



**Liquidated Damages versus Delay Penalties and Limitation
of Liability: A Comparison between the English and United
Arab Emirates Law**

التعويضات المادية مقابل غرامات التأخير وتحديد المسؤولية:
مقارنة بين القانون الإنجليزي وقانون الإمارات العربية المتحدة

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Liquidated Damages versus Delay Penalties and Limitation of Liability: A Comparison between the English and United Arab Emirates Law

Liquidated Damages versus Delay Penalties and Limitation of Liability: A

Comparison between the English and United Arab Emirates Law

Abstract

The liquidated damages and delay penalties and their limitation pursuant to the contract versus the applicable law are a subject that is frequently triggered during construction disputes all over the world. There are some differences between common and civil law countries when it comes to related cases. Since United Arab Emirates/ Dubai is a metropolitan country/ City that has attracted different professionals from around the globe with their different law backgrounds and interpretation of the Liquidated Damages and Delay Penalties; this subject has become a hot point of contention between the construction industry professionals.

In this dissertation I will be discussing the concept of the Liquidated Damages and Delay Penalties, why they are required in the contract; what their benefits are; how they are commonly used by the employer; what the difference is between them according to common and civil laws; and, the applicability of limiting them according to contract and applicable law. I will also be discussing the limitation of liability in general as a comparison between English and United Arab Emirates laws. To conclude I will submit recommendations on which one to use and under what circumstances.

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ملخص

التعويضات المقطوعة وغرامات التأخير والحد منها بموجب العقد بالمقارنة مع القانون الواجب التطبيق هو الموضوع الذي كثيرا ما أثير في نزاعات البناء في جميع أنحاء العالم. هناك بعض الاختلافات بين البلدان التي تطبق القانون العام والمدني عندما يتعلق الأمر بالقضايا ذات الصلة. منذ ان دبي / الإمارات العربية المتحدة المدينة الكبرى التي جذبت مختلف المهنيين من جميع أنحاء العالم باختلاف خلفياتهم القانونية واختلافاتهم في تفسير الأضرار المادية وغرامات التأخير، فقد أصبح هذا الموضوع نقطة ساخنة الخلاف بين مهنيين صناعة البناء والتشييد.

في هذه الأطروحة سوف أناقش مفهوم الأضرار المادية وغرامات التأخير، لماذا هي مطلوبة في العقد، ما هي فوائدها، كيف تستخدم عادة من قبل رب العمل، ما الفرق بينهما وفقا للقوانين العامة والمدنية و تطبيق الحد منها وفقا للعقد والقانون الواجب التطبيق. كما سوف أناقش تحديد أو تقنين المسؤولية بشكل عام وعلى سبيل المقارنة بين القوانين الإنجليزية والإمارات العربية المتحدة. وفي الختام سأقدم توصيات بشأن أي خيار افضل للاستخدام وتحت أي ظرف من الظروف.

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Definitions/ Abbreviations

Abu Dhabi Global Market – Abbreviated as “ADGM”

Civil Procedure Law – Abbreviated as “CPL”

Commercial Transactions Law – Abbreviated as “CTL”

Dubai International Financial Centre – Abbreviated as “DIFC”

International Federation of Consulting Engineers – Abbreviated as “FIDIC”

United Arab Emirates – Abbreviated as “UAE”

United Arab Emirates Legal System Rules – Abbreviated as “Civil Code.”

United Kingdom – Abbreviated as “UK”

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Introduction

Liquidated damages and delay penalties and their limitations pursuant to the contract versus the applicable of law are a subject that is frequently triggered during construction disputes all over the world. There are some differences between common and civil law countries when it comes to related cases. Since United Arab Emirates/ Dubai is a metropolitan country/ City that has attracted different professionals from around the globe with their different law backgrounds and interpretation of the Liquidated Damages and Delay Penalties; this subject has become a hot point of contention between the construction industry professionals.

Aim

The aim of this research is to provide a comparative analysis of the contractual landscape and application of law in the United Kingdom and the United Arab Emirates. The overarching goal is to provide project managers with a firm operational foundation as it relates to the application of contract law in those countries.

Objectives

The research has named several key objectives as follows:

- Analyze liquidated damages, delay penalties, and their application for the UAE and the UK in general.
- Provide a comparison and contrast among the two countries to demonstrate the differences that exist between the two legal jurisdictions/systems.
- Integrate examples of case law in both countries to verify the analysis and support meaningful analysis.
- Synthesize the findings and make recommendations for project managers that may face venture opportunities with various legal systems of application.

Methodology

The research requires covering a tremendous amount of information. The doctrinal method has been selected as the best methodology for a variety of reasons. The doctrinal method is a widely-accepted best-practice in legal research with many added benefits.¹ The doctrinal

¹ Chynoweth 2011 Chapter 3: Legal Research

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method is concerned for the formation of legal doctrines via the analysis of legal rules. Among the common law jurisdictions, legal rules are found in statutes and case law as the common sources of law. It is important for the doctrinal method to realize that these sources cannot provide an entire statement regarding the law in a particular situation. This can only be achieved by the application of legal rules to the specific facts of a given situation under review. The decision regarding what rules to apply in a given situation can make it easier through the development of legal doctrines, which are systematic formations of law given specific contexts. This method therefore supports legal interpretation by clarifying any ambiguities among the rules, and places them in a coherent and logical framework to describe the relationships to the rules. The doctrinal method will be supported through the thorough study of legal text and case outcomes from the UAE as well as the UK. As such, this research is concerned with the development of a legal doctrine for project managers to review when faced with making leadership decisions within these jurisdictions.

Chapter one provides an over view of the two legal systems especially with regard to the role of judicial precedent in the development of the construction law. Chapter two will focus on the various aspects of delayed penalties and liquidated damages including their applications, commercial reasons and their fundamental clauses in both the UK and the UAE. Chapter three focuses on the limitations of liabilities associated with construction contracts and their enforcement and application in the two regions. The fourth chapter entails the findings and a discussion on the applicability of LDs and delayed penalties in the United Kingdom and United Arab Emirates.

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CHAPTER ONE: CONSTRUCTION LAW

UNITED ARAB EMIRATES CONSTRUCTION LAW

Introduction

To begin I will consider the body or bodies of law that address the issues surrounding the plethora of construction that takes place on a continuing basis somewhere in the UAE. To accomplish this it is necessary to consider contract law both procedural and substantive as well as laws that govern the remedies that are available to the parties to a construction contract. It is also necessary to consider various collateral issues to a given construction contract and the bodies of law that govern these. The appropriate starting point is to look at the judicial structure that exists within the United Arab Emirates (hereinafter 'UAE').

United Arab Emirates Judicial System

The Constitution of the UAE makes room for two distinct types of governing entities. First is the Local Government and the second is the Central Federal Government. The Local Government is dictated by either local laws that are in writing or the customary laws that exist within a given state, which are not necessarily put in writing. The reality is that there has been very little if any change made to the local laws from before the formation of a Central Federal Government and now.

However, the Central Federal Government is controlled in its totality by the given State Constitution, which is modeled after the Western format, in that "each state is divided into three distinct authorities: executive, legislative, and judicial."² Article 104 of the Constitution gives each emirate the authority to "establish or maintain its own judicial organs, to deal with matters outside the jurisdiction of the federal judicial authorities."³

² John Duke Anthony, *Arab States of the Lower Gulf: People, Politics, Petroleum* (Washington DC: The Middle East Institute, 1975), p. 99, retrieved from http://0-www.jstor.org.topekallibraries.info/stable/3381593?seq=1#page_thumbnails_tab_contents, p. 119-20, August 24, 2015.

³ *Ibid.*, at p. 139.

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Types of Courts

The Civil Court System in the UAE consists of “The First Instance Court, The Court of Appeal, and The Cassation Court.”⁴ The First Instance Court is made up of a “Small claims division, Ordinary court, and, a Serious offenses division.”⁵ The Court of Appeal Court hears matters that are appealed from decisions issued in the First Instance Court. Finally, The Cassation Court hears appeals that are “issued from decisions rendered by the Appeal Court, on issues of law, not fact.”⁶

In 2004 the UAE authorized one of its seven monarchical provinces, the Emirate of Dubai, to pass “Dubai Law No. 9 creating a global, cosmopolitan business campus, referred to as the ‘DIFC’ – or Dubai International Financial Centre – which was established to attract foreign investment and to make this emirate an international hub for commercial transactions.”⁷

There are two levels to the DIFC courts. There is a Court of First Instance that has jurisdiction over “civil or commercial claims and actions to which the DIFC or any DIFC Body, is a party; civil or commercial claims and actions arising out of or relating to a contract or promised contract, finalized or performed within DIFC pursuant to express or implied terms stipulated in the contract. In addition, there is civil or commercial claims and actions arising out of or relating to any incident or transaction which has been wholly or partly performed within DIFC and is related to DIFC activities. Moreover, it also includes appeals against decisions or procedures made by the DIFC Bodies where DIFC Laws or Regulations permit such appeals;

⁴Ali Ebrahim & Al-Hosani, “Constitutional and Judicial Organization in The United Arab Emirates,” (Unpublished Ph.D. dissertation, University of Exeter, 1989), p. 36, retrieved from http://0-www.jstor.org.topekcalibraries.info/stable/3381593?seq=6&Search=yes&resultItemClick=true&searchText=Courts&searchText=within&searchText=the&searchText=UAE&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3DCourts%2Bwithin%2Bthe%2BUAE%26amp%3Bacc%3Don%26amp%3Bwc%3Don%26amp%3Bfc%3Doff%26amp%3Bgroup%3Dnone#page_scan_tab_contents, August 29, 2015.

⁵ Ibid. and Butti Sultan Butti Ali Al-Muhairi, “The Development of the UAE Legal System and Unification with the Judicial System,” Arab Law Quarterly, Vol. 11, No. 2 (1996) , pp. 116-160, at p. 132, retrieved from http://0-www.jstor.org.topekcalibraries.info/stable/3381593?seq=17&Search=yes&resultItemClick=true&searchText=Courts&searchText=within&searchText=the&searchText=UAE&searchUri=%2Faction%2FdoBasicSearch%3FQuery%3DCourts%2Bwithin%2Bthe%2BUAE%26amp%3Bacc%3Don%26amp%3Bwc%3Don%26amp%3Bfc%3Doff%26amp%3Bgroup%3Dnone#page_scan_tab_contents, August 29, 2015.

⁶ Ibid, at p. 133.

⁷ Jayanth K. Krishnan & Priya Purohit, “A Common Law Court in an Uncommon Environment: The DIFC Judiciary and Global Commercial Dispute Resolution,” Research Paper Number 300, AM. REV. INT’L ARB., forthcoming (2015), retrieved from http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2482532, August 29, 2015.

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and, any claim or action over which the Courts have jurisdiction in accordance with DIFC Laws or Regulations.”⁸

There is also a Court of Appeal that hears matters “filed against judgments and awards made by the Court of First Instance as well as any requests for interpretation of the DIFC Laws or Regulations made by any party to an action before the Court.”⁹

Although the previously stated court system is considered to be at least a quasi-civil law system, there are what are referred to as “financial free zones” that are located in specific locations in the UAE. Abu Dhabi, one of the seven emirates that comprise the United Arab Emirates (UAE), recently “opened a free zone, or special economic area, for banking and finance located on Al Maryah Island called the Abu Dhabi Global Market (hereinafter ‘ADGM’).”¹⁰

In certain regards, the ADGM resembles the UAE's other financial free zone; specifically, the older Dubai International Financial Centre (DIFC). Like the DIFC, the ADGM has been granted power of a separate jurisdiction. Similarly, the ADGM is developing its own laws, regulator, and judiciary. The Abu Dhabi Global Market (ADGM) was “created by Federal Decree No. 15 of 2013 and Cabinet Resolution Number 15 of 2013.”¹¹ The primary objective of this financial free zone is the same as the former such zone, that is, the attracting of investment from foreign investors, which in many regards requires it to have the designation as a common law jurisdiction. What is meant by this is that they use as the basis for their legal systems the English law. This, as mentioned above, is in stark contrast to the legal system that exists in the remaining portions of the UAE. However, due to the limitations that are imposed by the legal system in the majority of this geographical region, these free zones are almost a necessity to see any real economic growth in this area of construction.

⁸See Article 5A, Dubai Law No. 16 (2011), also cited, retrieved from [http://www.difc.ae/sites/default/files/Translation-Law%20No%2016%20of%202011%20Amending%20DIFC%20Courts%20Law%20\(040212\)FINALsigned%20\(external%20doc\)123_0.pdf](http://www.difc.ae/sites/default/files/Translation-Law%20No%2016%20of%202011%20Amending%20DIFC%20Courts%20Law%20(040212)FINALsigned%20(external%20doc)123_0.pdf), August 24, 2015.

⁹ Ibid.

¹⁰D. P. Horigan, (2015), “The Birth of a New Jurisdiction: The Abu Dhabi Global Market,” retrieved from http://www.researchgate.net/profile/Damien_Horigan/publication/278684568_The_Birth_of_a_New_Jurisdiction_The_Abu_Dhabi_Global_Market/links/5583d4dc08ae89172b85fa09.pdf, August 20, 2015.

¹¹ Ibid, at p. 9.

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The common law was selected for the ADGM because there is a comfortable level of familiarity to many bankers. Indeed, several of the world's "leading financial hubs, including London, New York, Hong Kong, and Singapore, happen to be located in common law jurisdictions."¹² Additionally, either English law or New York law is often selected as the governing law for international contracts even if the parties are from other jurisdictions. Further "many contracts are drafted in English, even for agreements between parties that are from non-English speaking countries, because English has become the main language of international business."¹³ Finally, many of the judges conducting business in this jurisdiction as well as the attorneys representing clients in this jurisdiction are foreigners. This adds a level of comfort to the parties to these construction contracts, who are also foreigners.

A very attractive element to this common law jurisdictional enclave referred to as the ADGM is that it has what is referred to as opt-in jurisdiction. This gives the power to parties to international contracts, including construction contracts, to have any disputes coming out of a given contract, to be heard within this jurisdiction. This can be true "even if the parties to the matter have neither subject matter nor geographic-based jurisdiction over the parties or the matter to be heard."¹⁴ The reason that this could be especially attractive is because of the increased expertise that may exist with the judges hearing a matter in this jurisdiction, which many times have considerable experience with most complex and unique cases. Further, the same could and should be said about the attorneys that are readily available to represent individuals within this world class jurisdiction.

A final element of uniqueness offered by this enclave jurisdiction within the UAE, is the presence of its own arbitral institution known as the ADGM-LCIA Arbitration Centre, "which

¹² Hong Kong has kept the common law as the basis for its legal system despite returning to Chinese control in 1997. Yet, its faith after the year 2047 remains uncertain. Stuart Lau, Preserve common law after 2047: top Hong Kong judge, THE SOUTH CHINA MORNING POST (Hong Kong), Jan. 24, 2013, retrieved from <http://www.scmp.com/news/hongkong/article/1134756/preserve-citys-common-law-legal-system-after-2047-says-top-judge>, at <http://www.scmp.com/content/search/Hong%20Kong%20has%20kept%20the%20common%20law%20as%20the%20basis%20for%20its%20legal%20system%20despite%20returning%20to%20Chinese%20control%20in%201997.%20Yet%20its%20faith>, September 14, 2015.

¹³ *Supra*, note 17, at pg. 7.

¹⁴ *Ibid*, at p. 8.

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was organized in cooperation with the London Court of International Arbitration. This Centre provides both arbitration and mediation services.”¹⁵ This is an option to some of the more difficult circumstances that parties to a construction contract find themselves in.

Precedent Doctrine

The Doctrine of Precedent is a common law rule that requires that any rulings from a given court will be considered as some level of authority for any subsequent cases of the same or similar nature. This concept is consistent with the English maxim known as “*stare decisis* (which is Latin for, *to stand by things decided*), in which a previous decision of a court will be binding on the same and lower courts. Thus a decision of Court of Appeal will be binding on the same court and the Court of First Instance, unless a party is able to prove either the dissimilarity of the two cases, or that the previous case was wrongly decided.”¹⁶ It is important to note that since this is a common law rule that it is not a requirement within the UAE judicial system, which is a civil law system, however a record is kept by the UAE courts and prior rulings are certainly available as basis for making compelling legal arguments within the UAE court system.

The common law is a system of law that “developed over the course of several centuries largely as a result of the British Empire, English law reached far beyond the British Isles.”¹⁷ As it spread to various parts of the world, the common law was modified to suit local conditions. Today one can reference a number of different jurisdictions that despite considerable individual differences share the common law as their system of law.

Another major legal system is the civil law family, which “traces its origins to Roman law. Most jurisdictions in Europe and Latin America belong to this family although each is unique. A

¹⁵ Ibid.

¹⁶ Mohamed Shafik, “UAE Construction Law: A UK Perspective on Payment and Liabilities,” LLM Construction Law and Practice, University of Salford, 2010, Retrieved from <http://www.mohamedshafik.com/resources/Dissertation.pdf>, p. 9, August 25, 2015.

¹⁷ David Horigan, “From Abu Dhabi to Singapore: The Rise of International Commercial Courts,” retrieved from http://www.researchgate.net/profile/Damien_Horigan/publication/272647839_From_Abu_Dhabi_to_Singapore_The_Rise_of_International_Commercial_Courts/links/54eae0d0cf2f7aa4d584587.pdf, August 21, 2015.

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number of other jurisdictions have mixed legal systems that combine elements of civil law, the common law, and sometimes additional influences.”¹⁸

In addition to the Common law and Civil law systems, “there are other legal systems such as Islamic law systems.”¹⁹ However, many Muslim nations including various Arab countries actually follow a “mixed system based on aspects of both civil law and Islamic law.”²⁰

Customary law is another source of law in some countries. For example, the Afghan legal system “mixes aspects of civil law, Islamic law, and customary law,”²¹ which is in many ways a lot like the UAE in the continuing application of its engrained customary law. As well, it is important to note that all of these jurisdictions that have these mixes of civil, common, Islamic, or customary law, have the common theme of having English as the language that they conduct their business in.

Construction Law in United Arab Emirates

Notwithstanding the ever-growing importance of the law governing construction in the UAE, no specific body of law that has been dedicated to the issues involved in the construction industry. Articles “872 to 896 of the UAE Federal Law No. 5 of 1985 amended by Federal Law No.1 of 1987 (the ‘Civil Code’) related to construction works. It also related to the general maxims and principles set out in the same law, form the basis of the legal framework relating to construction in the UAE.”²²

In addition, the provision of the UAE Commercial Transactions Law No. 18 of 1993, (the ‘CTL’) would also apply to the extent that the parties to a construction contract can be defined as

¹⁸Ibid, at p. 2.

¹⁹ M. Balala, *Islamic Finance and Law: Theory and Practice in a Globalized World* paperback ed. London: I.B. Tauris, 2015, retrieved from http://www.researchgate.net/publication/272647839_From_Abu_Dhabi_to_Singapore_The_Rise_of_International_Commercial_Courts, August 22, 2015.

²⁰ Ibid.

²¹ Ibid.

²²Ibid, p. at p. 10.

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traders carrying out commercial business in accordance with Articles 6 and 11 of the CTL.”²³ This is a reasonably adequate expectation when considering the nature of commercial contracts and transactions connected therewith.

Finally, there are “Articles 203 to 219 of the Civil Procedure Law of 1992 (the ‘CPL’) which are related to Arbitration and appointment of arbitrators as well as authentication of arbitral awards.”²⁴ This is certainly an area of law that would be utilized on a regular basis when carrying out the particulars of construction contracts, as many times parties to such contracts opt for arbitration of any conflicts that may arise within the course of the contract, to expedite matters as quickly as possible.

In recent years, the UAE construction industry has made impressive progress. The demand for housing, infrastructure and entertainment projects resulted in the existence of mega projects which were complex in nature and of significant value. With this complexity came an “increased demand in the form of reworks, change orders, and site modifications.”²⁵

Concomitantly, there was a demand for reliable contracts capable of allocating the risk among the parties to such a contract, which would normally consist of the designer, the owner, and the contractor. The critical points in such a contract are both at the point of minimization of conflicts and disputes at the level of execution or at the point that these projects are completed.

In the UAE, The International Federation of Consulting Engineers (hereinafter ‘FIDIC’) is the “understood form of contract used to administer construction contracts. Many of the clauses included in construction contracts are directly extracted from FIDIC which most Employers greatly rely on in the UAE. FIDIC acknowledges an additional party to a construction contract, the Engineer.”²⁶ The essential role of an engineer “is to administer the contract impartially

²³ Ibid, at p. 11.

²⁴ Ibid.

²⁵ Nael Maher Zubaida, (May, 2012), “Claims Management and Substantiation in the United Arab Emirates Construction Sector,” The British University in Dubai, retrieved from <http://bspace.buid.ac.ae/bitstream/1234/285/1/110159.pdf>, September 15, 2015.

²⁶ Ibid.

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between the Employer and the Contractor and perhaps the design and supervision of the executed works.”²⁷

Once a particular construction project is awarded to the Contractor through the customary letter of intent and the signed contract, the contractor then has (14) fourteen days to submit his ‘baseline work program’ for the given project. This is considered to be a critical document because it is used subsequently as a baseline from which to measure delay or evaluate delay caused, without consideration for the party responsible. Further, it becomes the basis upon which an action is brought by the contractor or by the employer toward the other, is substantiated.

Once there is a challenge concerning a delay, an investigation is conducted to determine the reasons behind the delay “whereby a comparison is conducted between the impacted program and the baseline to determine the amount of time the contractor might be entitled to.”²⁸

At the initiation and execution phases of the project, the contractor engages in monitoring his progress against the baseline program. Whenever “a delay occurs, the planning department signals an alert to the project manager on the occurrence of the delay. Accordingly, a recovery plan is determined and the baseline is updated if deemed necessary by the Contractor. This is in order to get the approval of the Engineer and the Employer,”²⁹ such that the project can continue as efficient a manner as possible.

Construction claims seem to be almost inevitable in mega construction projects executed within short durations. This is in large part due to the fact that these particular construction projects are overrun on either costs or time, due to a number of possibilities or fault on any one of the parties to such a contract. Some of the possibilities could include “design errors and omissions, delay damages, or numerous change orders, just to name a few.”³⁰

²⁷ Ibid.

²⁸ Ibid, at p. 13.

²⁹ Ibid.

³⁰ Moazzami, M., Dehghan, R., & Ruwanpura, J.Y. (2011), “Contractual Risks in FastTrack Projects,” *Procedia Engineering*, 14 pp.2552-2557, retrieved from <http://www.sciencedirect.com/science/article/pii/S1877705811013981>, September 15, 2015.

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These delays put the Contractor in a position to feel the need to tender claims which are either related to time, cost or both. This is due to the dominance of the Employer as a contract party, who leaves the Contractor with “no other option but to protect his interests by preventing any liquidated damages or penalties imposed by the Employer due to fear or doubt that the delivery of the project within the agreed time frame and budget may not be achieved. Regardless of the resulting impact, a claim will surface and the Contractor will need to substantiate and justify his claim. In most contract forms, the entitlement made by the Contractor is valid if the contractor is able to establish his case with proper support and substantiation.”³¹

Substantiation of claims and management is considered as very essential and fundamental in the construction industry. The more convincing and substantiated the claim, the closer the Contractor is to reaching his target goal by “being guaranteed additional monies or time to cover losses and moreover providing a shield against counter claims or penalties imposed by the Employer.”³²

United Kingdom Construction Law

Introduction

To begin I will consider the body or bodies of law that address the issues surrounding the plethora of construction that takes place on a continuing basis somewhere in the United Kingdom (“hereinafter ‘UK’). To accomplish this it is necessary to consider contract law both procedural and substantive as well as laws that govern the remedies that are available to the parties to a construction contract. It is also necessary to consider various collateral issues to a given construction contract and the bodies of law that govern these. The appropriate starting point is to look at the judicial structure that exists within the UK.

United Kingdom Judicial System

The United Kingdom is a member of the European Union, and as such is a member state of a much larger entity than itself, leaving its position open to interpretation in many regards,

³¹ Supra note 36, at p. 14.

³² Ibid.

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including but certainly not limited to its judicial system. The judicial system of the United Kingdom (hereinafter 'UK') is based in Common law, unlike many of its fellow European Union members.

The union between the countries, nations and regions of the United Kingdom was originally achieved by England through treaty-making with Scotland and by force in Wales and in Ireland. The United Kingdom will still be a unitary state. The whole of that state, and all the parts that comprise it, "will remain-at least ultimately under the jurisdiction of the Parliament of the United Kingdom and through it of Her Majesty's Government in the United Kingdom. Local power, of course, will remain vested in traditional local authorities, and much power has been diffused to Scotland, Wales and Northern Ireland."³³

Types of Courts

The system of Courts that exist within the UK is unique and the European Union (hereinafter 'EU') exemplifies its legalization of everything by "requiring each member state to abide by the entire body of European law and the jurisprudence of the European Court of Justice (hereinafter 'ECJ')."³⁴ A failure to fulfill a legal obligation can lead to a suit in front of the ECJ, and "as of 1993 the failure to obey an ECJ resulted in the imposition of a fine."³⁵

Second, is the continuum of "precision" in that many European rules are unambiguous in defining how states must comply with their respective duties to the EU"³⁶ When there is doubt, the ECJ is there to give a decisive meaning to the rules.

³³ Williams, D. G. T. (1972), "The Constitution of the United Kingdom," *The Cambridge Law Journal*, 31(01), 266-292, p. 105, retrieved from http://0-www.jstor.org.topekalibraries.info/stable/4508532?Search=yes&resultItemClick=true&searchText=United&searchText=Kingdom&searchText=Court&searchText=System&searchText=Power&searchText=Structure&searchText=for&searchText=Construction&searchText=Contracts&searchUri=%2Faction%2FdoBasicResults%3FQuery%3DUnited%2BKingdom%2BCourt%2BSystem%2BPower%2BStructure%2Bfor%2BConstruction%2BContracts%26amp%3Bprq%3DUnited%2BKingdom%2BCourt%2BSystem%2BPower%2BStructure%26amp%3Bgroup%3Dnone%26amp%3Bfc%3Doff%26amp%3Bhp%3D25%26amp%3Bacc%3Don%26amp%3Bwc%3Don%26amp%3Bso%3Drel%26amp%3Bsi%3D51&seq=10#page_scan_tab_contents, August 26, 2015.

³⁴ K. Alter (2000), "The European Union's legal system and domestic policy: spillover or backlash?" *International Organization*, 54(03), 489-518, retrieved from https://scholar.google.com/scholar?start=40&q=court+system+in+the+United+Kingdom&hl=en&as_sdt=0,5, August 29, 2015.

³⁵ The system of sanctions was adopted as part of the Maastricht Treaty on a European Union. For a discussion of the origin and use of this sanction, see Tallberg 1999.

³⁶ *Supra*, note 29.

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Third is the continuum of “delegation” that must be considered. The ECJ is perhaps the most active and influential international legal body in existence, operating as a constitutional court of Europe. The advanced level of legalization in Europe is in part a consequence of the institutional design of the EU. Member states “created the ECJ, authorizing it to hear disputes between states and the EU’s governing institutions; to review challenges to EU laws and Commission decisions; and to review and, if necessary, invalidate EU rules.”³⁷

The states created a “preliminary ruling mechanism (Article 234 EEC) that allows private litigants and national courts to refer cases to the ECJ, so that they too could challenge the validity of EU law and thus hold EU legislative and executive bodies in check.”³⁸

There were two main cases that challenged the functionality of this system. First in the 1963 *Van Gend and Loos* decision, the ECJ declared that “European law can create direct effects in national law creating individual rights that European citizens could utilize in national courts.”³⁹ Shortly thereafter in the *Costa v. Enel* decision, the ECJ “declared that European law usurped national law by creating an obligation for national courts to enforce EU law when confronted with conflicting national law on the same issue.”⁴⁰

Precedent Doctrine

The Doctrine of Precedent is a common law rule that requires that any rulings from a given court will be considered as some level of authority for any subsequent cases of the same or similar nature. This concept is consistent with the English maxim known as “stare decisis (which is Latin for, *to stand by things decided*), in which a previous decision of a court will be binding on the same and lower courts. Thus a decision of Court of Appeal will be binding on the

³⁷ Ibid.

³⁸ Ibid.

³⁹ *Van Gend and Loos v. Nederlandse Administratie Belastingen*, ECJ decision of 26/62 (1963) ECR 1, retrieved from https://scholar.google.com/scholar?start=40&q=court+system+in+the+United+Kingdom&hl=en&as_sdt=0,5, August 30, 2015.

⁴⁰ *Costa v. Ente Nazionale per L’Energia Elettrica (ENEL)* ECJ decision of 6/64 (1964) ECR 583, retrieved from https://scholar.google.com/scholar?start=40&q=court+system+in+the+United+Kingdom&hl=en&as_sdt=0,5, August 30, 2015.

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same court and the Court of First Instance, unless a party is able to prove either the dissimilarity of the two cases, or that the previous case was wrongly decided.”⁴¹

The common law is a system of law that “developed over the course of several centuries largely as a result of the British Empire, English law reached far beyond the British Isles.”⁴² As it spread to various parts of the world, the common law was modified to suit local conditions. Today one can reference a number of different jurisdictions that despite considerable individual differences share the common law as their system of law

The system of Courts or Judiciary in the UK is the “ultimate Sui Genesis form of court system or judicial system.”⁴³ That is, the UK is a unique system of judiciary especially due to its courts that are a model to any other place in the world, including but not limited to the UAE. The uniqueness is brought forth by the fact that it was established under the Scot law which is based on the ancient Roman law. Therefore, there is no single legal system that is apprehended in the UK.

EU law has a wide reach in that if a national policy indirectly affects the free movement of *goods, people, capital, or services*, there might be an EU legal angle of attack. But “EU law contains biases that make it more useful for some issues than for others. EU law creates significant legal rights for its citizens, but these rights are primarily economic citizenship rights directed at obtaining the four freedoms expressed above.”⁴⁴

The ECJ looks at each statute to determine whether or not it creates direct effects, looking first at the specificity of the law, next, at whether the statute is clear and unconditional, and finally, at whether the statute leaves states significant discretion.”⁴⁵ Litigants who are claiming a violation of the regulations of the ECJ are able to invoke these rights directly without any appeal

⁴¹ Supra, note 17.

⁴² Supra, note 18.

⁴³ Kohler-Koch, B., & Eising, R., (1999), “The transformation of governance in the European Union (Vol. 12), Psychology Press, retrieved from https://books.google.com/books?hl=en&lr=&id=BqQxmGT0uToC&oi=fnd&pg=PP1&dq=court+system+in+United+Kingdom&ots=eVe_Bg1U0k&sig=gPeblX-lxBAerC0aZOBffp1RJQ#v=onepage&q&f=false, August 23, 2015.

⁴⁴ Supra, note 30.

⁴⁵ Ibid, at p. 495.

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process. The more specific a given directive is and the greater negligence that exists in its application, the greater the power is for a litigant to challenge the matter in the ECJ.”⁴⁶ Thus, much like several other jurisdictions, the EU requires a specific set of circumstances under which an individual can challenge national policy on a given matter. It is not unreasonable to conclude that a policy concerning the interpretation and application of a LD clause or a delay penalty in a construction contract would be a matter that rises to the level of national policy importance, as it certainly speaks to the bottom line gross domestic product of a nation state.

Although as a rule the ECJ avoids decisions that most probably cause political backlash, if possible, “the greater the clarity of EU legal texts, case precedent, and legal norms in support of a judgment, the less likely the ECJ is to be influenced by the politics of a given matter.”⁴⁷

Recent research shows that, compared to civil law and socialist law countries, common law countries exhibit better protection of investor rights, less aggressive regulation of new entry and labor markets, and more generally higher scores on a variety of measures of security of property rights. Quantitatively, these differences among legal origins are large. Legal origin has proved to be a particularly useful variable for economic analysis, because laws have been transplanted by relatively few colonial powers, leading to systematic variation in the legal rules. Yet despite this evidence, the exact mechanism through which legal origin matters has remained uncertain. Consistent with both history and theory, “judicial independence is empirically strongly associated with common law legal origin, and is itself a strong predictor of some of the same economic freedoms as the common law. This allows us to dig deeper into the micro-foundations of legal origin and to ask whether its influence on economic freedoms is in part through judicial independence.”⁴⁸ In the U.K. the lack of review “derives from the absolute supremacy of Parliament.”⁴⁹

⁴⁶ Ibid

⁴⁷ Garrett, Kelemen, and Schulz 1998, retrieved from https://scholar.google.com/scholar?start=40&q=court+system+in+the+United+Kingdom&hl=en&as_sdt=0,5, August 29, 2015

⁴⁸ LaPorta, R., Lopez-de-Silanes, F., Pop-Eleches, C., & Shleifer, A., (2003), “Judicial checks and balances” (No. w9775), p. 9, National Bureau of Economic Research, retrieved from <http://down.cenet.org.cn/upfile/36/2008425231048131.pdf>, August 22, 2015.

⁴⁹ Ibid.

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CHAPTER TWO

Delay penalties and Liquidated Damages in United Arab Emirates and United Kingdom

Introduction and Definition of Delay Penalties & Liquidated Damages

The limitation of liabilities must also consider the provisions of delay penalties and liquidated damages. The following section provides a general introduction to delay penalties and liquidated damages, and then analyzes the provisions according to how they are implemented and enforced in the UAE and UK.

Delay Penalties

Construction contracts often hold the contractor liable to execute according to an agreed upon timeline. It is vital for many businesses to make investments in new construction with the expressed understanding that the project will be finished according to a specific time. This is important as businesses must budget and plan ahead operationally in order to perpetuate financial health and grow the business. Delay penalties are often included as a contractual term in an effort to hold contractors accountable to a timeline while also providing compensation to the company if the project goes beyond the deadline for completion. Businesses often seek this provision as it limits their operational exposure to losses when the business cannot function as a result of ongoing construction projects. Additionally, this provides a strong incentive for contractors to adhere to a deadline and finish on time.

Liquidated Damages

Liquidated damage provisions are also related to delay penalties, but are typically enforced differently. Liquidated damage provisions are designed to protect the employer from construction delays that would limit operations and revenues; however, this provision specifies exactly the amount paid due to specific circumstances. When the project is not completed on time, this subjects the contractor to compensate the employer for losses that are realized due to inoperability because of the delays. The triggering event for compensation is generally expressed by a delay on behalf of the contractor. For example, a liquidated damages provision can be included to protect the employer from contractor delays by mandating that every day that the project goes over, a specific sum is charged accordingly as a fine. This provides a powerful force that guides the contractor to stay at least on schedule in order to avoid costly per diem charges

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for the overage. It is also important to note that liquidation damages provisions are not always enforceable unless the parties include three primary language provisions. First, the parties must agree to the liquidation terms as expressed in advance. The amount must be agreed and the amount must be included in the contract language specifically. Second, the anticipated damages that occur as a result of the breach of contract must be difficult to prove exactly or hold an element of uncertainty to the exact amount. The amount is agreed in advance largely as a result of difficulty in quantifying the exact losses that will be realized due to the breach. Third, the amount agreed upon must also be defined as reasonable or at least the amount mandated must be proportionate to the anticipated loss absorbed by the employer.⁵⁰

With the uncertainties that can and do exist in the course of a construction project, the terms of a construction contract, especially as pertains to the penalties that are to be imposed in the case of a given type or extent of a delay, are especially important to the parties to such a contract. Further and probably more important is the manner in which such terms will be considered by the current law of a place and the law-imposing entities of a place. Sometimes, but not necessarily always, the parties to such a contract are arguably in the best position to have some specific knowledge concerning the potential delays that may be involved in a given construction project, and by definition, in the best position to anticipate the costs for such delays. With this specific knowledge, these parties to such a contract are in the best position to anticipate what they can and cannot tolerate in terms of delays that may occur in the course of carrying out the construction of a given entity. For this and a number of other reasons, the terms of the construction contract on delay penalties ought to best be left as were hammered out by the parties, unless there is undue unfairness that is a result of unequal power of the parties or some such.⁵¹

When considering a construction contract that is entered into between a citizen of the UAE and a citizen of the UK or a construction contract that has designated the UK as the

⁵⁰ Lal, H. "The Doctrine of Penalties and the " Absurd Paradox": Does it Really Matter in 2003?(" INTERNATIONAL CONSTRUCTION LAW REVIEW 20, no. 4 (2003).

⁵¹ Lal, H. "The Doctrine of Penalties and the " Absurd Paradox": Does it Really Matter in 2003?(" INTERNATIONAL CONSTRUCTION LAW REVIEW 20, no. 4 (2003).

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jurisdiction to handle any litigation stemming from a contract, where at least one party of the contract is a citizen of the UAE, there is an additional layer of consideration that must be addressed. As has already been discussed somewhat hereinabove, the laws in the UAE are based in a fundamental notion that they must not be in contravention of the moral precepts of their religion which is Islam in origin. With particular application to a construction contract is the notion of a Muslim being prohibited from engaging in *riba* which is defined colloquially as “*unacceptable profit*.”⁵² Another equally important prohibition in this setting is that of *gharar* which is considered by a Muslim to be “*an unacceptable level of risk*.”⁵³

Delay Penalties & Liquidated Damages in United Kingdom Law

Liquidated damages is the amount of money that the parties to a construction contract have agreed to pay, or that will be payable, in the event of a breach of the given contract. This money amount is based upon a number of considerations, primarily a result of the experiences of the contracting parties. Since these parties are in the best position to know the particulars of the agreements they are coming to within the contract; then they ought to be in the equally best position to determine what is the most appropriate remedies for the foreseeable eventualities.

Although the UK has struggled with similar issues as the UAE in establishing legislation that adequately addresses the controversial nature of the construction industry, which in today’s economy takes place between parties of two different countries or locales on a regular basis. The UK has “amended its legislation which was encased in Housing Grants Construction and Regeneration Act 1996 (hereinafter the ‘Act’) to the Local Democracy, Economic Development and Construction Act 2009 (hereinafter the ‘New Act’).”⁵⁴ Although this act was passed for the express purpose of making issues pertaining to the construction industry in the UK, smoother

⁵² On *riba* See, e.g., Koran IV: 161; Vogel, F. E., and Hayes, S. L., *Islamic Law and Finance: Religion, Risk and Return*, (Kluwer Law International, 1998), at chapter 4, “Islamic Laws of Usury, Risk, and Property”, especially the section headed “Plumbing the Rules of *Riba*,” 77-87, retrieved from <http://0-www.jstor.org.topekalibraries.info/stable/pdf/27650582.pdf?acceptTC=true>, September 11, 2015.

⁵³ On *gharar* see Koran 11:219 and V:91; Rayner, S. E., *The Theory of Contracts in Islamic Law*, (Graham & Trotman, 1991), chapter 6.7, “*Riba, Gharar*” and especially 72.1, “The definition of *gharar*”; a full account with reference to Malaysia is contained in Buang, A. H., *Studies in Islamic Law of Contracts: The Prohibition of Gharar*, (International Law Book Services, 2000), retrieved from <http://0-www.jstor.org.topekalibraries.info/stable/pdf/27650582.pdf?acceptTC=true>, September 11, 2015.

⁵⁴ Sachin Kerur, February 2010, “Debt Recovery in the UAE” <http://kluwerconstructionblog.com/2010/02/11/debt-recovery-inthe-uae/>, retrieved from <http://www.mohamedshafik.com/resources/Dissertation.pdf>, September 15, 2015.

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and more predictable, that is not the practical result necessarily. Specifically, the New Act now provides that “the National Assembly of Wales and the Scottish Parliament may make orders that misapply the provisions of Part 8 of the new Act, meaning that the possibility exists in the future of varying provisions as to payment matters and adjudication applying in different parts of the UK.”⁵⁵ This option certainly gives a basis for concern that matters would be even more unpredictable in the UK concerning construction contracts. However, just because the option exists does not mean that the parties or the courts will necessarily utilize it. Nevertheless, the drafters of this Act certainly intended for the diversity to be there.

The original Act contained a requirement in Section 107 that all terms of a construction contract be in writing. However as has been the bane of many a construction contract party, the requirement that all things be foreseeable and thus reduced to writing, has been removed from the New Act. This would seem to give a little more wiggle room to the parties to a construction contract in the UK.

The new Act now provides “(section 139(2)) that the parties' construction contract (the definition of which remains unchanged) is to contain written provisions for adjudication that comply with sections 108 (2), (3) and (4) of the 1996 Act – that is addressing the procedure for adjudication, the binding nature of the adjudicator's Decision and the liability of the adjudicator; all of which provisions have not changed.”⁵⁶

Section 141 of the new Act effectively “eliminates the current practice of the inclusion in the parties' construction contract of oppressive terms relating to liability for the costs for the adjudication and costs. Any such term in the contract will be rendered ineffective by this section, except if that term confers discretion upon the adjudicator to decide how his/her charges are to be allocated between the parties. The parties in addition, are allowed to make their own agreements, however, after the Notice of Adjudication is served.”⁵⁷

⁵⁵ Mark Entwistle, (June, 2010), “The Local Democracy, Economic Development and Construction Act 2009,” The Adjudication Society, Major Projects Association, UK, retrieved from <http://www.adjudication.org/local-democracy-economic-development-and-construction-act-2009>, September 14, 2015.

⁵⁶ Ibid.

⁵⁷ Ibid.

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Section 142 of the New Act “rules out the possibility of ‘pay when certified’ clauses, which frees up the payment for work accomplished by a given party, which is certainly more desirable from an economic perspective.”⁵⁸

A new section added to the New Act is found in Section 110B, which makes provision for a situation where there is no notice of payment from the payer, then the payee can serve notice upon the payer, setting out the sum due to be paid. This will allow a payee to take this matter into their own hands, and receive payment in a more expedited fashion hopefully.

Finally, along these same lines the New Act now provides that “a party lawfully suspending its works through not having been properly paid can recover ‘a reasonable amount in respect of costs and expenses’ reasonably incurred in exercising that right. This would undoubtedly include additional construction costs arising from delay or disruption caused by the suspension, but may also include indirect costs, such as administrative or legal costs arising.”⁵⁹

Several cases of construction laws have been heard in the English courts hence helping to remove any controversy in their application. For instance, the case between AMEV-UDC Finance Limited and Austin attracted the following commentary from Wilson JJ and Mason, “The doctrine of penalties has pursued such a tortuous path in the course of its long development that it is a risky enterprise to construct an argument on the basis of the old decisions”⁶⁰. Additionally, the case involving Azimut-Benetti, the judge, Blair J gave substantial emphases on the negotiations reached by the parties before the contract was agreed. As such, the justifications of the shipbuilder were highly prioritized in which he gave the following commentary, ““This was a contract for the construction and sale of a very expensive yacht, aptly described in the evidence as a ‘super-yacht’. Both parties had the benefit of expert representation in the conclusion of the contract. The terms, including the liquidated damages clause, were freely entered into.... in a commercial contract of this kind, what the parties have agreed should

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Bell, M., & Manly, R. J. (January 01, 2012). Liquidated Damages and the Doctrine of Penalties: Rethinking the War on Terrorem. (The International Construction Law Review,29),394

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normally be upheld”⁶¹. Conclusively, he said, ““In the event... the buyer . . . agreed to clause 16.3 as proposed by the builder. In my judgment, the evidence clearly shows that the purpose of the clause was not deterrent and that it was commercially justifiable as providing a balance between the parties upon lawful termination by the builder”⁶²

Delay Penalties & Liquidated Damages under United Arab Emirates Law

With consideration for the fact that liquidated damages (hereinafter ‘LD’) are fundamental to a construction project, in large part due to the fact that many times they involve a considerable amount of money, I will address this aspect of the construction contract first. When considering the issue of LD in the UAE there is a certain amount of vexation that is caused to the parties to construction contracts as well as the legal practitioners that represent them, due to a section of the civil law in the UAE, namely Article 390(2) of the UAE civil code. Not only does this section of law not work to clarify matters in a construction contract LD clause, it in fact has the opposite effect.⁶³ The crux of the complaint concerning this Article of the UAE civil code is that it potentially impinges on the “right of parties to freely contract and the court’s supervisory jurisdiction to limit this right, which is a power drawn directly under the Article.”⁶⁴ The apparent discord that exists within this Article and its application exemplifies the conflict that can exist “between common law principles, which have spilled over and somewhat overflowed into the UAE legal landscape, and the indigenous civil and Shariah law principles which predicate and overarch this particular Article and the UAE Civil Code in general.”⁶⁵

⁶¹ Bell, M., & Manly. Liquidated Damages,399

⁶² Bell, M., & Manly. Liquidated Damages, 399

⁶³ Mohd Marican & Sadique Bin Ibrahim, 2014, “THE EFFECT OF ARTICLE 390(2) OF THE UAE CIVIL CODE ON LIQUIDATED DAMAGES CLAIMS IN THE UAE CONSTRUCTION INDUSTRY.” Construction Law in Dispute Resolution (CLDR), retrieved from <http://bpace.buid.ac.ae/bitstream/1234/643/1/110075.pdf>, September 2, 2015.

⁶⁴ Ibid.

⁶⁵ Ibid.

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First it is important to understand that the common law legal position concerning LD is that “claims for LD which represent a genuine pre-estimate of damages are recoverable.”⁶⁶ On the other hand if the “amount of the LD is found as a matter of fact to be in excess by the courts, it is considered to be a penalty and is not recoverable.”⁶⁷

There are several reasons the use of LD clauses in construction contracts are preferred. First, it allows for administrative convenience, because it is not necessary to take the time and go to the expense to litigate the specifics contained within a LD clause. If litigation does take place, then the burden is upon the party challenging it to show good cause for venturing outside the confines of this agreement, requiring a showing that the terms are tantamount to a penalty. Second, the LD clause protects the contractor such that they are able to project the most it would cost in the event of a full application of the LD clause. Third, a LD clause can function as a “deterrent to the contractor to not delay in completing a given project or as an incentive to complete a project within a given time frame under given circumstances, and make a greater profit as a result.”⁶⁸ Finally, along this same line LD clauses ensure a certain degree of certainty concerning the project and eliminate the need to litigate.

However in UAE courts the application of this dreaded Article 390 of their Civil Code can eliminate all of the benefits intended in engaging in LD clauses in the first place. In pertinent part Article 390 sets out:

“(1) The contracting parties have the freedom to fix the amount of compensation in advance, by making particular provision for this in the contract or in an applicable later agreement, as allowed by the given law of a place and,
(2)The judge has the power if application is made by any party, to modify an agreement of this nature to make compensation

⁶⁶ Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd [1915] AC 79 CA, 86-88, retrieved from [⁶⁷ Supra, note 47, at p. 12.](https://books.google.com/books?id=FZY3AAAAQBAJ&pg=PA414&lpq=PA414&dq=Dunlop+Pneumatic+Tyre+Co+Ltd+v+New+Garage+%26+Motor+Co+Ltd+%5B1915%5D+AC+79+CA,+86-88&source=bl&ots=qh9UdyF7kI&sig=gVQws4jCjzAy_lfY-a0YKvMtbns&hl=en&sa=X&ved=0CCsQ6AEwBGoVChMIzajMxoLfxwIVCdGACH2qAAhg#v=onepage&q=Dunlop%20Pneumatic%20Tyre%20Co%20Ltd%20v%20New%20Garage%20%26%20Motor%20Co%20Ltd%20%5B1915%5D%20AC%2079%20CA%2C%2086-88&f=false, September 2, 2015.</p>
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⁶⁸ Ibid, at p. 13.

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meet the loss in a given matter, and any contrary agreement is considered to be void.”⁶⁹

Official Commentary on the Civil Code states:

“Entitlement to compensation is a prerequisite for the application of this Article and if compensation is not payable, then the provisions of this Article do not come into operation. If compensation is due and payable and the amount determined by the parties is compatible with the damage sustained, then well and good. However, if it is more or less, then the judge may reduce or increase the figure upon the request of either party, as it is a jurisprudential requirement that the amount of compensation should be equivalent to the actual damage sustained.”⁷⁰

When applying this Article the UAE in essence puts the onus on the employer, once the contracting party has challenged the legitimacy of the LD clause, to come forward with proof that the given costs were as has been agreed to within the LD clause. This Article is not only a basic rule of jurisprudence but a rule of practice. Once a contractor objects to the amount, although he had assented to it before within the LD clause, “the court is entitled to look at the LD claim and decide whether losses equivalent to the LD were actually suffered and not merely claimed.”⁷¹ This is perfectly consistent with its sister provision - Article 292 of the Civil Code. Article 292 states that:

“In all cases the compensation shall be assessed on the basis of the amount of harm suffered by the victim, together with loss of profit, provided that that is a natural result of the harmful act.”⁷²

⁶⁹ Ibid, at pp. 13-14.

⁷⁰ James Whelan, UAE Civil Code and Ministry of Justice Commentary (Thomson Reuters, 2010) retrieved from http://www.iflr.com/pdfs/me_guide_2011_inbound.pdf, September 3, 2015.

⁷¹ Supra, note 47, at p. 19.

⁷² Ibid.

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Clearly it is important to understand the extent to which this Article applies and the specifics pertaining to this are that it:

- (1) Allows for damages to be both decreased or increased in fit and proper cases, as the case may be; and
- (2) Only applies for consideration if actual damages are incurred and the obligation to pay has arisen, but does **not** apply to:
 - (3) Post breach agreed compensation;
 - (4) when the agreement has lapsed or been terminated; and
 - (5) claims under tort.

With the uncertainties that can and do exist in the course of a construction project, the terms of a construction contract, especially as pertains to the penalties that are to be imposed in the case of a given type or extent of a delay, are especially important to the parties to such a contract. Further and probably more important is the manner in which such terms will be considered by the current law of a place and the law-imposing entities of a place. Sometimes, but not necessarily always, the parties to such a contract are arguably in the best position to have some specific knowledge concerning the potential delays that may be involved in a given construction project, and by definition, in the best position to anticipate the costs for such delays. With this specific knowledge, these parties to such a contract are in the best position to anticipate what they can and cannot tolerate in terms of delays that may occur in the course of carrying out the construction of a given entity. For this and a number of other reasons, the terms of the construction contract on delay penalties ought to best be left as were hammered out by the parties, unless there is undue unfairness that is a result of unequal power of the parties or some such.

Thus, it appears that there is some reasonable limit to the power that the court in UAE has when undoing or redoing the particulars that may have been set out in a LD clause. One disconcerting factor that needs to be noted is that unlike other jurisdictions in this region of the

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world, the UAE with its overarching rules of Shariah is specific in giving or conferring upon the judge the full freedom to adjust the amount of damages under the parties' agreement.

Thus, it appears that there is some reasonable limit to the power that the court in UAE has when undoing or redoing the particulars that may have been set out in a LD clause.

It has been observed that this judicial power to increase the LD “does damage to one of the most important advantages of having an LD clause in the first place which is the protection of the contractor against unliquidated damages.”⁷³

It is instructive to look at commercial law decisions made by the UAE Federal and the Dubai Courts of Cassation (the highest courts of appeal) which does not necessarily constitute binding precedent in the UAE. However, we will find that the Court of Cassation decisions are very persuasive before the lower Courts and in practice are quite likely to be followed if they are on point in a given case. The English courts also uphold the rationale for the various clauses relating to liquidated damages in construction contracts. As such, construction agreements especially the ones related to project finance involve clauses that tend to give one of the parties the option of terminating some payments in case the project was not altered by the breach of a contract. In this regard, the doctrine of penalties is not applied in the clause as ascertained in the case involving Export Credits Guarantee Department Ltd and the Universal Oil Products Company⁷⁴. In the case, the House of Lords resolved that the doctrine of penalties was not applicable since there was no breach of the contract. Additionally, despite the clauses associated with the LDs, courts in the UK have been very particular in determining the credibility of the construction cases with regard to the agreements reached by the parties. This helps in overcoming probable uncertainties that may engulf construction contracts⁷⁵.

Another case in particular a Dubai Court of Cassation found that an “arbitral award issued in London was enforceable because (i) it did not contradict UAE public policy or any previous

⁷³ James Mullen, “Liquidated damages under UAE and UK law: A Comparison”, Fenwick & Elliott Annual Review, 2013-2014, retrieved from <http://www.fenwickelliott.com/research-insight/annualreview/2013/liquidated-damages-uae-uk-law-comparison?> September 5, 2015.

⁷⁴ Lal, H. "The Doctrine of Penalties and the " Absurd Paradox": Does it Really Matter in 2003?(" INTERNATIONAL CONSTRUCTION LAW REVIEW 20, no. 4 (2003).505

⁷⁵ Bell, M., & Manly, R. J. (January 01, 2012). Liquidated Damages and the Doctrine of Penalties: Rethinking the War on Terrorem.(The International Construction Law Review,29),. 386

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judgment, despite the fact there was no precedent, (ii) it was made pursuant to an agreement between the parties, (iii) it was signed by the arbitrator, and (iv) both parties' arguments were given due consideration. However, the Court held that UAE Courts had no jurisdiction to look at the merits of the case or to deliver a further judgment with regard to costs and interest. Hence, the Court held its role would be limited to enforcing only the principal amount of the award and not any collateral costs involved therein.”⁷⁶ So it would appear that the UAE courts are willing and able to impose restraint upon their judgments of this nature, notwithstanding the power to do otherwise.

Delay and numerous causes therefore, are a consistent issue in construction contracts everywhere, but maybe more especially in the UAE. For this reason, most every adequately prepared construction contract should and does include a “no damage for delay” clause. Such a clause normally contains language such that it is waiving the rights of the subcontractors to recovery from the employer for damages sustained as a result of the owner causing the subcontractor’s work to be stopped or delayed, when the architect deems it necessary.⁷⁷

Construction delay in the UAE is not limited to just the construction industry in that it has an impact on the overriding economy of a country situated like the UAE. This is true because of the major role that construction has played, in that “it has contributed 14% to the Gross Domestic Product (hereinafter ‘GDP’) of the UAE.”⁷⁸ When you add to this fact, the reality that construction delay is considered one of the most recurring problems in the construction industry, it becomes apparent that to mitigate construction delays is a wise objective in the UAE today. Specifically, delays can impact the bottom line of a construction project due to the time extensions required, the additional costs incurred, the quality of the construction, and the safety

⁷⁶ Richard Price & Essam Tamimi, 1999, “United Arab Emirates Court of Cassation Judgments 1989-1997, Arab Law Quarterly, Vol. 14, No. 2, pp. 188-189, retrieved from <http://0-www.jstor.org.topekalibraries.info/stable/pdf/3382005.pdf>, September 5, 2015.

⁷⁷ Nelse Mortensen v. Group Health, 566 P.2d 560, 17 Wash. App. 703 (Ct. App. 1977), retrieve from https://scholar.google.com/scholar_case?case=1005256472386050580&q=Nelse+Mortensen+%26+Company+v.+Group+Health+Coop.&hl=en&as_sdt=2006, September 5, 2015.

⁷⁸ Arshi Shakeel Faridia & Sameh Monir El-Sayegh, (2006), “Significant factors causing delay in the UAE construction industry,” Construction Management and Economics, 24:11, pp. 1167-1176, retrieved from <http://www.tandfonline.com/doi/abs/10.1080/01446190600827033>, September 13, 2015.

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of the individuals carrying out the construction project. As much as “50% of the construction projects in the UAE encounter some form of delay during the contract period.”⁷⁹

Delay Penalties & Liquidated Damages Application

Next we will discuss the various uncustomary liabilities that “constitute a unique feature of UAE law when compared to UK law.”⁸⁰ The main focus will be on liabilities that are not present in common law such as the acceptance of penalty clauses and their uncertainty. In looking at these uncustomary liabilities we will use the English Common Law as the benchmark to measure them.

Commercial Reasons for Liquidated Damages Clauses

The underlying clauses that relate to liquidated damages have significant commercial implications especially to the parties involved. For instance, the clauses are essential in safeguarding the innocent party against probable breach by the construction firm. As such, the innocent party is entitled some compensation packages by the courts of law thereby overcoming probable losses that may come about as a result of delay and subsequently the failure of the other party to respect and adhere to the terms of the contract. The materiality of this endeavor is based on the fact that the courts have the ability to ascertain and uphold the conditions of the underlying construction contract in a bid to safeguard the involved parties against any uncertainties that may arise while defending the policy of minimal interference. English courts have been very attentive and vigilant in ascertaining this endeavor since they uphold the assumption that all the parties had freely agreed to enter into a contract and that the imposition of strict measures and standards would lead to undesirable uncertainty thereby undermining the core aim of the commercial contracts. Additionally, the clauses seek to overturn the counter-intuitive aspect of the contract laws to enforce the performance of the contracting parties especially by reducing potential risks and thereby bringing forth desirable and better outcomes. In this regard, risk-sharing terms are upheld leading to mutual benefits between the parties.

⁷⁹ Ibid.

⁸⁰ Supra, note 23, at p. 13.

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Overly, liquidated damages act as a risk mitigation measure to the parties that take part in the construction industry⁸¹.

The clauses are also important in overcoming exigencies in court as well as in the arbitration processes. As such, the contracting firms are made aware of the terms and conditions of their engagements thereby overcoming probable delays and hesitations in the construction works. These delays have adverse effects on the commercial purpose of the project since they lengthen the anticipated payback periods and also make the firms incur unplanned extra costs due to underlying forces of demand and supply. Additionally, the clauses help in overcoming and avoiding additional costs that may be incurred in the court processes that may further prompt some delays in the project. Thirdly, they help in upholding certainty at the commencement of the construction projects. This is achieved by their ability to clarify potential liabilities to those doing the work. Additionally, they help those being worked for to assess their ability to recover incases of uncertainty and risks. As such, the liquidated damages provide a limitation on the claimant's right of recovery and the amount of compensation he or she is entitled to according to the contractual mechanisms and the terms of service. LD commercial clauses are essential in drafting the risk matrix⁸² in construction contracts thereby placing minimum restrictions in the enforcement of the legal decisions regarding the decision of the concerned parties.

LD Clauses in Construction Contracts

Liquidated damages clauses are essential in ensuring that the injured party is compensated fairly in case of a breach of the construction contract. As such, both parties are bound by the law to honor and adhere to the terms and conditions of the contract by abiding by the numerous clauses that define the whole process. The clauses are aimed at streamlining the process and bring about the anticipated levels of success in the contract. The clauses are determined by the common law that governs the people in the society. For instance, the penal

⁸¹ Bell, M., & Manly, R. J. (January 01, 2012). Liquidated Damages and the Doctrine of Penalties: Rethinking the War on Terrorem. (*The International Construction Law Review*,29),386-405.

⁸² Bell, M., & Manly, R. J. (January 01, 2012). Liquidated Damages and the Doctrine of Penalties: Rethinking the War on Terrorem. *The International Construction Law Review*,29, 405.

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clause ascertains that the main aim of its enforcement is to pay for the damage inflicted on one party by the other and not to punish him or her in the case of a breach of the underlying contract. In this case, the penal damages of the clause are distinguished from the punitive damages in that it is upheld as a way of compensating the party whose terms have not been met and not to punish the wrongdoer⁸³. This clause is upheld due to the uncertain nature of the construction contracts thereby increasing the risks of damages and other related vices. Therefore, the court is required to determine the terms of the construction contracts to ascertain the case of breach and whether the penalty is oppressive, fair or whether it had equal footing.

The second example of LD clauses is defined as ‘operative’. In this case, the clause becomes effective when there is a valid extension of time to the contracting parties. The effectiveness of this clause is valid in cases whereby an unusual happening takes place and delays the construction work. As such, the employer will end up extending the time frame for the project but will claim some compensation from the contractor⁸⁴. This compensation is allowed if and only if the contractor was liable for the eventuality and consequently the delay in the construction process. A practical example of this clause is evident in the case of Surry Health BC and Lovell Construction Limited in which the latter failed to honor the agreed time for completion of the assigned contract. In this case, Surry Health BC⁸⁵ claimed that the severe fire that delayed the completion of the project was due to the negligence of the contractor. With such, Surry Health BC demanded some compensation as a result of the delay and the losses incurred by the same. An inoperative LD clause is the one in which the employer breaches the construction contract thereby his ability to claim unliquidated rather than liquidated damages. This provision is upheld by the courts in cases whereby the fluctuation clauses are incorporated in the contract.

⁸³ J. R. Murdoch and Will Hughes, *Construction Contracts Law and Management* (Princeton, N.J.: Recording for the Blind & Dyslexic, 2006), 303.

⁸⁴ Murdoch and Hughes, *Construction contracts*, 304.

⁸⁵ Murdoch and Hughes, *Construction contracts*, 303

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Permitted LD and Penalty Clauses

Liquidated damage clauses are geared towards estimating the underlying damages in cases where the contracting parties breach the terms of their engagements. On the other hand, penalty clauses come about as a result of disproportion of the liquidated clauses. LD are clauses that are enforced by the court when it ascertains the damages incurred as a result of the breach of the construction contract. The enforcement is also triggered by the fact that the courts are not in a position to estimate the cost and harm caused by the breach. On the contrary, the penalty clauses are void with limited recovery options. Huge differences between these clauses are evident especially in terms of the underlying elements, estimations and the jurisdictions in the court system. English courts, as well as those in the United Arab Emirates, have similar characterizations and processes in handling permitted liquidated damages and penalty clauses.

The major differences between these clauses are dictated by the underlying elements of uncertainty and the reasonability of the damages incurred. For instance, if the harm caused by the contract breach is uncertain in terms of calculations, then the liquidated damage clause is enforceable. The ability of the court to calculate and ascertain the actual cost of the breach will render the damage unenforceable. On the contrary, the clause is referred to as a penalty if it is unforeseeable in the sense that the liquidated damages are reasonable relative to the anticipated levels of harm or damage⁸⁶.

The second difference between the two clauses is the motive behind their execution and practice. As such, liquidated damages are offered to the injured party in terms of a fixed amount due to the breach of the contract by the other partner. In this case, the clause acts as a mere compensation for the losses and delay incurred. On the other hand penalty clauses involve the provision of a fixed amount of money as a penalty and not a compensation thereby acting as a punishment to the wrongdoer. The other difference that exists between the two clauses is the manner in which they are treated in various judicial jurisdictions.

There exist huge disparities in the two clauses of both the common and civil laws. The two legal systems have distinct ways of dealing and handling cases that involve liquidated

⁸⁶ Reedsmit, "The Critical Path".(2008), Retrieved from <http://www.reedsmit.com/files/Publication/e5e3e826-020f-4c4d-b5b1-ab1a8b50530f/Presentation/PublicationAttachment/085e07b6-e8f9-402c-b980-cc660a4956d2/0804crit.pdf>

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damages and penalty clauses. For instance, the English case of 1915 between Dunlop Pneumatic Tyre Company Limited and New Garage and Motor Company was ruled under the common law approach in which the court enforced the provision of liquidated damages because it was difficult to estimate and determine the damages as a result of the contract breach⁸⁷. The decision made by the court would be later borrowed by most of the countries that uphold the principles of the common law such as England and Ireland. On the other hand, the civil law approach upholds both the liquidated damages clauses and the penalty clauses. However, the civil approach tends to put more weight on the penalty clauses because they aim at punishing the wrong-doer by subjecting him or her to a fixed fine in a bid to offer compensation to the employer. It is significantly important noting that most of the penalty clauses have been applied in Europe for a long time since the Roman law. As such, the courts felt that a punishment was always essential in case one of the parties violated the terms and conditions of a construction contract. As such, some of the European nations consider both clauses while some tend to incline on one. Therefore, it would be of paramount significance that the construction companies review the contraction templates and practices so as to adhere and familiarize with the underlying laws and clauses. For instance, most of the countries that use common law have similar policies regarding liquidated damages and, therefore, do not perceive them as penalty clauses. On the contrary, the applicability of these clauses is extremely difficult in international marketing due to the underlying differences in the legal systems and jurisdictions.

Examination of LD clauses and penalties under the English legal systems and the UAE

Generally, Liquidated Damages causes are considered ancillary contractual obligations. In other words, as stated herein, Liquidated Damages will not occur unless there is an obligation to pay damages. Liquidated damages bring out two distinct obligations. On one hand, the contractor's obligation to complete the work within a specified time and secondly payment of

⁸⁷ Saloua Hoeve-Ouchan and Giorgio De Rosa (July, 22, 2013), "Liquidated damages and penalty clauses: a common law and civil law perspective". Retrived from <http://www.internationallawoffice.com/Newsletters/Company-Commercial/Singapore/VoskampLawyers/Liquidated-damages-and-penalty-clauses-a-common-law-and-civil-law-perspective>

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liquidated damages if the contractor is in breach of the primary duty. Manly and Bell⁸⁸ begin their thesis on the premise that the law shall enforce the terms of the agreement as long as the Liquidated damages are sufficiently expressed between the parties. In common law, parties are in anticipation with maximal certainty that upon the breach of a contract, they will benefit from the remedial consequences provided for in the agreement. Citing Lord Woolf, Manly shows that the common law has to be careful not to "set too stringent a standard and bear in mind that what the parties have agreed should normally be upheld"[Lord Woolf as quoted by Manly]. In doing so, the courts avoid uncertainties in commercial contracts. Manly observes that the purpose of the LD is to acts as a deterrent to discourage the breach of the contract.

The sole aim of the creation as the essay reiterates, of the LD in a contract is to have certainty among the parties. Hamish Lal⁸⁹ addressing penalties reasons that a provision calling for the payment of money by a party at the occurrence of an event as opposed to the breach of a contract cannot be referred to as a penalty. To support his argument, Lal relies on Lord Denning's observation in the *Export Credits Guarantee Department Ltd V. Universal oil Products Co.* Here, the learned judge held that the doctrine of penalties could not be equated to sums stipulated to be paid for breach of contract.

However, Lal observes there are instances where the developer may argue that the provision of rent-free periods is an enforceable penalty. The argument rests on the presumption that the unenforceable penalty does not necessarily indicate a genuine "pre-estimate of the perspective's tenant's loss. Where the target days are days apart, then the graduation of the payment of rent-free days can be viewed as penal." Lal observes there are two underlying arguments that make it difficult to determine the correct position of the LD. Lal observes there is no case law that addresses the different positions. Further, Lal observes that it is difficult to judge who is correct between the developer who says that specified events (that contractual obligations

⁸⁸ Bell, M., & Manly, R. J. (January 01, 2012). Liquidated Damages and the Doctrine of Penalties: Rethinking the War on Terrorem. *The International Construction Law Review*, 29, 386-405.

⁸⁹ Lal, H. (January 01, 2003). The Doctrine of Penalties and the "Absurd Paradox": Does it Really Matter in 2003?. *The International Construction Law Review*, 20, 505-516.

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are void in his/her ability to prevent them) are sufficient to exclude the principles, and the tenant who would argue that payment solely occurs as a result of an occurrence of a certain event as opposed to contractual obligations.

Thompson observes that it is the duty of the court to determine (using the wordings) whether the particular scenario qualifies to be a penalty or Liquidated damages. Lord Dunedin observed that the question of construction should be judged as at the time of making the contract as opposed to the time of the breach. Thompson⁹⁰ accords with Lal, Nell and Manly that there exist problematic areas in LDs. Thompson notes four areas are problematic. On his first ground, Thompson, presuming a valid contract exist questions whether there exists an opening for the employer to prove that his loss was greater and therefore be entitled to general damages. Thompson also questions the meaning of "genuine covenanted pre-estimate of damage" by arguing that sometimes it is difficult to predict financial consequences of the failure to complete in time. Further, Thompson questions what happens if late completion happens to be a cost saving event as opposed to a loss. The standard of proving whether the provision is either true liquidated damages or a penalty is ambiguous. Finally, Thompson questions what happens to the right to recover damages in the event where the provision is held to be a penalty.

In the English system, the law is of the presumption that liquidated damages benefit both parties. The reasoning is that the injured party is entitled to a remedy while the other party "has the comfort of knowing that his liability is limited" In the English system according to Thompson, the onus of showing that a certain stipulation is a 'penalty clause' lies with the party sued upon it. This was established in the case of *Robophone Facilities v Blank*.

Bell and Manly on the other hand acknowledge that in cases where the completion date is put into jeopardy, the possibility of the daily rate accruing to an aggregate substantial amount is real. The test to be applied in determining whether the provision is either a Liquidated Damage or a penalty is uncertain. For instance, in the *Clydebank Engineering & Shipbuilding Co v Don*

⁹⁰ Thompson T. (2006) Construction Law Journal A fresh look at liquidated damages

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Jose Ramos where the provision read "The penalty for later delivery shall be at the rate of £500 per vessel per week was interpreted to be liquidated damages.

Both the law of equity and precedents guide the position in common law. Under the law of equity, Lal observes that a court will be of the view that where a clause "provides for the payment of a sum on the happening of a specified event other than a breach of contract is not a penalty and equity has no role in granting relief." Manly and Bell claim that the doctrine of penalties is perhaps the most common ground LDs are challenged. Blair J, note that the "law on penalties is well settled"[Manly and Bell] However, Manly and Bell claim that commentators have long argued that the doctrine presented is in a "confused and contradictory state" In the English courts, the doctrine [of penalties] is thought to have sprang as a result of general prohibition seated within canon law. In *La v. Redditch Local Board* the court was of the view that the distinction between penalties and liquidated damages rests on the intention of the parties. Bell and Manly observe that in the English courts, courts often give divergent outcomes when faced with the same facts resulting to inconsistent precedents. The dilemma the courts face is fuelled by the court's interest to promote freedom of contract and on the other hand an objective reasoning as opposed to a look at the party's intention.

Jenkins and Gates⁹¹ observe that LDs are treated differently across the Gulf region. In comparison with the English common law system, the position of the civil law in the Middle East is also different. As discussed above, the English law courts often are reluctant to look beyond the contractual positions. Different civil codes across the Gulf enable the courts to review the party's contract. In fundamental nature, the provision of this enables the courts to adjust delay damages, enabling the principles of actual loss and fairness. In other words, the codes enable UAE courts to exercise discretionary power to intervene and vary the agreement of the parties considering their pre-agreed amounts.

According to Bell and Manly, In the English courts, there is no "middle ground" and the claimant is either entitled to "the entirety of the LDs amount calculated by reference to the

⁹¹ Liquidated Damages in the UAE, Qatar, and Saudi Arabia | K&L Construction Law Blog. (2015). Retrieved January 31, 2016, from <http://www.klconstructionlawblog./2015/07/articles/articles-and-publications/liquidated-damages-in-the-uae-qatar-and-saudi-arabia/>

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contractual mechanism or left to prove its legally recoverable actual loss [...].” In the UAE, the claimant has the onus to establish that the agreed amount should be varied either upwards or downwards. However, the courts will rarely increase the claimed amount. Also, unlike the English common legal system where the decision by the higher courts are binding to the lower courts through the doctrine of Stare Decisis, the decisions of the courts of UAE have a persuasive effect. Court rulings (the Dubai court of Appeal) have ruled that the LDs are ancillary contractual obligations and as so, will not be enforced unless a primary obligation has been established. In the event where the primary obligation is terminated, then the LD clause is disregarded as well.

According to the International Comparison of liabilities indemnities and liquidated damages, exceptional clauses are not definitively relied upon in UAE .Jenkins and Gates observe that 'The contractual standard' is contained in Clause 8.7 of FIDIC or simply referred to as 'Red and Yellow Book'. The clause permits delay damages in express terms. "If the contractor fails to comply with Sub-clause 8.2[on time completion], the contractor shall subject to Sub-clause 2.5 [on Employers entitlements] pay delay damages to the Employer for this default. [...] the total amount shall not exceed the maximum amount of delay damages.” The parties however reserve the discretion to agree the levels of damages. This opens the possibility of the parties (both the contractor and the employer) to recover costs accordingly. In the formulation of the clause, the intention of the drafters foresaw the possibility of having the employer recover damages without proving the actual loss and the contractor to ask his/her price accordingly.

As aforementioned, each gulf country applies different standards. The UAE has a similar position as that of Qatar. The only dissimilarity is that in UAE, the levels of LDs can be increased or decreased by the courts. Under article 390(cited above), of the UAE's Civil Code, the courts have the discretion to vary the parties' agreement to reflect the actual loss. In the Dubai Court of Cassation (Dubai Court of Cassation in Appeal 222/2005 Judgement 19th June 2006), the learned judges in quintessence held that compensation must be equal to the actual damage. "[...] the judge may in all cases when requested by any party amend such agreement to the effect of making the compensation equal to the actual damage; any agreement to the contrary is null and void."

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Article 2 of the UAE commercial code stipulates that parties may specify in advance the amount of compensation. Parties are also at the discretion to agree on other contractual terms provided they are consistent with the law. To award damages, the courts must be satisfied that the following conditions are present. In other words, the test to be applied is based on three conditions, which are; whether the fault is on the part of the party who agreed to pay the pre-agreed LD, whether there was any loss on the party invoking the pre-agreed LD and lastly if there is causation between the fault and the damages. The court examines the conditions that give rise to the LD claim to establish whether compensation is awardable. After applying the test, the claimant must then prove that indeed elements of damage exist.

The element of default cannot be applied in isolation and as such, the court must apply the elements of damage. Unlike to the English court system where the burden rests with the claimant, in this particular case the burden rests with the challenging party. (Union Supreme Court, 412/2009, 27 Jan 2010) However, a certain (specific) standard of proof is void in the UAE legal system. Generally, there exist three standards of proofs, which are; A prima facie case, balance of probabilities and preponderance of evidence. The court has the discretion to decide the standard of proof to use. As discussed, once a claimant has proved the existence of the LD clause, the onus then shifts to the party that is challenging the LD. However, while the claimant is disputing the challenge, the standard of proof cannot be lower than that of the respondent.

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CHAPTER THREE: LIMITATION OF LIABILITIES

Introduction

Project managers are often challenged with planning all the nuanced details of very large and expensive projects. Additionally, managing all the risks associated with large projects can be extremely challenging, especially considering the risks associated with costly litigation. It therefore behooves project leaders to consider mitigation strategies such as implementing limitation of liability provisions into contractual agreements. The following sections outline the general provisions of limitation of liability clauses, how limitation of liability clauses interact with delay penalties liquidated damages, and specifically analyzes limitation of liabilities as they are commonly enacted and enforced within the UAE and the UK.

As the name suggests, a limitation of liability is a legal provision that provides a limit for the amount of losses that can be incurred by a contractual party in terms of any future litigation dispute. Construction contracts are often very large undertakings due to the sheer volume of activity and financial investment among two or more participant parties. Any limitation of liability clauses will be a single dimension of the overarching contractual agreement for construction projects. This section will typically specify the exact damages that one party will have to pay the second party under the terms expressed as conditions in the stipulated, and agreed upon, contract. In general legal context, a liability is a responsibility to provide compensation for a failure to execute a portion of the contract as an agreed stipulation of performance. Limitation of liability clauses specify the compensation for noncompliance with contractual agreements in advance due to the risks associated with complex construction projects. This results in limitation of liability clauses being commonplace among contractual parties in the vast majority of the developed world.

Limitation of Liabilities in United Arab Emirates & United Kingdom Law (In General)

Limitation of Liabilities in United Arab Emirates

There are many considerations to make when considering business practices in the UAE in terms of limitation of liabilities. It is also common for contractual agreements in the UAE to contain provisions that specify limitations of liabilities (Garcha, 2013). The UAE has drawn

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international criticism for its treatment of contractors under the provisions of its limitation of liabilities law. According to Garcha (2013) “Many standard form contracts contain provisions limiting the overall liability of the contractor, upon which a contractor unfamiliar with UAE law may place mistaken reliance.”⁹² This assertion is largely driven by the conflict between the legal enforcement practices and expressed written expectation for handling limitation of liability clauses in the UAE. In short, the enforcement practices do not match the legal provisions. The FIDIC Red Book is commonly used throughout the Middle Eastern region and contains numerous limitations on liability. For example, the FIDIC Red Book (1999) states in clause 17.6 that “The total liability of the Contractor to the Employer, under or in connection with the Contract other than under Sub- Clause 4.19 [Electricity, Water and Gas], Sub-Clause 4.20 [Employer's Equipment and Free-Issue Materials], Sub-Clause 17.1 [Indemnities] and Sub-Clause 17.5 [Intellectual and Industrial Property Rights] shall not exceed the sum stated in the Particular Conditions or (if a sum is not so stated) the Accepted Contract Amount. This Sub-Clause shall not limit liability in any case of fraud, deliberate default or reckless misconduct by the defaulting Party.” The language of this provision is clear and understandable; however, it must be noted that the overall liability of any contractor is limited subject to a very small volume of exclusions. In short, the total liability of the contractor is restricted, and many contractors will engage in construction contracts with the understanding that their overall exposure to risk is capped. However, there are other considerations in the UAE that perpetuate a climate defined as contradictory to the provisions of the FIDIC Red Book.

Decennial liability is one of the most important elements to consider strategically when engaged in a construction contract in the UAE with a limited liability clause. The Law of Civil Transaction established the vital statutory elements to the rule that the contractual parties are free to agree to limit their liability. Article 880 is one of the most important of the elements of this provision that establishes the architect, or supervising engineer and the contractor are partners in jointly accepting, and severally liable, for a term of ten years from the project completion. This term is also reduced in the event that the project or property is reconstructed, improved

⁹² Garcha J (November 14, 2013) “United Arab Emirates: Limitations On Liability In The UAE - Beware!” Retrieved from <http://www.mondaq.com/x/272284/Building+Construction/Limitations+On+Liability+In+The+UAE+Beware>

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significantly, or demolished prior to the expiration of the ten years. This term is commonly coined in the field as “decennial liability.” Decennial liability is a unique feature of the UAE’s limitation of liabilities terms as it is considered to be a very strict form of a no fault liability provision. This causes an operational environment in the UAE defined as having no expressed requirement to establish fault among parties; rather, it merely asks for a demonstration that the conditions that gave rise to any liability were caused. This is a mandatory provision supported by UAE law, and this means that the provision cannot be limited contractually or excluded by the contractual parties. The Civil Code’s Article 882 provides the terms that “any agreement tending to exclude or limit the decennial liability of the architect and the contractor shall be void.” This results in an agreement and legal framework that holds the architect and contractor to the highest threshold of liability standard as the law mandates that they be held liable without the ability to remove that liability through contractual language. The other important provisions as outlined in Article 880 are summarized in the following paragraphs:

First, decennial liability is correlated with the partial or total demolition of a project or building that has a defect that has been defined as providing a threat to the safety or stability of the structure. This statute of decennial liability therefore only relates to significant structural defects, and was never intended to extend beyond that scope to include minor defects in the completion of the construction project. As such, those defects considered under the language to be minor fall under the provisions of defect corrections, which typically involved minor defect liability periods with limitations of that liability expressed in the contractual agreement under the provisions of minor structural issues.

Second, the terms of decennial liability does apply when the structural defect is a result of the ground by which the project was built. The basis for this provision has been argued due to the lack of expertise among one of the contractual parties. The contractor is held by this standard as the expert with specialist knowledge of the ground upon which any structure is built. As such, this provision shifts the risk associated with liability to the contractor in the agreement as understanding about ground conditions and how they will impact the future structure on that land. The contractor is therefore required to satisfy the project success in terms of ground conditions that define the location of the project.

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Third, the architect is held to a high level of liability assumption in this standard because they are held to joint responsibility with the contractor in terms of the project completion and prevention of defects. The rationale for this provision is that the architect and contractor must assume responsibility together for any major structure defects as the stakeholders with a supervisory role. In circumstances by which the architect and contractor are to be held jointly liable, the employer is able to make a claim against the contractor, the architect, or both, and either party cannot argue or have a viable defense for why any fault was not actually their own.

The duty to supervise is held to a very high standard in terms of liability under the Article 880 in the UAE. The only notable exemption is when the architect provides designs for the project only, and does not serve in any managerial or leadership role for the defects in the project. This exemption is expressed in Article 881 of the UAE Civil Code as holding the architect liable for design defects as follows “if the work of the architect is restricted to making the plans to the exclusion of supervising the execution, he shall be liable for defects in the plans.” As such, in the event there is not supervision carried out by the architect, and the design has been produced correctly and without structural defects that arise out of problematic construction, the architect does not have any liability to assume in the scenario. Outside of this condition, tremendous liability is shifted to project leaders, typically architects and contractors, when projects are engaged in the UAE.

In closing, when project managers are negotiating contracts for activities in the UAE, they must be aware of the provisions of decennial liability as it relates to limitations of liability in the contract. Contracts must be developed with a mandated consideration for the powers granted under Civil Code Article 880 in the UAE, which may contradict the provisions expressed in a form contract. When parties are painting the contractual landscape or using an industry for such as recommended by the FIDIC, special considerations must be given to amendments that reflect the UAE law’s mandatory provisions expressed in this section.

Limitation of Liabilities in United Kingdom

Limitation of Liabilities are common in the UK, but take a more relaxed position legally when compared to the handling of these provisions in the UAE. The focus of the legal system in enforcing limitation of liability clauses is to ensure that the contractual language is concise, clear,

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and enforceable. The UK, in general, does not strongly limit the provisions of any limitation of liabilities clauses; however, when clause language is deemed to be unclear in the judgment of the courts, there is a strong risk of the clause being rendered ineffective.

One case that highlights this assertion is *Ailsa Craig Fishing Co Ltd v. Louis Dreyfus & Company* 1983 1 All ER 101.⁹³ The contra proferentum rule in the UK argues that in the event that the language or meaning of a clause is confusing, unclear, or ambiguous, it is then construed against the contractual party that drafted the terms. While the terms of contra proferentum can be applied to any exemption clauses, the courts tend to be more stringent on language that seeks to exclude liability in its totality versus those that seek clauses that express terms as limited liability. The rationale for this argument and provision is that it is inherently improbable that any contractual party would want to agree to the total removal of the secondary party's liability in the contract. As the judge outlined in *Ailsa Craig Fishing Co Ltd v. Louis Dreyfus & Company* 1983 "there is no such high degree of improbability that he would agree to a limitation of liability."⁹⁴ Generally, this provision is only ruled as a last resort as it is only applied when the clause cannot be understood or does not have clarity of meaning.

One unique and vital consideration when engaged in contractual agreements in the UK is the proposition of "reasonableness." The courts have routinely placed limitations of liability to the terms of the reasonableness test. The overarching goal of this test is to ensure that the agreement appears to be reasonable to both parties. As such, when the terms are deemed to be unreasonable, the courts have shown a willingness to intervene and render such clauses unenforceable. One example of this is found in *Lobster Group v Heidelberg Graphic Equipment* 2009.⁹⁵ In this case, the terms of the contract focusing on limitation of liability were subjected to five conditions to test if the limitation provisions were reasonable.

⁹³ *Ailsa Craig Fishing Co Ltd v. Louis Dreyfus & Company* 1983 1 All ER 101. Retrieved from <http://www.mondaq.com/x/99362/Contract+Law/Limitation+of+Liability+An+Update>

⁹⁴ *Ibid*

⁹⁵ *Lobster Group v Heidelberg Graphic Equipment* 2009 EWHC. Retrieved from <http://www.mondaq.com/x/99362/Contract+Law/Limitation+of+Liability+An+Update>

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First, the limitations consider the strengths of the bargaining position of both parties. Second, the test seeks to determine whether there was or was not any coercion to accept the terms. Third, the courts seek to prove that the customer understood and had knowledge regarding the existence and extent of the legal provision. Fourth, the test had to confirm that the exclusion applies if some condition was not complied with. Fifth, the courts needed to determine whether the project was a special order for the customer. The courts made a judgment and demonstrated the importance of the reasonableness test when constructing terms held in any limitation of liability clauses in the UK. The overarching message to practitioners is that they must give careful considerations when drafting the extent of any exclusion clauses that are broad or all-encompassing as they now provide a heightened risk of being struck out in court.

Limitation of Liability: Delay Penalties and Liquidated Damages in United Arab Emirates and United Kingdom

The UAE and the UK both have well-developed frameworks for engaging delay penalties and liquidated damages clauses. The following section examines the relevant provisions and case law of each country.

Limitation of Liability: Delay Penalties & Liquidated Damages in United Arab Emirates Law

Delay Penalties and Liquidated Damage clauses in the UAE are designed to establish a predetermined agreement that assesses the losses that will be suffered by an employer in the event that the contractor finishes the project behind schedule. The legal framework that allows for multiple parties to agree to any damages in advance can be found within the UAE's Civil Code, Article 390, as "1- 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. 2- The court may, on the application of either party, vary such agreement so as to make the compensation equal to the loss and any agreement to the contrary shall be void."⁹⁶ As a result, the provision is concerned with quantifying the damages versus the liability imposed for those damages. The liability granted for the damages is linked to the breach of the

⁹⁶UAE Civil Code, Article 390.

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fundamental obligation of the contractor to complete the project on time. Therefore, the contractor's defined obligation to pay any damages becomes the secondary litigation concern. The result is that if a project contract is terminated, the liquidated damages clause becomes moot. The employer then has the option of moving a claim to general un-liquidated damage. The Dubai Court of Cassation has stated that ““delay fines contained in contracts are deemed to be a penalty clause which is a secondary obligation correlated to the primary obligation, and it is a forfeit to the breach of the latter. The ineffectiveness of the primary obligation – as a result of the contract termination – leads to the ineffectiveness of the penalty clause. It follows that the court should not take account of the agreed damages stated in the delay fines clause; the judge may award general damages subject to proof of fault and loss according to the general rules.”⁹⁷ Contractors have routinely challenged the article to avoid paying costly liquidation damages. Typically, the contractor will target the definition of “loss” in the language in order to remove the fine. In this scenario, Article 390 (section 2) empowers the judge to modify the party's agreement in order to reflect the actual loss, which may be different than the original agreement specifies. Regarding the empowerment of the judge to modify the contractual terms, the Federal Court of UAE located in Abu Dhabi has stated “delay fines clauses contained in construction contracts are, in substance, no more than an agreed estimate of compensation that would become due in case of the contractor's failure or delay to perform its contractual obligations. According to Article 390 of the Civil Code, it is not sufficient - for the agreed compensation to become due - to establish the element of fault alone. It should be established, in addition, the element of loss which is suffered by the other party. If the contractor succeeds in establishing the absence of loss, the agreed compensation should be repudiated.”⁹⁸

In closing this section, liquidated damages in the UAE must not be considered from an equal perspective versus if they were held under another law jurisdiction such as in the UK. The courts in the UAE clearly enforce delay penalties and liquidated damages clauses, but uncertainties do exist regarding the court's interpretation of previously agreed upon contractual

⁹⁷ Dubai Court of Cassation, 17 June 2001, case 302/21 retrieved from <http://www.fenwickelliott.com/research-insight/annual-review/2013/liquidated-damages-uae-uk-law-comparison>.

⁹⁸ High Federal Court, case 25/24 – 1 June 2004

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terms related to these provisions. As such, there are significant risks associated when one of the parties challenges the definition and amount of the “losses.” There is ample room for lawyers to challenge the provisions, and this leaves the potential for the judge to disregard the entire agreement or make modifications according to the rules of the Civil Law in the UAE.

Limitation of Liability: Delay Penalties & Liquidated Damages in United Kingdom Law

In the UK, parties will agree on the level of delay penalties and liquidated damages upon negotiation of a contract. While this is not always transparent and straightforward in the eyes of the courts, the agreed level of liability and compensation should represent an accurate landscape of loss that reflects the breach that has occurred. However, when making a claim against the terms of the limitation of liability clause in the UK, the employer is not expected to prove that the loss is equivalent to the predetermined amount and this often results in the imposed penalty being exactly the amount stipulated in the contract. Even if the company’s realized loss due to the breach is lower, very often the courts have upheld the predetermined amount without significant proof of that loss being shown. However, if the amount of the liquidated damages does not provide an equivalent to a genuine estimate, it can be challenged in court on the basis that it truly represents a penalty. Therefore, tremendous care must be taken among the employers when engaging in a contract with liquidated damage provisions in a contract. The most common breach in the UK court system occurs when the contractor is unable to meet the deadline for the project. The truth that the employer does not suffer any real losses from the delay is not a significant factor as the courts have routinely upheld that the contractor remains obligated to pay as a result of the delay as a contractual event. However, it must be noted that delay issues are not exclusively to consider when analyzing liquidated damages in the UK.

The precedent for today’s liquidated damages law in the UK has a foundation in the case *Dunlop v Matthew Tyre Co Limited v New Garage Motor Co Limited*.⁹⁹ This case is very important to understand in the UK as it provides the foundation for how liquidated damages are handled in the country, and is based on several principles. First, in the event the employer has made a true attempt at estimated losses in advance, the court is not likely to judge that event as a

⁹⁹ House of the Lords Court (1915) AC 79

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penalty. This means that a genuine predetermined estimate of loss does not equate to an honest representation of that loss when it occurs. For example, the case of *Alfred McAlpine Capital Projects Ltd v. Tilebox Ltd* demonstrated that the amount of loss must not be unconscionable, overestimated purposefully, or embellished.¹⁰⁰ While this does not imply that the exact amount of losses be entirely accurate, it does place an indirect limit on predetermined loss payments that are decidedly over-projected when realized truthfully. Outside of the penalty debate, there are a few other defenses that are available to the contractors that want to challenge liquidated damages such as the employer is truly responsible for any delays, there were at least one failures to comply with a contract's notification or certification provisions, and the result is that the contractor is entitled to timeline extensions for the project.

¹⁰⁰ *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd* [2005] EWHC 281 (TCC).

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CHAPTER FOUR: FINDINGS AND CONCLUSIONS

Liquidated damages are a universal component to construction contracts in the UAE and the UK; however, they vary in terms of application and terms defensibility in the two different legal systems. In this regard, both liquidated damages and delay penalties are applied differently in the two countries owing to the nature of the legal system and original jurisdictions of similar cases. In some instances, civic laws define LDs as penalties that ought to be enforced when there is a breach of a contract. Additionally, some systems consider the negotiations and the agreements that were struck by the two parties prior to contraction. Ultimately, the probable uncertainties of the deal are evaluated before a rational decision is made by the courts.

Liquidated damage provisions are also related to delay penalties, but are typically enforced differently. Liquidated damage provisions are designed to protect the employer from construction delays that would limit operations and revenues; however, this provision specifies exactly the amount paid due to specific circumstances. When the project is not completed on time, this subjects the contractor to compensate the employer for losses that are realized due to inoperability because of the delays. The triggering event for compensation is generally expressed by a delay on behalf of the contractor. The FIDIC Guide that is popular in the UAE notes that the mission of liquidated damages is to provide compensation to the employer for any losses that are suffered as a result of delayed project completion. Although the amount of the liquidated damages payment is predetermined and agreed, the intent is given that the employers do not have to provide proof of the actual loss or damage. Whether that is the case in 100% of the cases is not entirely certain as the application of law has varied in a few scenarios mentioned in the previous section.

Different jurisdictions tend to handle the application of law as it relates to limitations of liability penalties in significantly different ways. There is not a clear split among the application of civil code and common law. The onus of this study has shown that problems exist nearly universally when the contractors' claim to compensation is clearly out of proportion with the realized losses due to breach of contract. Furthermore, in the UK, the onus of the law and application happens when the contractor shows that the level of liquidated damages is actually a penalty. Nonetheless, the lesson to be learned is that there are tremendous risks and dangers with

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analyzing liquidated damages from one's own perspective and understanding of a familiar legal system. When engaging in a business project contract, it is vital for project managers to have a firm understanding of the legal system by which the contract may be considered in the future if a breach occurs.

Conclusion

In conclusion, the application of liquidated damage provisions in the UAE and the UK have generally the same mission with a few discrepancies in terms of visionary rationale. However, the application of law has many more nuances to consider when engaging in a project proposal in both of the countries. Two noteworthy examples must be considered as follows when planning a project. First, the UAE places a unique emphasis on project leaders as liable parties due to their formal position of influence and authority during project execution. As a result, these leadership roles assume an introductory level of liability simply as a result of their formal position as a project leader. Second, is the UK's tendency to place an emphasized importance on any contractual provision's "reasonableness." Lastly, delay penalties have been shown to be easier to handle in both the UAE and the UK. This is largely due to the agreement that a timeline exists, a deadline has been imposed, and that term has expired and resulted in a claim. Although delay penalties are generally easier to define than liquidated damages claims, the amount of the payment and how it is enforced is very different when comparing the application of law in the UAE versus the UK. The implications for international project managers are far reaching.

Several recommendations can be made as a result of this study for existing and future practitioners. First, it is a dangerous oversimplification to believe that other legal jurisdictions will handle construction contractual claims in a similar fashion to the legal system that one is familiar. If a deep understanding of construction contractual law and application is not immediately available, it behooves the project leader to implement a consultant's role or hire outside legal representation as a project resource. It can therefore be recommended that legal experts be a member of any large project's executive team. When there is a risk of losses associated with poor legal provisions, it is absolutely necessary to mitigate that threat with adequate legal insights provided by a hired lawyer with a strong reputation and experience in construction contracts. Secondly, it is vital for the contract to represent an honest projection of

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losses that may occur due to a breach of contract. In short, the losses should be at least closely in proportion to any actual losses. While the application of law and enforcement of penalty varies in terms of accuracy of the estimated losses, it is highly recommended that this figure be as close to accurate for both parties. Exaggerating these details can result in the provisions being struck down. As the consequence of exaggerated losses can be that the entire damages provision is struck out in court, which can be a catastrophic outcome resulting from overemphasizing losses. Third, it is vital that practitioners make the terms “reasonable” in the eyes of the courts. While the term “reasonable” takes on different meanings in the UAE versus the UK, project leaders must make a serious effort in designing contractual terms that are agreeable to both parties in the courts perception. For example, exaggerating penalties that are disproportionate to actual losses in an effort to prevent delay among the contractors can result in a determination that the contract was not reasonable, and the judge can either modify the agreement or strike out the provisions entirely.

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