpose of these clauses is to limit the liability of the defendant.⁷⁵ Thus, the amendment of standard form of contract is not an easy job as some people would anticipate and transferring all risks to the contractor without balance is a self-defeating exercise.⁷⁶

Contract drafters shall do their due diligence at the clause construction stage in order to avoid ambiguity as much as possible once a dispute arises. Keating on Construction Contracts portrays two cases which shall be addressed at the contract drafting phase:

- Case no. 1: If the completion date is delayed due to the contractor carrying defective work, and the work is remedied either by the contractor himself or another contractor. Is the loss due to the delay recoverable? And would it be limited to liquidated damages?
- Case no. 2: when the contract is terminated (for any reason possible) is the delay in the project resulting from such termination limited by the liquidated damages clause in the contract?

⁷⁴ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 156-169

⁷⁵ Stephen Furst, *Keating on Construction Contracts* (8th edn, Sweet & Maxwell 2006) 309-311

⁷⁶ John Adriaanse, *Construction Contract Law* (3rd edn, Palgrave Macmillan 2010) 188-190

The construction of the clause can also decide if the provision will survive the expiry of a contract in the case of an accepted repudiatory breach. Failure to address these little details can leave a lot of room to attack the validity of the clause. The case between *Temloc v. Errill Properties* (1987) supports this argument, the parties had failed to include the rate for each day of delay in the Appendix of the Contract and it was included as “£ nil”. It was held that the parties had agreed that there shall be no liquidated damages in the contract for the delay of completion.⁷⁷

Additionally, if the contract includes sections, it is vital to include the completion date for each section and to divide the single sum of the contract between the sections, making it possible to assess the liquidated damages sum for the relevant section. Failure to address this at the contract drafting stage would make claiming for liquidated damages not possible.⁷⁸ A good example of this rule is detailed in the case of *Stanor Electric v. R Mansell* where the contractor has delayed completion of electrical works for 1 villa in a contract that contained 2 villas. The damages to be claimed were 5,000 pounds per week for delayed completion; the judge held that absent a clear sectioning mechanism, the Employer shall not unilaterally reduce the liquidated damages amount to 2,500 pounds for the delay of 1 villa which is half the contract. Hence, liquidated damages cannot be claimed.⁷⁹

⁷⁷ Stephen Furst, *Keating on Construction Contracts* (8th edn, Sweet & Maxwell 2006) 309-311

⁷⁸ Ibid

⁷⁹ John Adriaanse, *Construction Contract Law* (3rd edn, Palgrave Macmillan 2010) 181

7.2 Misconceptions

There are several misapprehensions around the principle of liquidated damages. The most common one would definitely be that many construction professionals still believe that liquidated damages are introduced for the sole benefit of the employer; this is proved to be wrong in Section 7 of this dissertation.

7.2.1 Problems with Terminology

As previously mentioned, several times in this research paper, the process of constructing contracts is a vital one, especially when it comes to the choice of wording. The law can anticipate certain contractual words vastly different than how the same exact words might be interpreted in any other normal scenario. For instance, phrases that are often used safely in daily manner in the construction industry, such as: “Time at large”, “Time of the essence”, “Conditions and Warranties” or “reasonable time”; in fact, weigh a lot in contractual terms and shall be handled with care. Contracts wording is also critical because of the fact that a huge percentage of construction disputes arise out of misinterpretation and/or different understanding of contracts.⁸⁰

7.2.2 Distinction Between Liquidated Damages and Penalties

Although it is known that common law distinguishes between damages and penalties, both terms are often used interchangeably at construction sites and in the technical engineering community. English courts look at employers’ penalizing contractors as an illegal matter and will nullify any

⁸⁰ Brain Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 16-17

penalty provision. Liquidated damages sums are based on a formula, and that makes it highly unlikely to be oppressive. It is not common that courts annul a liquidated damages clause on the basis of it being penal; nevertheless, it might be worth mentioning that contractors are now more accepting of the application of liquidated damages than they used to be.⁸¹

There are three (3) modern examples for when liquidated damages were held to be penalties, which are laid out in the below cases:

1. *Stanor Electric v. Mansell* (1988)
2. *Ballast Wiltshier Plc (formerly Ballast Nedham Construction Ltd) v. Thomas Barnes & Sons* (1998)
3. *Braes of Doune Wind Farm (Scotland) Ltd v. Alfred McAlpine Business Services* (2008)⁸²

In addition, in *Dunlop Pneumatic Tyre Co. Ltd v. New Garage & Motor Co. Ltd* (1915), it is stipulated that a penalty provision is identified by looking into the intentions of both parties at the time of contract. If the sum is allocated in order to ensure adequate performance, then the amount is rendered as a penalty. On the other hand, if it is used to reimburse the employer for any losses and/or damages he might go through, it would be considered as liquidated and ascertained damages.⁸³

It is important to note that the Dunlop case demonstrated that it is irrelevant what the clause is named in the contract; the thing to be considered here is the effect of the clause. If it is found to

⁸¹ John Adriaanse, *Construction Contract Law* (3rd edn, Palgrave Macmillan 2010) 178

⁸² John Adriaanse, *Construction Contract Law* (3rd edn, Palgrave Macmillan 2010) 188-190

⁸³ John Adriaanse, *Construction Contract Law* (3rd edn, Palgrave Macmillan 2010) 178

be a true approximation of the loss, it will be deemed as damages despite the provision being called ‘delay penalties’ in the contract.

Based on the above-mentioned case, Dunlop Test for penalty clauses will distinguish the damage from the penalty by applying the below questions:

1. What is the intention of the clause?
2. Is the sum extravagant?
3. Does this sum apply to all breaches, minor and major?⁸⁴

This is a topic that is often given a lot of attention because of its importance. The association between the two definitions occurred because of the nature of its application, as liquidated damages are used to remedy the breach of a contract for its non-performance. Hence, it could easily be looked at as a penalty imposed by the employer on the performing party. It would be interesting to know that many legal systems in fact allow penalties and leave the matter of agreeing over a penalty to the party themselves. This originated in ‘Equity’ which is a branch of justice; nevertheless, even this doctrine has applied the common law’s view of contract penalties for the last two centuries. The position of the common law understands that a penalty is imposed in a contract to secure performance. And so, if the promisee is properly compensated for his/her loss; then, he/she has no business recovering anything more than his/her actual loss, even if the parties had agreed to such amount previously. That is where the common law has found its basis to draw the line between penalties and liquidated damages. Whatever the case may be, courts have shown serious reluctance interfering in commercial bargains unless the case

⁸⁴ Ibid

absolutely requires it. Reference is made to the case of *Elsley v. J.G. Collins Insurance Agencies* (1978). Lord Roskill lays out the position of the law in relation to penalty clauses in the case of *Export Credits Guarantee Dept v. Universal Oil Products Company* (1983) that the main purpose of the law taking such a firm stance against penalty clauses is to prevent the defendant from claiming money that is not directly related to his loss. The Lord's argument seems to support the opinion that the law's intervention here is nothing more than merely protecting public policy which was brought up previously in *The Angelic Star* (1987). The question of whether the sum is a liquidated damage or a penalty is answered by analysing whether it was a true pre-estimate of the loss and not whether or not there was an actual loss. Case *Philips Hong Kong Ltd v. Attorney General of Hong Kong* (3 tiers of the courts: 1990, 1991, 1993).⁸⁵

It seems like the only distinction between the two terms is historical. Gibson LJ provided that the rule of penalty relates to public policy more so than it being illegal. According to John Adriaanse, wherever it is hard to appropriately estimate the amount of loss prior to the execution of a contract, the penalty rule will be unlikely to apply.⁸⁶

As for the UAE Civil law, there really has not been any clear distinction between the terms, in fact, the term liquidated damages, literally is translated to delay penalty in Arabic which is the language used in federal and local courts.

⁸⁵ Brain Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 5

⁸⁶ John Adriaanse, *Construction Contract Law* (3rd edn, Palgrave Macmillan 2010) 188-190

CHAPTER 8: LIQUIDATED DAMAGES IN SPECIFIC SITUATIONS

The views of the law may be vastly different than what is explained in this dissertation if certain factors were present, such as the following:

8.1 Sectional Completion

The details of the *Stanor Electric* case deny the application of liquidated damages on a contract that does not provide for sectional completion. Nevertheless, when a contract clearly defines what is included in each section, its amount and the liquidated damages for each section, the contractual terms will inevitably apply. These prerequisites were fulfilled in the case between *Liberty Mercian Ltd v. Dean & Dyball Construction Ltd [2008] EWHC 2617 (TCC)*; where the project was to construct four retail units which were divided over six stages and were defined as sections in the contract. The sections were to be completed sequentially in order to allow for fit-out works to take place, which would save time and allow the employer to run his business gradually and as soon as possible. Since each section had a specified amount and liquidated damages value, the contractor, in accordance to the contractual clause, had to pay liquidated damages for each section when he delayed the completion of the first section by four weeks. He argued that this clause imposes a penalty on him. His Honour Judge Coulson decided that both parties mutually understood the purpose of sequencing the completion, and that the clause is workable as stated in the contract especially that the amount of Liquidated and Ascertained Damages (LAD) varied from one section to the other which proves that the pre-estimate was thought through, dismissing the penalty claim. This case puts emphasis on the importance of

constructing a clear contract; as the same clause would most likely be inoperable due to unclear definition of what is the scope of each section of the contract. This is also construed in *Taylor Woodrow Holdings Ltd and anor v. Barnes & Elliott Ltd [2004] EWHC 3319 (TCC)*.⁸⁷

8.2 Liquidated Damages in Administrative Contracts

There is a significant difference between the application of delay damages in non-profit administrative contracts and commercial contracts which generate revenue to the Employer. Administrative Contracts are classified under civil law as the contracts on which the government's procurement rules apply. This type of contract administers the works related to government entities which often are non-beneficiary, and hence do not include any real loss of profit. However, as previously mentioned in this paper, considering the fact that governmental projects primarily serve the purpose of delivering to the public; this inevitably makes the failure to complete government projects a means of preventing public interest and causing damage to the community. Ergo, there is no requirement to prove the breach, causation or loss in an administrative contract. The mere occurrence of contractor's delay is enough to trigger the deduction of delay damages; this was the finding of the *Federal Supreme Court in Case No. 462/18 dated 17 February 1998*.⁸⁸

Abu Dhabi Law No. 6 of the year 2008 relating to Purchases, Tenders, Auctions, and Warehouses explicitly addresses this matter in Article (41) Subclause 2:

⁸⁷ John Adriaanse, *Construction Contract Law* (3rd edn, Palgrave Macmillan 2010) 186-187

⁸⁸ Michael Grose, *Construction Law in the United Arab Emirates and the Gulf* (Wiley Blackwell, 2016) 6-7

“The penalty shall be calculated as soon as the delay takes place without the need for any notice or legal proceedings and without the need for proving the damage which will be in all cases considered as happened upon delay of performance by the Contractor.”⁸⁹

If the contractor delays the completion and the damages calculated exceed the ten percent limitation of the total contract value. The same provision gives the right to the government body to impound the contractor’s performance bond, claim reasonable administrative cost and carry out the works at the contractor’s expense.⁹⁰

Likewise, Dubai Law no. (6) of 1997 gives the right to its own institutions to appoint the works to a different contractor or even re-tender the project if the contractor fails to start the works in time, or delays the progress so that it becomes evident that the completion date will not be met. The same right stands if the contractor’s delay exceeds the limitation of ten percent of the contract amount, if he suspends the works for more than fifteen days, or abandons the works. In such cases, the contractor will be liable to ten percent of the unperformed works to cover the administrative costs of the government institute as well as any damages incurred by the departments. The law also gives right to the entity to seize the contractors’ tools and equipment available at site and utilize it in completing the works. The entity will not be liable towards the contractor for any damages that may go down on these tools and equipment. To ensure the settlement of the contract, the government department may seize the tools and equipment after the completion of the works.⁹¹ Article 65 of Dubai Law states that the government entity shall

⁸⁹ Abu Dhabi Procurement Law No. 6 of 2008, Article 41(2)

⁹⁰ Abu Dhabi Procurement Law No. 6 of 2008, Article 41(1)

⁹¹ Dubai Law No. 6 of 1997, Article 63

charge the defaulted contractor for the fees of the supervision consultant. This will not require any notification, legal proceedings, court decision or proof of suffered damage.⁹² Similar to Abu Dhabi Law No. 6 of 2008, Dubai Law No. 6 of 1997 states that the contractor shall submit a claim to the entity including the causation of the delay if it is due to force majeure or actions of the employer. The contractor shall submit his claim within 30 days from this occurrence, else he would have forfeited his rights for an extension of time due to this particular event and waived his right to object.⁹³

8.3 Liquidated Damages Application & Nominated Subcontractors' Delay

Liquidated Damages clauses shall provide the Client with the ability to continue their business and/or operation despite the handing over of the building, but it shall not be so extravagant to the point that it puts the contractor's existence in jeopardy. It is also very important to ensure that the contract allows for the financials of the involved subcontractors to be backed up.⁹⁴ This is very interesting, because the nominated subcontractor's delay automatically entitles the main contractor for an extension and he will not pay any liquidated damages to the employer, which in return means that he will not claim any damages from the sub. In other words, the nominated subcontractor will get away with his delay without damages. This is why providing a contractual link between the employer and the nominated subcontractor is crucial to enable the employer to make a direct claim against the nominated-subcontractor for liquidated damages if he fails to

⁹² Dubai Law No. 6 of 1997, Article 65

⁹³ Dubai Law No. 6 of 1997, Article 49

⁹⁴ John Murdoch and Will Hughes, *Construction Contracts: Law and Management* (3rd edn, Spoon Press 2000) 36-37

perform and leads to delayed completion of the project.⁹⁵ A common way in which most of the modern standard construction contracts have tackled this issue is by introducing ‘collateral warranty’ which is a contractual link that allows the employer to directly claim his money from the subcontractor if he needs to. Without a collateral warranty clause in the contract, the subcontractor will simply have no incentive to complete the work on time.⁹⁶

Murdoch and Hughes support the above argument in their book which mentions in its essence that if a nominated subcontractor causes the main contractor delay, then the main contractor would not need to pay the employer any amount for liquidated damages. The English common law agrees with the UAE law in this matter.⁹⁷

The above is supported by *Commercial Case no. 1628/2013 Dubai Courts*, where the court of first instance granted the claimant who was the main contractor in the case liquidated damages for a value AED 4,072,660.00.

⁹⁵ John Murdoch and Will Hughes, *Construction Contracts: Law and Management* (3rd edn, Spoon Press 2000) 191 & 280

⁹⁶ John Murdoch and Will Hughes, *Construction Contracts: Law and Management* (3rd edn, Spoon Press 2000) 284

⁹⁷ John Murdoch and Will Hughes, *Construction Contracts: Law and Management* (3rd edn, Spoon Press 2000) 37

CHAPTER 9: REMEDY & RECOVERY

9.1 Exclusive Remedy

According to the Honourable Judge Ramsey of the high court of justice, liquidated damages clause is in fact the only remedy to failure to complete the project by the contractual end date. Moreover, if there was another breach which indirectly caused delay to the project, the contractor would still only be liable to pay the employer the liquidated damages of the contract. These are the findings of the case of *Biffa Waste Services Ltd v. Maschinenfabrik Ernst Hese GmbH* [2008] *EWHC 6 (TCC)*. Many other honorary judges have adopted the same view on the possible remedies to delay, such as his Honour Judge Fox-Andrews QC in *Surrey Health Borough Council v. Lovell Construction Ltd* (1988) 42 *BLR* 25 as well as his Honour Judge Gilliland QC in *Piggott Foundations Ltd v. Shepherd Construction Ltd* [1993] 67 *BLR* 48 at 68 who in turn has held that a liquidated damages clause will prevent the avoidance of overall damages limitation even if there was a provision of general damages for the delay which has resulted from the failure of performing certain works.⁹⁸ An enforceable liquidated damages clause has been described as an ‘irresistible conclusion’ irrelevant of the breached clause which has caused the delay, whether partially or wholly.⁹⁹ Keating on Construction Contracts (8th edn) at Paragraph 9-006 also shares the same view, detailing that the position of why the contractor had delayed the completion does not alter the fact that he did actually delay it; hence, does not

⁹⁸ Patrick Mead, ‘Liquidated Damages: A sole remedy for delay?’, (Carter Newell Lawyers, April 2014) https://www.carternewell.com/page/Publications/Archive/Liquidated_Damages_A_sole_remedy_for_delay/ accessed on 30 March 2020 at 13:13

⁹⁹ Hamish Lal, ‘Liquidated Damages’ (2009) 25(8) Construction Law Journal 567 – 690 [586]

change the nature of the loss he shall compensate. In other words. He is liable to liquidated damages and nothing but that.¹⁰⁰ In the case of *Peak Construction*, it was held that the corporation of housing (employer) could not recover damages for a delay to which it was partly responsible for.¹⁰¹

Some professionals misunderstand the liquidated damages clause assuming that if the employer does not suffer any damages in reality, the clause will be inapplicable. This argument is denied in common law by the ruling of His Honour Judge Davies QC OR in case *BFI Group of Companies v. DFB Integration Systems Ltd* (1997) CILL 348. It can be assumed that in this case the principle of parties' autonomy and their freedom to pre-agree on ways to deal with dispute.¹⁰² Therefore, if the contractor agrees to pay a sum once it has delayed the completion of the contract, it shall be liable to deliver its end of the bargain. It is just that simple.

The question of whether or not liquidated damages is an exclusive remedy to project delay is one that is often asked. While the answer may seem obvious at the beginning, namely because it would not make sense for a contract to include a clause that's sole purpose is to deal with the compensation of delayed works, and then have other clauses that deal with this matter. However, the situation is not so simple. The reason for this is that it is not uncommon for employers or property owners to claim to have suffered more loss than what is specified in the contract as liquidated damages, and decide to sue for their common law right of claiming damages which

¹⁰⁰ Stephen Furst, *Keating on Construction Contracts* (8th edn, Sweet & Maxwell 2006) 309

¹⁰¹ Stephen Furst, *Keating on Construction Contracts* (8th edn, Sweet & Maxwell 2006) 185

¹⁰² John Adriaanse, *Construction Contract Law* (3rd edn, Palgrave Macmillan 2010) 188-190

they can prove they have suffered. There are mixed opinions about this; the first opinion which is supported by Lord Justice Nourse and previously discussed in the case of *Temloc Ltd v. Errill Properties Ltd* (1987) which states that the employer is not entitled to any compensation other than liquidated damages. On the other hand, Lord Justice Bingham and Lord Justice Parker, amongst others, support the opposing side of this argument. This is showcased in the case *E. Turner & Sons v. Mathind Ltd* (1986) where the Court of Appeal had ruled that the employer can claim both liquidated damages for failure to complete the whole works at the contractual completion date as well as unliquidated damages for failure to meet the dates for handing over of phases. Another case that refuses the ruling of *Temloc Ltd v. Errill Properties Ltd* (1987) and goes to the root of the contractual clause is *Baese v. Bracken* (1989) a case from a New Zealand Court. This case brought forward a new argument stating that if the right wordings were used then a liquidated damages clause would not be the fundamental remedy, and that it would be merely an alternative to unliquidated damages.¹⁰³

9.2 Recovery of Liquidated Damages

For an out-sider to the construction field, one would assume that liquidated damages become recoverable when the completion date is not achieved. However, someone who works in the industry would know that the matter is not as simple, for various reasons. Contracts often set the process in a way that issuing extensions must come before the application of delay damages, or postpone the application of delay damages until the works are completed. Likewise, some

¹⁰³ Brain Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 6-7

contracts often provide for a requirement of serving a notice prior to recovering liquidated damages, this could also be applicable under certain laws even if the contract does not enforce it. Another element that adds up to the complexity of the matter is the fact that there is a huge dispute in the industry for what qualifies for ‘lateness’ and ‘completion’.

It is vital to note that liquidated damages recovery is a function that can be agreed upon in the contract. It can be recovered as soon as the contractual completion date passes or after the actual completion of the project. While it might make good sense to recover the liquidated damages when it is very clear that the contractor will not be able to meet the due date, the law does not allow the deduction of liquidated damages before the completion date passes. Eggleston brightly justifies this by highlighting that, in the eyes of the law, damages follow the breach, it does not anticipate it. Hence, for liquidated damages to be recoverable the breach must be materialized, and the due date shall be passed.¹⁰⁴

9.3 Methods of Recovery

The most preferred method of recovering liquidated damages sums is deducting the sum from intermediate payment certificates which are due to the contractor. This method is efficient since it saves the employer from the trouble of suing for his damages as well as it allows him to avoid wasting efforts in dealing with the problems of suing insolvent contractors. Standard forms of contracts often give the right to employers to withhold an amount for liquidated damages from the interim certificates; nevertheless, there is usually a contractual process for it that involves

¹⁰⁴ Brain Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 188-190

serving a notice. Under the English Law, the Housing Grants, Construction and Regeneration Act 1996 sets a requirement for notifying the contractor prior to deducting a sum due under the contract; the notice shall be served no less than the duration specified in the contract which the parties are free to agree upon.¹⁰⁵ The act also provides for specific requirements that qualify a notice to be effective, such as: the notice shall mention the amount to be deducted and the grounds of deduction.

Other methods of recovery would normally be deducting the sum from the retention money and of course claiming and/or suing for the sum is also an option; however, as mentioned earlier less preferred.¹⁰⁶

¹⁰⁵ Housing Grant, Construction and Regeneration Act 1996, Article 110

¹⁰⁶ Brain Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 200-202

CHAPTER 10: MEANS OF AVOIDING LIQUIDATED DAMAGES

In this section, the discussion will primarily focus on the ways a specific party can avoid the application of liquidated damages; this section will explain the routes that can be adopted if a contractor was to defend against the application of liquidated damages.

10.1 Prove the sum is a penalty rather than an actual sincere compensation

To confidently distinguish whether or not the sum of liquidated damages is a genuine pre-estimate or a penalty, is in fact more complicated than it sounds. Lord Diplock defined a penalty in the case of *Scandinavian Trading v. Flota Ecuatoriana* (1983) saying that a penalty clause in a contract is one which provides a secondary obligation to be bestowed upon the breacher for his breach of his primary obligation and where the secondary obligation does not properly represent a genuine estimate of the loss suffered by the obligor.

Lord Dunedin's speech to the House of Lords in *Dunlop Pneumatic Tyre Company Ltd v. New Garage Co Ltd* (1915) also offers the following distinguishing approach:

*“The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damages”*¹⁰⁷

It is important to highlight that the function of inserting a contractual provision for delay damages is to deter the party from breaking the contract in addition to compensating the innocent party for the occurred breach. Ultimately, the construction of the clause also affects whether or

¹⁰⁷ Stephen Furst, *Keating on Construction Contracts* (8th edn, Sweet & Maxwell 2006) 312

not it is a penalty, in addition to the circumstances of the case. The fact that the sum of liquidated damages shall be determined objectively at the time of drafting the contract, does not eliminate the importance of what happens during the execution of the contract. The events that take place during the performance of the contract are crucial in identifying what could reasonably be estimated at the time of constructing the contract, which in return helps in assessing whether or not the sum was intended as a penalty or a compensation. Nevertheless, it is not sufficient to depend solely on the fact that the actual loss suffered is less than the amount of liquidated damages in the contract, unless the party was dominated into entering the contract and had no choice in the terms and conditions.

The authors of Keating on Construction Contracts have highlighted a number of tests to help assess whether the clause in question is a penalty or not.

- a. If the sum of liquidated damages stipulated is immensely greater than the greatest loss that could be suffered by the claimant. Practically, this is the most important test to be applied.
- b. Moreover, the sum would be considered a penalty if it exceeded the total sum of the contract.¹⁰⁸

¹⁰⁸ Stephen Furst, *Keating on Construction Contracts* (8th edn, Sweet & Maxwell 2006) 313-314

10.2 Omission of contract date

As previously discussed, the completion date shall be mentioned in the contract less the contractor will not be obliged to finish by a specific time, and then liquidated damages will not apply.¹⁰⁹

10.3 Waiver and/or agreement

Parties may agree to contract out of the liquidated damages clause and/or the employer may also waive his right to claim for liquidated damages by expressly mentioning it in the contract. Moreover, waiving right to claim for liquidated damages may be implied by action. An example is when the sums are to be deducted from progress payments, and the employer does not exercise this right; he might not be able to recover the due amount at a later stage. However, if this is not expressly stipulated in the contract it would be hard to prove that it acts as a bar to claim for the whole sum of liquidated damages. Then again, each case has its own circumstances and the resulting findings are different.¹¹⁰

10.4 Final certificate

It is within the engineer's power to extend the time and certify the final amount of the contract, whether in applying liquidated damages or not. This does not prevent the employer from claiming for liquidated damages if the engineer did not exercise the power given to him by the contract.¹¹¹

¹⁰⁹ Stephen Furst, *Keating on Construction Contracts* (8th edn, Sweet & Maxwell 2006) 319

¹¹⁰ Stephen Furst, *Keating on Construction Contracts* (8th edn, Sweet & Maxwell 2006) 319

¹¹¹ Stephen Furst, *Keating on Construction Contracts* (8th edn, Sweet & Maxwell 2006) 319-320

10.5 Employer being the cause of delay

When the employer is the cause of the delay by any means, he will not be eligible to claim for liquidated damages, as he will in fact have to grant the contractor an extension for the time of completion. It is irrelevant whether the employer delayed the project by interfering through his agent, i.e. engineer, instructing extra works, or delaying certain instructions and/or information. As long as the employer is the reason for the delay of the project, the above will apply and he will not be able to claim for liquidated damages. The rule would apply even as far as where the contractor is already delayed due to his own doing.

There is one case in which the employer could technically still claim for liquidated damages while being the reason of delay, and that is if the contract allows for unlimited amounts of extra works and the contractor undertakes that he will perform the whole of the works on time, regardless of how much extra works the employer orders. This, although might seem unreasonable and extremely onerous, is possible to include in the wording of the contract. However, if the contract was drafted in an ambiguous way, then the court will not enforce such a clause in which the contractor has basically committed to an impossibility.

Even after the employer loses his right to claim for liquidated damages for the delay he has conferred on the project, the contractor shall complete the project within reasonable time. If the contractor delays the contractor beyond reasonable measures, the employer will be able to claim

for unliquidated damages. These damages are also known as general damages and need to be proved, unlike liquidated damages.¹¹²

10.6 Extension of time

Contractors often try to prove that they are due an extension of time at the end of the contracting period to avoid the application of liquidated damages, and that is probably the most used defence used.¹¹³ Granting the contractor an extension of time to complete the project, inevitably means that the employer concurs that the delay in the project was not due to the contractor's default, regardless of the reason being: the employer himself, a third party or unforeseeable circumstances. Accordingly, the contractor is not liable to pay liquidated damages. Keating on construction contracts adds an interesting point of view on the clause of liquidated damages; it states that the absence of such an express clause opens the contractor to the risk of inability to avoid liquidated damages.¹¹⁴

10.7 Dispute resolution

Contractors are, of course, entitled to resort to dispute resolution methods as allowed for in the contract, starting from adjudication which happens to be a statutory right in the United Kingdom provided by the Housing Grant Construction and Regeneration Act 1996 (HGRCA) under Article 108 'Rights to Refer Disputes to Adjudication', Subsection (a) "*A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a*

¹¹² Stephen Furst, *Keating on Construction Contracts* (8th edn, Sweet & Maxwell 2006) 320-322

¹¹³ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 209-210

¹¹⁴ Stephen Furst, *Keating on Construction Contracts* (8th edn, Sweet & Maxwell 2006) 323

procedure complying with this section.”¹¹⁵ The parties may also escalate the case to arbitration or litigation and aim to challenge the application of liquidated damages and/or granting an extension of time.¹¹⁶

10.8 Achieving completion prior to issuance of completion certificate

Eggelston, interestingly, brings forward the argument that an engineer’s failure to issue a certificate of completion appropriately for bias reasons or for simply looking for perfection, entitles the contractor to sue for damages incurred. He bases his justification on the engineer’s responsibility to act in a fair manner when deciding on contractual matters between the builder and the employer. In other words, the engineer has a duty of care when certifying the works executed, and if he fails to issue the certificate of completion on time or certifies that less money is payable than what is actually due, then the contractor shall have the right to have the certificates reviewed by another board as allowed for in the contract and/or jurisdiction. Considering that the cashflow is essential in the construction industry, such negligent acts from the engineer could lead to serious financial burden on the contractor, and this would entitle him to sue the engineer for his negligence or even recover the damages applied due to the unreasonable and unfair certificates issued. The case of *Micheal Sallis & Co. Ltd v. Calil* (1987) is a classic example which supports this idea.¹¹⁷

¹¹⁵ Housing Grant, Construction and Regeneration Act 1996, Article 108

¹¹⁶ Brian Eggelston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 209-218

¹¹⁷ Brian Eggelston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 218-219

10.9 Waiver by Conduct & Estoppel:

If the employer led the builder to believe that he will not insist on claiming liquidated damages, he would then have practically made a promise to the contractor to accept the delayed works. He cannot go back on such promise if the works are in fact delivered late. In the eyes of the law, by providing such assurance to the contractor, the employer had waived his rights to claim for liquidated damages.¹¹⁸

Estoppel is a very similar rule and could be explained through an example of an employer who ensures the contractor that he will not apply damages for late completion, and accordingly the contractor relaxes where he would have normally probably crashed his programme in efforts to meet the deadline and avoid liquidated damages. In such case, the employer would be estopped from claiming for these damages.¹¹⁹

¹¹⁸ Brian Eggleston, *Liquidated Damages and Extensions of Time in Construction Contracts* (3rd edn, Wiley-Blackwell A John Wiley & Sons Ltd 2009) 230-231

¹¹⁹ Ibid

CHAPTER 11: CONCLUSION

The inclusion of a liquidated damages clause in the contract serves the benefits of both the employer and the contractor alike. It provides a cap to the contractor's liability towards the contract and gives the employer a quick and easy remedy to the losses he encounters. Not to mention it is convenient, efficient, and saves time.

In the English law, proving the loss is not necessary for the application of liquidated damages, and according to Article 41 of the Procurement Law in Abu Dhabi, the law in the Emirates shares the English law its same views on the matter, but only when it comes to government contracts. However, the UAE civil law applies the rule of proving loss differently when the contract in question is a private one. In private commercial endeavors, the UAE civil courts apply delay damages based on three (3) conditions: 1) Default; 2) Damage suffered by the aggrieved party; and 3) Causation relationship between the default and the damage. These conditions are derived from the religious principle of “No Harm; No Damage”; thus, the damage shall be linked to the harm suffered through study and proof.

When studying a case of liquidated damages, it is important to look at the contract as a whole; ignoring the full contract and focusing only on the term related to liquidated damages would be a naïve approach and would often result in wrongful outcomes and/or decisions. One of the most important terms to consider would be “Time for Completion”, as it would not be possible to calculate or identify the delay unless a completion date is identified first. Additionally, once the works are completed, the activation of several events takes place including: the transfer of the

risks related to the works from the contractor to the employer, the start of defects liability period, and the end of employer's right to damages for late completion.

Extension of time clauses are equally important. The main objective of extending the contract duration is to maintain a realistic and truthful program. Just like liquidated damages, extension of time clauses serve the benefit of both the employer and the contractor as well. A well drafted extension of time clause actually enables the application of liquidated damages. Without the formation of a proper extension of time term, the employer will not be able to extend the contract after causing delay, or after the occurrence of a delay event that was not within the reasonable control of the main contractor. Thus, liquidated damages cannot be claimed from a contractor that had no contributing hand in the delay in the first place. This is a matter that both UAE and English law agree upon. The drafting of a liquidated damages clause does not rank lower in importance; it is important to note that making reckless adjustments to standard contract templates could potentially render the clause inoperable.

One main distinction between Common English Law and the UAE Civil Law, is that the UAE law allows the courts to interfere and change the parties contract if it deems it to be unjust. Judges in the UAE would use this power, given to them by the law, to amend extravagant liquidated damages clauses, if necessary. Article 390 as mentioned earlier, authorizes the court to make the delay damages equal to the suffered loss, given that the two (2) conditions of the obligor being at fault, and the obligee has suffered a loss, are met and fulfilled.

On the other hand, common law courts look at liquidated damages as those damages that arise naturally as a consequence of the breach. The courts interference will be limited to deeming an unfair liquidated damages clause to be null and void and will not interfere further in the matter.

One important view which is adopted by the UAE law is that the employer takes the risk of delay if the delay is caused by a subcontractor which is nominated by him. This fits well into the concept of prevention which basically obliges the contracting parties to allow each other to deliver their obligations towards the contract and not stand in the way of that. Both the English and UAE law agree on the concept of the nominated subcontractor's delay. If a main contractor delays the delivery of the works due to the delay of a subcontractor who was nominated by the employer, the main contractor will not be liable to pay the liquidated damages sum to the employer.

Liquidated damages clauses can be abused when there is unequal bargaining power between the contracting parties and that is precisely why courts refrain from enforcing penalty clauses, as they do not want to encourage a scenario where the strong persecutes the weak.¹²⁰ While both jurisdictions in study agree that the employer shall not have any authority to penalize the contractor, the wordings of liquidated damages, delay damages and delay penalty are often used interchangeably especially in the UAE. Nevertheless, it matters not what the name provided in the contract is. It is the intention of the parties that will be evaluated by the court, should a case

¹²⁰ Gene A Blumenreich, 'Liquidated Damages' (2008) 76(2) American Association of Nurse Anesthetists Journal 85-88

arise, and whether the sum provided is an actual estimate which opts to compensate the employer for a loss suffered.

Finally, the provision of liquidated damages provides certainty to the contracting parties. It also allows the contractors to calculate their risk properly and anticipate the scenario that will go down if a delay occurs, giving him adequate motivation to deliver the project on time and avoid these deductions. One of the main means of avoiding the application of liquidated damages is proving that the sum applied is in fact a penalty rather than a fair compensation. There are other means of avoiding liquidated damages as well, such as: omission of contractual end date, waiver for liquidated damages by the contracting parties, obtaining an extension to the contract duration, employer's prevention acts.

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