The Treatments of Liquidated Damages under the English and the UAE Laws

غرامات التأخير في أطار القانونين الانجليزي والاماراتي

by

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Abstract

Undesirable delays in construction projects result in needless costs and precipitate aggravated projects durations. Unfortunately, construction project delays are very common, which affect the objectives of the project, the parties` positions, which may lead to disputes between the parties. These difficulties are frequently dealt with by agreeing to a liquidated damage clause under the contract. Liquidated damages provisions are agreed upon between the parties to guarantee the performances from the parties to their contractual obligations. While it often ensures performance, another benefit is to identify a predetermined monetary sum which are to be paid by the performing party in the event of delays in delivering the works, or possibly specific milestones.

While liquidated damages are considered to be supplementary contractual provisions, its application and enforcement are conditioned to its applicability under the contract`s applicable law and the other contractual obligations.

This research discusses and compares the limitations to enforce liquidated damages under English and the United Arab Emirates (UAE) laws. Both laws impose limitations on recovering liquidated damages when the provision departs from its compensatory and equity nature. Under English law the court's position will be either allow or limit the award of the liquidated damages, whereas under UAE law the courts exercise the same discretions and may go further by varying the liquidated damages amount that is agreed between the parties.

English and UAE Laws stress the importance of honouring and prioritizing the parties` agreement, provided it contradict no mandatory law provision or the public order. The concept of liquidated damages is addressed differently depending on the legal system of the country. There are a few limitations the majority of countries regardless of this though which include the principle of equity and protecting the interests of the parties. However, the Common Law system is generally strict in limiting the award of any form of penalty clause in a contract due to the potential issues that may occur.

On the face of it, it appears that UAE`s courts do not differentiate between a pure penalty and a pure liquidated damages provision. It is safe to assume that the importance in differentiating between the two terms made in Common Law jurisdictions is not shared in the UAE, due to the granted power to the courts under Article 390 of the Civil Code.

الخلاصة

تؤدي التاخيرات الزمنية في المشاريع الهندسية الى زيادة التكلفة المالية و اطالة مدة المشاريع. تعتبر التاخيرات الزمنية شائعة و يصعب تلافيها, و التي قد تؤثر على المشاريع و العلاقة بين الاطراف المتعاقدة مما قد يتسبب بحدوث نزاعات. يتم تلافي التاثيرات المذكورة من خلال اضافة بنود غرامات التاخير, حيث يتم الاتفاق على ادراج بنود غرامات التأخير لضمان الايفاء بالتعهدات القانونيةوتشمل بنود غرامات التأخير تحديد قيمة مالية مسبقة تدفع كتعويض من قبل المقاول لصاحب العمل في حالة التاخر في تسليم العمل المتفق عليه.

على الرغم من ان بنود غرامات التاخير متفق عليها في اطار العقد, الا ان اقرار البنود مرتبط بالقانون الحاكم للعقد و البنود الاخرى في اطار العقد.

هذا البحث يبحث و يقارن المعوقات لاقرار غرامات التاخير في اطار القانونين الانجليزي و الاماراتي, بالاضافة الى تبين الموقف القانوني في حال تعارضت الغرامات مع بنود اخرى في العقد. حيث ان القانون الانجليزي و الاماراتي يمتنعون عن احالة الغرامات في حالة تعديها النطاق التعويضي. بالنسبة الى المحاكم الانجليزية فان الصلاحيات تشمل اقرار او حجب الغرامات, الا ان المحاكم الاماراتية بامكانها التعديل على قيمة الغرامات بالاضافة الى ممارسة الصلاحيات المذكورة.

يشدد القانون الاماراتي و الانجليزي على اهمية الايفاء باتفاقية الطرفين, الا اذا مثلت مخالفة لنص قانون اللزامي او نقيض للنظام العام. يختلف المفهوم المتبع لتطبيق بنود غرامات التاخير بحسب الدول و القانون المتبع, الا ان المتفق عليه ان جميع القوانين و الانظمة تشدد على اهمية تطبيق العدل و حماية مصالح الافراد. يعد القانون العام المتبع في عدة دول من بينها المملكة المتحدة, قانونا صارما حيث لا يتم السماح باي غرامة تمثل العقوبة, و ذلك لضمان عدم ممارسة الاذعان من قبل احد الاطراف المتعاقدة. بينما يعتبر موقف القانون الاماراتي اكثر ليونة في التمييز بين العقوبات و الغرامات, حيث لا يشارك القانون العام الموقف المتشدد. و يمكن الاستدلال على ذلك من خلال الصلاحيات الموكلة للمحكم بناء على نص المادة 390 من الاقنون الاماراتي.

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1.

1.Contents

Chapter 1
Introduction

1.1 Research Background

Liquidated damages may not present in every contract, there will arise occasions where contracts include liquidated damages clauses to provide certainty and security. Although the said clauses can complement the contract, project, and the parties` positions with numerous benefits, not addressing the clause correctly may result in some drawback. Additionally, the type of legal system in place within a jurisdiction and nation affect the applicability of awarding the damages.

Common Law and Civil Law nations have different concepts and approaches when it comes to this topic. In this research, the discussion will look into the concept of liquidated damages to summarize what the implications are across the United Kingdom, hereby UK, and UAE.

Legal systems grant courts the discretion to award compensations to make good a loss. Construction contracts commonly allow for an agreed amount of damages that are to be paid by the performing party in the event of delays in delivering the works, or possibly specific milestones. This is what is known in the construction industry as liquidated damages for the delay. The existence of liquidated damages in a construction contract is a mean of incentivizing a contractor to perform in time. The use of liquidated damages provisions helps in providing a contractual instrument to minimize dispute, considering the fact that time is of the essence in a construction project which in turn means money, as most of the construction projects disputes are related to variations and time extension,[1] which directly affect the entitlement of liquidated damages.

Including liquidated damages provision in the contract may not often be awarded by the courts if the liquidated damages are present in the contract as a form of punishment. The parties to a contract, despite agreeing to a pre-determined compensation in case of a breach, the courts may intervene with the parties` agreement by limiting or adjusting the agreed liquidated damages. The said intervention may be needed when the parties` contract presents deviation from the applicable law`s principle or considered contradictory to public order.

[1] Jane Jenkins, International Construction Arbitration Law (2nd revised Edition, Wolters Kluwer Law & Business, Published 2013), page 31

1.2 Research Questions

The research has identified a number of questions to answer that are as follows:

a. What are the risks for not including LD provisions in the contract?
b. What are the limitations for claiming LD under UAE and English Laws?
c. What are the similarities and the differences in the treatment of LDs by courts under UAE and English laws?

1.3 Significance of the Research

The aim of this research is to explain and provide guidance on the applicability and limitations to enforcing liquidated damages under Common and Civil Law jurisdictions, specifically for the UK and UAE. The said guidance can be used by the contracting parties to enhance their contract`s provisions and develop a better understating to both jurisdictions' approach to liquidated damages.

1.4 Research Methodology

This dissertation is intended to provide answers for the questions using the doctrinal method, "Black Letter". The purpose of using the doctrinal approach is that it allows the researcher to compare and discuss case-law, legal provisions, books, articles, and publications. The research focuses on the common and civil law jurisdictions to the research topic. For the Common Law jurisdictions, the discussion will focus on the UK case-law and statutory material. For the Civil Law jurisdictions, the research will discuss UAE law provisions and its courts' decisions. Further discussion, analysis and critique will be presented based on legal books.

1.5 Research Structure

In order to discuss the subject in detail, the research is divided into chapters. Chapter two will discuss the initiation to identify liquidated damages and the basic principles that govern it. Besides, this chapter will also illustrate the law provisions that legalize liquidated damages under English and UAE laws. The discussion will continue to establish the differences between the general and the liquidated damages.

The discussion will continue in chapter three and four to identify and compare the statutory and the contractual limitations to enforce liquidated damages. The discussion in chapter three will be the penalty nature, the need for genuine pre-estimate, and the prevention principle as statutory limitation. Chapter four will be about the contractual limitations that may arise from exercising contractual rights like the right to divide the work to section, the right to issue variation orders, the right to terminate the agreement, and the right for early benefiting and occupying the work. The chapter will also discuss the requirement and compliance with agreed condition to allow the award of liquidated damages.

Chapter five will illustrate the possible challenges contractors may rely on to limit the award of liquidated damages, focusing on the challenges that attack contract administrator`s performance and duties. The chapter will summarize the minimum requirement to draft an enforceable liquidated damages provision. The last chapter will provide the conclusion of the research discussion.

Chapter 2
Definition and Basic Principles
Governing Liquidated Damages

2.1 Definition

Liquidated damages, in general, are pre-agreed monetary sums asserted by materializing of a contractual breach.[2] The need for liquidated damages was developed to minimize the impacts of the breach on the work progress, the parties` relation and resources. Also, the practice of identifying the breach and agreeing on the damages helped in bringing certainty to the breach consequences.[3] Consequently, liquidated damages become an essential part of most contracts and agreements, where the parties agree on its application. The application of liquidated damages can be applied in various contract types such as (limited) employment contract, where it can be used to restrict an employee from working with a competitor company. In sales contract, the application of liquidated damages applies to assure the supplied material quality and quantity meet the standards and requirements. Due to the extensive usage of liquidated damages worldwide, the same damages can be referred to as genuine estimate of the actual loss likely to be suffered by the aggrieved party.

It is settled that, in construction projects, the term "liquidated damages" is used in reference to the non-completion on time breach. Accordingly, the reference to liquidated damages in this research will be related to the non-completion on time breach, save where the discussion is referring to an employment or a sale contract where the applicable breach will be identified. The abbreviation of LD refers to "liquidated damages". Accordingly, LD is defined as:

> Pre-agreed fixed monetary sum payable by the party in breach of late completion, or non-performance arising under a contract.

From the definition, the basic principles that govern LD can be identified as follows:

a. LD are pre-agreed damages, where the parties fix the amount at contract negotiation/ conclusion phase and the amount is known to both of the parties at the time of signing the contract.

[2] David Chappell, Vincent Powell-Smith, and Jon Sims, Building Contract Claims (4th edition 2005 Blackwell Publishing, 2005) page 42
[3] Brian Eggleston, Liquidated Damages and Extension of Time in Construction Contract (3rd edition, Blackwell Publishing 2009) page 41

b. LD are fixed monetary amounts, unalterable during the contract duration, except where the contract provided for proportioning down liquidated damages upon the issuance of partial completion certificate.[4]

c. LD are payable as compensation to the aggrieved party due to the likely losses to be suffered in the event of late completion of work by the performing party. According to Lord Diplock:

> "Every failure to perform a primary obligation is a breach of contract. The secondary obligation is on the party who has broken the contract to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach."[5]

d. LD are identified as compensation not penalty. In principle a liquidated damages clause will be allowed where the amount of liquidated damages presents a reasonable compensation. Where the liquidated damages are extravagant, unreasonable, and disproportionate, they can, however, be held a penalty. Such clauses may consider void under most jurisdictions. Penalty is the sum payable in *terrorem*, while liquidated damages is a genuine pre-estimate of damages.

e. LD are agreed contractual remedy where the parties to a contract anticipate possibility of a breach and prefer to name a particular amount to be paid to the injured party. There is no mandatory law provision under Civil and Common law force the said damages to take place in the parties` agreement. Consequently, courts will only award LD when the contract provides for LD, and the court may not award liquidated damages provision when the parties did exclude it. As Lord Browne-Wilkinson said:

> "In principle, in an action based on contract, the court can only enforce the agreement between the parties; it has no power to modify that agreement in any way. Therefore, if the parties have agreed on a specified machinery for establishing their obligations, the court cannot substitute a different machinery."[6]

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[4] Brian Eggleston, Liquidated Damages and Extension of Time in Construction Contract (3rd edn, Blackwell Publishing 2009) page 176
[5] *Photo Production Ltd*. v *Securicor Transport Ltd*., [1980] AC 827; [1980] 2W.L.R 283
[6] *Northern Regional Health Authority v Derek Crouch Construction Co. Ltd*, [1984] Q.B. 644

f. LDs are predetermined amount of damages payable by one party to another as compensation for late completion and nonperformance breaches arising under a contract. The failure in achieving completion by the agreed date is qualified as the trigger for the said damages. However, there are some cases where the completions were not achieved by the agreed dates and the courts intervened and limited the award, which will be discussed in subsequent chapters.

The wide recognition for LD principle encourages the parties to include contractual provisions to cover the said damages. Under Common Law jurisdictions, the principle of LD was introduced in the King`s Court around the 11th century following the Norman Conquest.[7] Many cases from the 19th century provided that, the parties` agreements included LD provisions.[8] The Civil Law jurisdictions also recognize and allow the parties to include LD provisions in their agreements like; the French Civil Code under Article 1226, and the Japanese Civil Code under Article 420-1. The Middle Eastern jurisdiction, where laws are influenced by the Islamic Sharia Laws, in principle, recognize the validity of LD provisions. UAE is another civil law jurisdiction that grants the contractual parties the right to include LD provisions within their agreement under Article 390 of the Civil Transaction Code (Civil Code).[9] Herein, it states:

> "1-The parties to a contract may fix, the amount of compensation in advance by making a provision in the contract or in a subsequent agreement subject to the provisions of law.
> 2-The court may, in all cases, at the request of one of the parties, amend such an agreement, in order to make the compensation assessed equal to the actual loss sustained. Any agreement to the contrary shall be void."

The wide recognition and usage of LD provisions can be found in numbers of standard forms of contracts like the Joint Contracts Tribunal (JCT) 2005 under clauses 2.32 and 2.37; the ICE Conditions of Contract 1999, 7th Edition under clause 47; and Engineering and Construction Contract 2005 (NEC 3) under optional clause X7, FIDIC conditions of contract forms provide the employer with the right to recover remedies for the contractor`s failure to achieve

[7] STA Law Firm ` United Arab Emirates: Liquidated damages Upon Contract Termination` 2020, < https://www.mondaq.com/contracts-and-commercial-law/891544/liquidated-damages-upon-contract-termination>
[8] Brian Eggleston, Liquidated Damages and Extension of Time in Construction Contract (3rd edn, Blackwell Publishing 2009) page 2.
[9] UAE Federal Law No. 5 of 1985 is known as The Civil Transaction Code (Civil Code).

completion by the agreed date. FIDIC books refer to the late completion remedies as delay damages.[10] Owing to the extensive usage of FIDIC contracts in the Middle East, this research will shed more light on its related provisions.

LD provision is provided under the Sub clause [8.7] of the 1999 Condition of Contract for Construction, known as Red Book, and Condition of Contract for Plant and Design-Build, Known as Yellow Book. The provisions state the following:

> "If the Contractor fails to comply with Sub-Clause 8.2 [Time for Completion], the Contractor shall subject to Sub-Clause 2.5 [Employer`s Claims] pay delay damages to the Employer for this default. These delay damages shall be the sum stated in the Appendix to Tender, which shall be paid for every day which shall elapse between the relevant Time for Completion and the date stated in the Taking Over Certificate. However, the total amount due under this Sub-Clause shall not exceed the maximum amount of delay damages (if any) stated in the Appendix to Tender."[11]

FIDIC Condition of Contract for EPC/ Turnkey Projects 1999, Known as Silver Book, includes similar sub-clause, save the reference to [Appendix to Tender] which have been replaced to [Particular Conditions].

Before commencing the discussion on the limitations and challenges to enforce LD provisions under English and UAE laws, it is worth to mention the advantages of LD provision and the risks for not including it.

Advantages and Disadvantages of Liquidated Damages

Construction projects are driven by commercial interests, where the focus is mainly on time and cost for the project's success. Managing the time and identifying the time-related breaches ahead help the parties to achieve the best projects outcomes. LD provisions under the contract save the aggrieved party the time and cost by allowing the injured party to claim damages without needing to prove loss, especially when agreements are unlikely to be concluded, where contractors encounter additional pressures to finish the project. While employers are concerned about the losses they may incur, it affects their reputation, financial positions, and the project

[10] FIDIC Red Book 1987, 4th edition, name damages for delays under clause 47 "Liquidated damages for delays", while the red book 1999 and 2017 under subclauses 8.7 and 8.8 name the same clause as "Delay Damages".
[11] FIDIC Conditions of Contract for Construction 1999, Sub-clause 8.7

objective. It can be summed that LD provisions present the parties with a time saving mechanism.[12]

Besides saving the parties` time, it allows the parties to avoid the difficulty, time, efforts and expenses involved in assessing the actual loss which the employer is likely to suffer from late completion. LD provisions under the contract help the parties to overcome the breach and resolve the potential dispute without investing additional expenses and efforts. Where dispute resolution methods like; negotiation, mediation, arbitration, or litigation will consume the parties` efforts, time, and resources. LD provisions may help the parties to avoid disputes and maintain the parties` relation. In the event the parties cannot resolve the disagreement, and the dispute is being referred to one of the dispute resolution methods, LD provision may be considered helpful as it presents guidance for settlement and save the parties from relying on court determination under Civil Law jurisdictions.

In addition to enhancing the contract, LD provisions provide certainty to the parties` positions by specifying the consequences of the breach, where it limits the contractor`s liability to the agreed amount, as it presents the sole remedy for the employer. On the other hand, it provides the employer with quick and effective remedies, where proof of loss is not needed.[13] The self-enforcing nature without the need for a court order can be considered as a useful tool reminding the contractor of his obligation to complete the work within the agreed time.[14]

At tendering stage, LD will expose contractors to the risk level for late completion and allow them to address the related risks.[15] Also, LD provisions provide contractors with guidance for cost comparison between liabilities and accelerating the performance.

Despite various advantages for LD provisions, there are some disadvantages too. The drawbacks may arise as a result of limiting and capping of the LD. Such capping may endanger employers` positions when the pre-estimate damages amounts are less than they actually suffered losses. Also, capping contractor`s liabilities may demotivate them to accelerate the performance, especially when the delays are significant and the acceleration`s cost exceeds the capping value.

[12] Julian Bailey, Construction Law (1st edn, Routledge 2011) page 1019.
[13] *Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Ramos Yzquierdo Y Castanedo*, [1905] AC 6.
[14] Julian Bailey, Construction Law (1st edn, Routledge 2011) page 1019.
[15] Brian Eggleston, Liquidated Damages and Extension of Time in Construction Contract (3rd edn, Blackwell Publishing 2009) page 7.

It is safe to conclude that not including LD provisions in the contract may risk the employers` positions, as their only compensation will be the general damages for the breach, where the easy and quick remedies will be replaced with a long litigation process, wherein it may be difficult to prove the incurred losses.

It is worth mentioning that the inclusion of LD provision under the contract may not grant the award and enjoy the aforementioned advantages, as it needs to be constructed considering other provisions, failing which, no liquidated damages will be awarded. Proportionality of the damages to the costs reasonably anticipated to be incurred is key to maintaining a valid liquidated damages claim. If successful in establishing a penalty, the contractor could, however, still be vulnerable to a claim for unliquidated (general) damages. Before commencing the discussion on the limitation of LD, a distinction between LD and general damages is needed. The following section will illustrate the differences between the two types of damages.

2.2 Liquidated Damages and General Damages

In general, damages are established to compensate the aggrieved party for the incurred losses, which arise from the contractual relation, or failure in performing a duty to others under tort. Despite sharing the compensational concept, LD differ from the general damages in few aspects. To establish the difference between the two types of damages, the research will briefly discuss the following aspects and differences. The discussion commences by illustrating the position of the two damages in relation to the need to incur losses as a condition to enforce it. The second aspect to discuss is the timing of establishing the damages` amount. Then the discussion will identify the party on which the burden of proof lays to enforce the two damages. Finally, some light will be shed on the duty to mitigate the losses and its effects on the entitlement to recover LD. It should be noted that under some jurisdictions general damages are referred to as "unliquidated damages" or "damages".

The Need to Incur Losses

The first difference is related to the nature of the damages and the need to incur losses. The compensatory concept of general damages demands losses to be suffered and consider it a condition to materialize the damages. The actual loss or damage which naturally arise in the course of things has to be proved. If no loss is incurred, then there is no damage to be awarded while LD`s position is different and will depend on the applicable jurisdiction.

Under English law, the loss amount is immaterial to the payability of the liquidated damages. In the case of *BFI Group of Companies v DCB Integration System Ltd*,[16] the contractor was six weeks behind the delivery date. The employer did not suffer any loss in commissioning the work, as the fit out works took place during the delay period. At the Court of Appeal, the contractor argued that the entitlement to recover liquidated damages should be rejected as there was no loss suffered. The Judge concluded that delay damages provision was triggered by the late completion, and it was immaterial to the existence of the losses. The actual loss or damage is not the *sine qua non* of awarding the LD.

On the other hand, under Civil law jurisdiction, the award of LD in relation to the need to suffer losses may differ. UAE law may link the right to recover liquidated damages with the need to suffer losses. In the event there is no loss incurred, the court has the discretion to limit awarding the LD. UAE Union Supreme court in delivering its ruling held:[17]

> "The effect of the provisions of article 390 of the Civil Code is that in order for a penalty for delay- consensual compensation – to be paid, it is not sufficient that just the element of default should have been made out on the part of obligor under the obligation. It is also necessary that the element of damage sustained by the obligee should be made out. If the obligor negates the element of damage, then the prescribed penalty lapsed. It is open to the judge to reduce the penalty for delay stipulated in private *muqawala* contracts if it is proved that they are excessive, and that the amount of damage is less than the amount of agreed penalty, on the basis that compensation should be awarded in proportion to the damage."

According to some commentators, the need to incur losses is one of the tests that liquidated damages provision should pass to be awarded, and it may present a limitation to the entitlement to recover LD. Some court rulings suggest that the right to include liquidated damages provision may not supersede the need to incur losses.[18] The position of the law can be referred to the influence by the Islamic Sharia Law, where it is not allowed to a party to recover damages when no losses are suffered.

[16] (1987) CILL 348; Brian Eggleston, Liquidated Damages and Extension of Time in Construction Contract (3rd edn, Blackwell Publishing 2009) page 78
[17] UAE Union Supreme court, 103/Judicial Year 24
[18] Faisal Attia, 'Liquidated Damages – the bigger Picture' 2012, < https://www.tamimi.com/law-update-articles/liquidated-damages-the-bigger-picture/>

It is safe to conclude that the need to incur losses differs between the two types of damages. Employers may recover LD without proving the suffered losses, save no challenges by the contractor. If a dispute has been escalated, the requirements of the applicable law may differ. English Courts will not limit the enforcement of the said provision on no losses incurred basis. Whereas UAE courts may limit the award of the liquidated damages provision when no losses are suffered.[19]

The Time of establishing damages

The second difference that can be established is the time of considering the damages amount. The principle of general damages is based on establishing the remedies amount upon proving and evaluating the incurred losses. In an English case it was said:

> "The rule of common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if contract had been performed."[20]

Under UAE law, the general damages are legalized to make good the loss, pursuant to article 288 of the Civil Transaction Code which states:

> "Whoever causes an injury to another in legitimate defense of his person, honor or property or, of the person, honor or property of others, is not responsible, provided that he does not exceed the measures necessary for his defense, as otherwise he will be liable to damages for this excess."[21]

On the other hand, LD are contractual remedies identified and designated during the formation of the contract. The value of the LD needs to be concluded in advance and identified in the contract or by the later agreement under the law, but not after the breach materialization. The nature of LD requires the amount to be fixed prior to the breach materializing. When the amount is not fixed or clearly identified it may result in limiting the award of LD due to the uncertainty, which will be discussed profoundly in chapter three.

[19] The reference to UAE courts excludes Abu Dhabi Global Village and Dubai International Financial Center, which are free zones area. The two free zones areas considered common law jurisdictions.
[20] Brian Eggleston, Liquidated Damages and Extension of Time in Construction Contract (3rd edn, Blackwell Publishing 2009) page 46.
[21] UAE Federal Law No.5 of 1985, Article 288.

In relation to fixing the LD value, UAE Union Supreme Court held:[22]

> "Pursuant to article 390 of the Civil Code, it is open to the contracting parties to specify in advance the amount of compensation, by a provision in the contract or by a subsequent agreement, subject to the provision of the law."

The Burden of Proof

The third difference between general damages and LD lays in the burden of proof. To establish general damages, the party who is claiming should provide sufficient evidence to prove the breach materializing along with the incurred losses. The followed rule is "he who asserts must prove."[23]

On the other hand, identifying the breach and fixing the remedy shifts the responsibility to prove from the claiming party to the party in breach. When the employer is intending to recover LD, he has to prove that the performance lapsed the agreed completion date, which considered a trouble-free task, by relying on a certificate issued by the contract administrator. If the parties disagreed and a dispute is escalated in front of an arbitrator or a court, the party in breach has to satisfy the jury with enough evidence to limit the award of the LD. In a case UAE Union Supreme Court ruled:[24]

> "The effect of the provisions of article 390 of the Civil Code is that a provision in a contract providing for a penalty means that harm falls within the assessment of the contracting the parties[25], and the obligee is not obliged to prove it, the burden being on the obligor to disprove it."

It is worth to note that both English and UAE laws share the same approach to the burden of proof for general damages, wherein the onus to prove the actual extent of the damages is on the aggrieved party, and in case of LDs, the party in breach has to provide sufficient proofs to challenge the quantum of the LDs. The duty of proving the actual loss (and its disparities from the agreed damages in the contract) will lay on the party seeking the adjustment. The said party will need to satisfy the court with evidence to establish the difference. Should the suffered loss was minimal, the other party may have to provide its own evidence to persuade the court

[22] UAE Union Supreme court, 706/Judicial Year 26.
[23] *Joseph Constantine Steamship Line v Imperial Smelting Corporation Ltd*, [1942] AC 154
[24] UAE Union Supreme Court, case 356/ Judicial Year 23
[25] [translator's note: this could also mean: the contracting the parties will deem there to have been harm]

enforcing the liquidated damages amount. However, as the discussion will illustrate in the coming chapter, the type of arguments, evidence and challenges that may differ in front of the two jurisdictions, due to differences in the treatment of LD.

Duty to Mitigate Loss

The duty to mitigate can be identified as the fourth difference between the general damages and the LD. Under general damages principles, the claimant who sues for damages is obliged to take all reasonable measures to minimize the loss consequent upon the breach. Failure in taking reasonable actions may jeopardize the party`s entitlement for compensation.

Under the principles of LD, the concept of mitigating losses may not apply. While the work performance is controlled by the party in breach, any action by the aggrieved party to minimize the losses may be considered as interference with the performance and may lead to other contractual consequences. For example, in the event of a delay in the performance by the contractor, the employer may not omit part of the work and award it to another contractor, as this is prohibited by law, unless the parties` agreement provides for it.[26] Additionally, if the aggrieved party wishes to mitigate the loss by instructing work acceleration order, such instruction may be considered as change order which may oblige the employer to pay more than the contract price.

It can hence be concluded that there are differences between general damages and LD. While general damages are considered legislative tools to compensate the aggrieved party, liquidated damages are contractual tools to remedy against an identified breach. To recover and enforce general damages, the claiming party has to prove its entitlement by establishing the incurred losses, along with all reasonable actions to mitigate the losses. While under the concept of LD, the claiming party neither has duty to establish the incurred losses nor to mitigate any loss. The burden of proof is shifted to the party in breach. Finally, the time to estimate the remedies differs, where the general damages are valued after breach materializing and in LD, the amounts are agreed upon at the contract conclusion.

After establishing the risks of not including LD as a provision in the contract, along with the differences between general damages and LD, the discussion will focus now on the limitation

[26] In the case of *Abbey Developments Limited v PP Brickwork Limited [2003] EWHC 1987*, the court held that in the absence of a clearly stated clause the employer cannot exercise the right to omit and award the work to third party to reduce contract price.

to enforce liquidated damages provisions under English and UAE laws. The next chapter will present the limitations under English and UAE laws.

Chapter 3
Limitations on Liquidated Damages Provisions

Although no statutory provisions impose limitations on LD provisions to the parties` agreement, the law may intervene in awarding LD. When the disagreement between the parties is escalated and becomes a dispute, the case will be presented in front of an arbitration panel or a court. The judge`s role will be to review the claim and decide on the merit of the case. The said review will focus on the interpretation of the provision, the operability of the provision within the contract, and compliance with the applicable law. Due to the confidentiality of arbitration awards, this research will not discuss any arbitration award, save the ones that had been discussed in the court judgments.

It may be noted that the jurisdictional difference, between English and UAE laws, imposes differentiation in the court's scope and discretion. Under English law, upon reviewing the claim the courts will either allow or limit the award of the LD. While under UAE Law, the courts may go further by varying the awarded amount. It may appear as English law more rigid in its treatment of LD. However, it should be noted that, when the claim to liquidated damages is rejected, the party can claim general damages. In an English case, Lord Justice Stephenson said:[27]

> "It is accepted that a party must elect whether to claim liquidated or unliquidated damages; but as it seems to me, where the claim for liquidated damages has been lost or has gone… the defendants are not precluded from pursuing their counterclaim for unliquidated damages."

Under English law, the claiming party has the right to choose whether to seek liquidated damages or unliquidated general damages, without any limitation to the awarded amount. However, under other common law jurisdictions, the awarded general damages may not exceed the unawarded damages.[28]

[27] *Rapid Building Group Ltd* v. *Ealing Family Housing Association* (1984) cited in Brian Eggleston, Liquidated Damages and Extension of Time in Construction Contract (3rd edn, Blackwell Publishing 2009) page 49.
[28] *Elsley v JG Collins Insurance Agencies Ltd,* (1978) 83 DLR 3rd 1. The Canadian Supreme Court ruled that, the awarded general damages cannot exceed the agreed liquidated damages, when the liquidated damages provision is held a penalty.

The aim of this chapter is to discuss the legal limitations of LD award under English and UAE laws. The approach will focus on discussing and comparing courts` rulings and law provisions. The research will commence on the discussion when the LD presents a penal provision and the effects on enforcing the award. Further, the discussion will continue to focus on the agreed damages amount and whether there is a need to have it as the genuine pre-estimate amount.[29] The final discussion in this chapter will cover the prevention principle and unjust enrichment.

3.1 Penalties and Liquidated Damages

Including LD provision falls within the principle of freedom to contract, which grants the parties the right to agree on their contract`s provisions. However, when LD provisions are drafted to force the party in breach to perform rather than compensate the aggrieved party, then the said provision may be held as failure in implementing its legal purpose, as such failure may shift the intended purpose from compensatory to penal. The effect of rendering the clause as penal will limit the award of LD under the common law jurisdictions. Such limitation may be considered as interference with the principle of freedom to contract. However, it is necessary to ensure compliance with equitability and justice principles. In delivering the Supreme Court judgment in a Canadian case, Judge Dickson said:

> "It is now evident that the power to strike down a penalty clause is blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression."[30]

Accordingly, liquidated damages should present compensation to the injured party for the suffered losses, not to terrorize the contractor to complete within the agreed time. Under English Law, courts will consider few factors before ruling on the nature of LD provisions. Some of the factors are: (i) the parties` arguments in regard to the true purpose of the contractual provision, whether the provision is intended to secure performance by imposing fine or intended to assess the likely damage resulting from the breach; (ii) another factor is the wording and certainty of the provision, as uncertainty and ambiguity may drive out the applicability of the provision; (iii) also, the reasonableness of the amount is considered another

[29] The title genuine pre-estimate usually falls under penalty clause discussion. However, this research is discussing it separately to provide flexibility in the comparison between the two laws.
[30] *Elsley v JG Collins Insurance Agencies Ltd* (1978) 83 DLR 3rd 1

factor, where the court may hold an agreed amount as a penalty when the damage is trifling;[31] (iv) another factor to be considered is the bargaining power in concluding the contract`s provisions, where courts may hold provisions which are resulted from unequal negotiation power, like adhesion contract, as penalties.

The difference between LD and penalties is found in judgments of some old cases, where English courts rely on these cases to observe, interpret, and rule on LD cases. The main guidance is found in the case of *Dunlop Pneumatic Tyre Company Ltd v New Garage & Motor Company Ltd*,[32] where the parties allowed for LD provision is as follows: “We agree to pay to Dunlop Pneumatic Tyre Company Ltd the sum of £5 for each and every tyre, cover or tube sold or offered in breach of this agreement, as by way of liquidated damages and not as penalty.” The case travelled through the three courts` levels and the House of Lords held the clause enforceable and did not present a penalty. The importance of the ruling is provided in Lord Dunedin in delivering the decision is as follows:

1. In determining the nature of the provision, the wording of the provision supposes to mean what it says, however, the use of “penalty” or “liquidated damages” should not be conclusive, and the court should find whether the provision presents a true LD or penalty.
2. Penalties are money paid to the offended party as in terrorem, where LD present genuine pre-estimate of the damages.
3. To decide whether the sum presented a penalty or a genuine pre-estimate the court should consider the terms and the circumstance at the time of concluding the contract, not at the time of the breach.
4. The following tests may be applied in establishing the nature of the provision:
    a. In the event the amount is considered extravagant and unconscionable in relation to the loss that may arise from the breach, then it may be held as penalty.
    b. If in case the breach includes more than a sum of money, and the sum presents a value greater than what should be paid, then it may be held as penalty.
    c. As Lord Dunlop cited “There is a presumption (but no more) that it is a penalty when “a single sum made payable by way of compensation, on the occurrence of

[31] In case *Ford Motor Company (England) v Armstrong*, (1915) 31 TLR 267, the amount of £250 was held penalty as the breached caused worthless damages.
[32] [1915] AC 79

one or more or all of several events, some of which may occasion serious and others but trifling damage."[33]

d. When the agreed amount is not based on the true bargain between the parties, then it may be considered as penalty.

Further guidance can be found in the Philips Hong Kong case, which was considered by some commentators as departure from the Dunlop case.[34] The case is *Philips Hong Kong Ltd. v Attorney General of Hong Kong*,[35] and related to an EPC contract. The contractor was required to meet sectional completion dates, where another contractor scope was linked to the sections. The contract provided LD provision allowing the government to levy liquidated damages for delays in delivering the sections along with the whole work. The Privy Council dismissed the appeal to hold the LD provision as penalty. The judgment contained important guidelines, which are as follow:

a. Courts may not approach the liquidated damages provision in a way that may undermine the concept of allowing the parties to agree beforehand what damages apply in the event of breach of contract.
b. Courts may not hold a provision as penal based on hypothetical drafting problems and arguments. An objective assessment of the provision purpose should be considered.
c. The right test to determine the provision nature is whether the amount presents a genuine pre-estimate for the likely losses to be incurred.
d. The aggrieved party may recover LD for sectional completions along with the whole project completion, when the losses arise from each are different.
e. Although some uncertainty and ambiguity in drafting the LD provision can be found, courts may not render it unenforceable, as their meaning can be ascertained and relied on.

In the past decades, the provided guidelines in the Dunlop and Philips Hong Kong cases helped English courts to distinguish between LD and penalty provisions. However, in some recent rulings by the House of Lords, the applicability of the said guidelines is emphasized and limited to the LD provision being a secondary obligation arising as a result of a failure in compliance with the primary obligation. In the event the obligation to pay the LD is held as a primary

[33] *Lord Elphinstone v The Monkland Iron and Coal Company, Limited, and Liquidators,* (1886) 11 A.C 332
[34] Brian Eggleston, Liquidated Damages and Extension of Time in Construction Contract (3rd edn, Blackwell Publishing 2009) page 87.
[35] (1993) 61 BLR 41

obligation, then some of the guidance may not apply. Furthermore, the discussion will be presented under the title “Genuine Pre-Estimate”.

One of the mechanisms to determine the nature of the provision and distinguish between LD and penalties is comparing the LD sum in relation to the suffered losses. As established earlier, when the suffered losses are greater than LD, the employers may not attack the provision to recover more remedy. On the other hand, if the LD amount is greater than the suffered losses, contractors may rely on the arguments to render the provision unenforceable, as it may present a penal provision. It is settled that a difference between the two amounts may render the provision a penalty, but not every discrepancy will limit the award of LD. In the case of *Murray v Leisure play Plc*, [36] where the contract was an employment agreement. The contract provided LD equaled to 12 months` salary to be paid in the event the employer`s dismissal without 12 months` notice period. The employment was dismissed after a short period without a notice. The judge at the High Court of Justice concluded that, the damages presented penalty as the award of the agreed amount would result a notable allowance. The court of appeal allowed the employee appeal, and Lord Justice Arden said:

> “A contractual provision does not become a penalty simply because the clause in question results in overpayment in particular circumstances. The parties are allowed a generous margin.”

In order to enforce LD provision under English law, it should not present a penalty. The significance in distinguishing LD and limiting penal provision by the English court may not be shared by the UAE courts. Under UAE law, the parties` arguments may not focus on establishing the penal nature of the provision, as it may not consider the importance due to the second part of article 390. The said part provides the court with the discretionary power to vary the awarded remedy. Consequently, the arguments may focus on provoking the adjusting power by the court. This approach is markedly distinguishing UAE law from common law jurisdictions where courts prioritize the agreed provisions and are excursing additional care to avoid interfering with the parties` intentions.

Under UAE law, when LD present an extravagant and unconscionable amount, an application from one party to the court to reevaluate the amount may result in reducing it to become a reasonable compensation. However, the applicant needs to satisfy the court with sufficient

[36] [2005] EWCA Civ 963

evidence that the amount is out of proportion. If the court accepted the application and considered reevaluating the amount, guidance can be relied on from the previous transaction between the parties, the transaction nature, customs, or expert opinion. It can be established that UAE law doesn`t share the same approach to penalty provision as English law in limiting LD provision when the amount is extravagant and unconscious. However, the UAE law approach is a reminder that the parties may only recover reasonable compensation.

It`s worth noting that, UAE courts distinguish between the private and the public sectors projects. UAE Union Court in delivering a judgment stated that: [37]

> "It is settled law that a penalty for delay in private muqawala contracts is no more than contractual compensation upon non-performance by the contractor of his obligation. The effect of that is that the conditions for compensation must be satisfied, namely default, damage, and the causal relationship between them. This differs from a penalty in public works contracts made by government authorities, which is regarded as a financial penalty due upon the mere fact of the default by the contractor, or his neglect, because this represents a harm caused to the beneficiaries of the public project."

As the above ruling demonstrates, LD in public sectors projects may exceed the normal function as a contractual tool to compensate due to delays in delivery, but to include a penalty as any delay may harm the public sector projects beneficiary. Additionally, under the laws of the emirate of Dubai, there are some provisions where the public entities may recover additional amounts in addition to the agreed damages to cover consultancy fees in the event of delays occurrence.[38] It is safe to conclude that the penalty clause may be enforced under UAE law under certain projects type, but not for private sector projects. Certain confusions may occur when individuals from common law jurisdictions review UAE courts` rulings, where the Arabic term of liquidated damages may vary in the translation between "penalty clause",[39] "Delay Penalty",[40] and "Penalty for delay"[41]. However, such variation in the translation should not be confused with the purpose of the ruling. As penal provisions award may be allowed

[37] UAE Union Supreme Court, Case No. 218/ Judicial year 25.
[38] Omar Al-Hyari, ` Applicability of the 2017 FIDIC Red Book in Civil Law Jurisdictions`, Arab Law Quarterly 36 (2020) 1-20, page 4.
[39] Abu Dhabi Court of Cassation, Case No. 1259/2009 (26). Dubai Court of Cassation, Case No.198/2009.
[40] Dubai Court of Cassation, Case No. 222/2005 (167)
[41] UAE Union Supreme Court, Case No. 103/ Judicial year 24.

under some circumstances, there may arise a question if all LD provisions are enforceable under UAE law?

Under UAE law, the enforceability of the LD will depend on the validity of the provision within the contract, breach materialization, and the need to incur losses caused by the breach.[42] The need for the validity of the provisions requires it to clearly identify the breach and the remedy amount. In the event of uncertainty, the court may rely on the guidance provided under Articles 265 and 266.[43] However, the court may not impose terms that don`t exist attempting to interpret the provision.[44] The breach materialization can be proved by reliance on a certificate issued by the contract administrator. In the event of certificate invalidity, the entitlement for LD may lapse. Finally, if no losses are suffered due to the breach, then the right to recover LD may lapse. For example, a challenge by a subcontractor to limit the award of LD may be allowed, when the contractor`s liability to LD has been waived by the employer.

In short, under English law, the entitlement to recover LD is limited when the provision is held penal. It`s worth noting that, despite the number of arguments by the parties to render the liquidated damages provisions as penalty and unenforceable, there are a limited number of cases where the delay damages provision has been held unenforceable under English Law.[45] While under UAE law, the penal nature of the provision can be neutralized by the court discretions to adjust the award amount. Under particular circumstances, the award of additional fees or penal provisions can be allowed to protect the public interest. The discussion will focus on the amount of the LD, the requirement to pre-estimate the damages amount, and whether it can present limitations to enforce liquidated damages provisions.

3.2 The Need to Pre-estimate the Damages

The need to fix the LD at the time of concluding the contract will require the amount to be pre-estimated. While the estimated amount falls within the freedom to contract limits, the law may intervene and limit the award when the pre-estimated LD present a deviation from the

[42] Faisal Attia, 'Liquidated Damages – the bigger Picture' 2012, < https://www.tamimi.com/law-update-articles/liquidated-damages-the-bigger-picture/>

[43] Federal Law No. 5 of 1985, Articles 265 and 266. The articles deal with the interpretation of unclear provision, where interpretation is required, the parties` intention, and the trade nature. The interpretation shall be concluded in favor of the party who had lower bargain power.

[44] Michael Grose, Construction Law in the United Arab Emirates and the Gulf (Wiley Blackwell 2016), Page 143. Dubai Court of Cassation rejected lower courts` ruling to cap delay damages up to 10%, as the parties didn`t include any limitation on the delay damages in their contract.

[45] Ellis Baker, Ben Mellors, Scott Chamlers, and Anthony Lavers, FIDIC Contract: Law and Practice (Fifth Edition, Informa Law 2009), page 415.

principles of equity. The essence of estimating LD is to estimate the likely losses to be suffered. Accordingly, there is a requirement for the LD to present a reasonable pre-estimate. The term "Genuine Pre-estimate" has been used as a reference to the need for estimating the LD reasonably. The term has been widely used after Lord Dunedin referred to it in the Dunlop Case ruling, when he said:[46]

> "The essence of liquidated damages is a genuine covenanted pre-estimate of damage."

The need for LD to present a genuine pre-estimate amount turns out to be one of the requirements to enforce LD provision. When the LD provision does not provide a clear reasonable amount, the English court may hold the provision unenforceable. It is settled when the LD provision provides a range for the damages amount, the court may find such provision ambiguous and uncertain and hold it unenforceable. In the case of *Arnhold & Co Ltd v Attorney General of Hong Kong*,[47] the contract provided a range for LD amount, as the minimum amount was $HK400, and the maximum amount was $HK2,700. By the time the employer was satisfied with the work and issued a completion certificate, the contractor was 393 days late in delivery. The employer sought to deduct $HK374,529 based on $HK953 per day as LD. Many arguments had been raised by the employer that the provisions provided a mechanism to calculate the damages amount which allowed the employer to calculate the actual losses. The judge held the provision void for uncertainty, then he added:

> "I will only add this, as a matter of common sense, the object of a liquidated damages clause is to enable an easily ascertained figure to be known as the damages which the contractor pays if he does delay. The clause specifically envisages a sum payable for each day. This contract appears to me to defeat the object of such a liquidated damages clause and is in reality the antithesis of such a clause."

As the ruling emphasizes, the objective of LD is to provide a clear figure, where the parties are exposed to the risk of late completion. Some companies had thoughts that, agreeing on a range and mechanism will grant them the right to recover the actual losses and protect them from losing amounts due to the discrepancy between the pre-estimated LD and the actually suffered

[46] *Dunlop Pneumatic Tyre Company Ltd v New Garage* [1915] AC 79
[47] (1989) 5 Const. L.J. 263

losses. The basic principles of LD provide room for discrepancy, which can`t be eliminated. Mr. Justice Jackson said:[48]

> "Pre-estimated damages did not have to be right to be reasonable. There had to be a substantial discrepancy between the level of damages stipulated in the contract and the level of damages that was likely to be suffered before it could be said that the agreed pre-estimate was unreasonable."

When LD provision is considered out of the proportion between the agreed sum and the incurred losses, then it is expected that the court will limit the award. In *Ford Motor Company v Armstrong*,[49] it was held that an amount of £250 as agreed damages was out of proportion to the likely losses to be suffered, as the breach mounted in trifling losses. Accordingly, the provision was held to present a penalty.

In reaching the conclusion of whether the amount is out of proportion or not, the court will consider the nature of the transaction. In the event the amount presents a reasonable estimate of the likely losses but is not based on any calculations, the court is expected to allow the award of the LD. In the case of *Indian airlines v GIA International*,[50] the agreement provided for a daily LD amount equal to $8,500. Upon delays, the claimant sought to recover $5.55 million for delays in delivering the aircrafts on time. It was argued by the defendant that, the amount was not based on a calculated estimate of the likely loss and could not present a genuine pre-estimate. In delivering the court judgment, Mr. Justice Tomlinson explained that the case presented a challenge, where a simple precise amount could not be pre-estimated. In his opinion, the amount was neither conscionable nor extravagant in comparison to the likely losses the airline company suffered due to the delay in providing the crafts on time. Accordingly, the court allowed the award of the liquidated damages.

On the other hand, when the agreed damages amount is less than the suffered losses, the employers may not run from their own mistakes by attacking the LD clause. In the case of *Widnes Foundry Ltd v Cellulose Acetate Silk Co. Ltd*,[51] where the agreed amount was inadequate genuine pre-estimate, the employer could not run from their mistake in concluding the LD at £20 per week. After delivering the work 30 weeks beyond the agreed delivery date,

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[48] *Alfred McAlpine Capital Projects Ltd v Tilebox Ltd* [2005] EWHC 281 (TCC)
[49] (1915) 31 TLR 267
[50] [2002[EWHC 2361 (Comm)
[51] [1933] A.C. 20

the employer sought to claim the full losses of the 30 weeks at £5,850. The case travelled through the three layers of the judicial system, and the House of Lords confirmed the £20 presented inadequate genuine pre-estimate but presented an agreed compensation. Accordingly, the employer couldn`t attack the liquidated damages clause seeking higher compensation. The same conclusion was reached by the court in ruling in the case of *Multiblex Construction Pty Ltd v Abgarus Pty Ltd*,[52] where it was stated:

> "It is clear as a matter of principle, and established by authority, that if the parties agree upon a quantum of damage as liquidated damages which is less than the damage which would be suffered from such breach, no attack can be made upon such a liquidated damages provision upon the basis that it is "extravagant or unconscionable."

When the court is faced with the need to look in the LD amount to determine it reasonableness, the evaluation shall consider the amount at the time of concluding the contract, not the time of breach materialization. In the case of *Rowland Valentine Webster v William David Bosanquet*,[53] Lord Davey said the following in expressing his opinion:

> "You are to consider whether it is extravagant, exorbitant, or unconscionable at the time when the stipulation is made—that is to say, in regard to any possible amount of damages which may be conceived to have been within the contemplation of the parties when they made the contract."

Nullifying the provisions of the LD is an intervention with freedom of contract; however, it is needed to provide a relief, when the amount is considered oppression. The principle of equity is that the innocent party has no interest in punishing the party in breach, but in performance of the obligation or recover an alternative compensation. Thus, in the last two decades, a different approach to treat the liquidated damages provisions was proposed. A drafted bill in 1999 by the Scottish Law Commission recommended that "Penalties which are not manifestly excessive should be enforceable even if they cannot be regarded as based on a genuine pre estimate loss."[54] The recommendation objective is to loosen the inherited limits on enforcing

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[52] (1992) 33 NSWLR 504
[53] [1912] A.C. 394
[54] Brian Eggleston, Liquidated Damages and Extension of Time in Construction Contract (3rd edn, Blackwell Publishing 2009) page 11.

the parties` agreement and minimize the court intervention. It has been noticed that in a recent ruling the approach of the court may present some changes in the approach to LD enforcement.

In the case of *Makdessi v Cavendish Square Holding BV,*[55] the contract was related to a purchase agreement. The purchaser paid an upfront amount, and the balance was agreed to be divided to interim and final payments. The contract included a provision that in the event the seller breached the contract terms, he should not be entitled for the remaining payments. It was established that the seller breached the contract. The purchaser commenced legal proceeding to obtain a ruling to disentitle the seller from his share in the remaining payments. The Commercial Court ruled in favor of the purchaser and disentitled the seller from his share which was equal to $40 million. The Court of Appeal rejected the ruling, as the amount was out of all proportion of the suffered losses caused by the breach, and the party in breach was to stand losses which might go beyond compensation. The House of Lords rejected the Court of Appeal`s decision and allowed the award of $40 million. In the decision, the House of Lords considered the remedy related to a primary obligation, where the rule of limiting the award due to extravagant and exorbitant amount had no application. In distinguishing between primary and secondary obligations the House of Lords provided the following guidance:

> "…in some cases the application of the penalty rule may depend on how the relevant obligation is framed in the instrument, i.e. whether as a conditional primary obligation or a secondary obligation providing a contractual alternative to damages at law. Thus, where a contract contains an obligation on one party to perform an act, and also provides that, if he does not perform it, he will pay the other party a specified sum of money, the obligation to pay the specified sum is a secondary obligation which is capable of being a penalty; but if the contract does not impose (expressly or impliedly) an obligation to perform the act, but simply provides that, if one party does not perform, he will pay the other party a specified sum, the obligation to pay the specified sum is a conditional primary obligation and cannot be a penalty."

Whether the Makdessi case presents a change in the approach that has been adopted since the Dunlop case, or a new guidance to LD`s principles. The ruling emphasis the careful approach to intervene with the parties` agreement by the House of Lords. Additionally, the case of *De Havilland Aircraft of Canada Ltd v Spicejet Ltd*,[56] may illustrate the reluctant approach to

[55] [2015] UKSC 67
[56] [2021] 2 WLUK 334

render LD provision a penal and limit the award. An appeal is outstanding in front of the Court of Appeal. The case is related to a purchase contract where the LD amount as per the contract was $42.95 million, and the Commercial Court ruled in favor of the claimant and allowed the recovery of the LD. The significance of the ruling can be found in Sir Michael Burton statement, where he said:

> "Both the parties were represented by sophisticated and experienced lawyers and were substantial commercial operators in the aircraft industry with a long-standing commercial relationship, and with clearly comparable bargaining power. The defendant had every opportunity to take advice and to use its own experience before agreeing in art.15.4 that the liquidated damages did not constitute a penalty and were a reasonable and agreed amount, and it had not in evidence made any attempt to cast doubt on the realistic nature of that estimate."

The statement emphasises the court`s reluctant approach to limit the award of LD based on hypothetical arguments. Additionally, the case circumstance along with the parties` business nature are considered as factors in allowing or limiting the award.

Another aspect to discuss in relation to the need for LD to present a genuine pre-estimate amount for the likely losses is the difference between the public and the private sectors projects where a number of arguments focus on a concept that public and non-commercial projects don`t suffer direct losses when the delivery dates are delayed, and the LD provision should not be enforced. It is unlikely that the said argument may be accepted by the courts, as any public sector or non-commercial project has direct and indirect losses like; salaries for the team on site to supervise the work, the project mostly financed through a special arrangement where delays may affect the following years budgets, and the possibility of owner liabilities to a third party who may run or operate the project. Also, UAE law courts are not expected to allow such arguments, where the previous discussion illustrated that for public projects, additional fees can be applied to protect the end clients of public projects.

Although UAE law shares the same compensatory principles with English law, its approach to the amount of LD and the need for the amount to present a genuine pre-estimate differs. The difference arises from the nature of civil law and the court`s power to adjust the amount of the award to meet the suffered losses. As discussed earlier, Article 390-2 allows the judge to adjust the damages amount to equal the suffered losses. Also, the parties have the right to fix a suitable amount for agreed damages if they decided to include the LD provision in their agreement. But the said right can be considered conditioned to the reasonableness of the amount. In the event the amount is held unreasonable, the intervention of the court is needed to assure that the awarded damages don't conflict with public order. It is worth mentioning, if the parties` agreement provides LD provision, article 390-2 is mandatory and can`t be superseded by the agreement.

Under UAE Law, for the judge to use his discretion to adjust the damages amount, one of the parties needs to request the court to look in the reasonableness of the amount and without such request, the judge may not consider adjusting the delay amount. The Dubai Court of Cassation in a number of cases held that the party who requests the court to invoke the adjustment power is required to satisfy the court with evidence to establish disparities between the actual losses and the agreed damages.[57] The principle that either of the parties may request the amount adjustment emphasis that the agreed amount can be increased or reduced.

While no case has been reported yet, where the judge has increased the awarded damages, the application of Article 390-2 may result in affecting other contract`s provisions related to contractor`s total liability. FIDIC Red Book provides the following as part of the delay damages Sub-clause:

> "…However, the total amount due under this Sub-Clause shall not exceed the maximum amount of delay damages (if any) stated in the Appendix to Tender."[58]

This research is not intended to address the applicability of adjusting the LD amount and its effect on other contract`s provisions. The importance is to highlight that, the judge`s right to adjust the damages amount must be exercised carefully, as the court has no power to impose a limit on the awarded damages if the contract didn`t include one, which was ruled by the Dubai Cassation Court. In case number 138/1994, the Dubai Court of Cassation rejected rulings by the First Instance and Appeal Courts, which relied on Article 390-2 and ruled a cap on the awarded LD value. The cap was based on an expert opinion that relied on the customs and recommended to limit the amount up to 10% of the contract value. The Dubai Court of

[57] Dubai Court of Cassation, cases No. 494/2003, 48/2005, and 177/1998
[58] FIDIC Conditions of Contracts for Building and Engineering Works 1999 (The Red Book), Sub-clause 8.7

Cassation explained that, if the parties agreed to fix the LD amount without capping, then the agreement is to be followed, not the local customs.[59]

In conclusion, the liquidated damages as contractual devices are expected to reflect pre-estimates to the likely losses to be suffered due to the delays in the completion of works. To enforce liquidated damages, English law requires the delay damages to be a genuine pre-estimate amount, and not exorbitant, or unconscionable. Despite being excessive, compensation can be awarded when it is considered a primary obligation. In addition to the requirement for a genuine pre-estimate, the pre-agreed amount must be clearly stated in the contract without any ambiguity, which may render the clause unenforceable for uncertainty. Under UAE law, the parties have the right to fix the amount of the delay damages. The court may intervene and adjust the amount of the award based on an application by one of the parties to the court to adjust the fixed amount.

After establishing the effects of penalties clauses and the need to pre-estimate the damages amount on enforcing liquidated damages provisions, the discussion will now focus on the party`s entitlement to recover the liquidated damages when his actions contributed in the late completion.

3.3 The Prevention Principle

The trigger for LD is the lapse of work delivery. The general rule is that each party is obliged to perform his obligations as per the agreement and within his control. However, due to the complexity and unique nature of construction projects, some delays may occur out of the performing party`s control. Such delays may impact the project program and delay the project completion. Whenever the delays are considered out of the performing party control, the courts may intervene and limit the right to recover LD. The said intervention may fall within different principles based on the jurisdictions.

Common law jurisdictions recognize and apply the prevention principle, which limits the award of LD when one party impedes the performance of the other party and prevent him from accomplishing by the agreed date. Under English Law, the principle was established in the case of *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*,[60] where the LD provision only dealt with delays caused by the contractor, while some delays were caused by the

[59] Dubai Court of Cassation, Case No. 138/1994
[60] [1971] 1 WLUK 456.

nominated subcontractor`s defective work and the local authority`s process in investigating and evaluating the defected works. It was ruled that the LD provision didn`t bite, as there were delays out of the contractor control.

In construction projects, a number of applications to the prevention principle can be identified. The simplest one, when the employer fails to perform any obligation entrusted to him, which results in delays in the completion. In the case of *Perini Pacific v Greater Vancouver Sewerage and Drainage District*,[61] the employer was under an obligation to procure and deliver the engine equipment to the building. There were delays in delivering the equipment to the site which resulted delays in the work commissioning. The employer sought to recover LD for the delays. The appeal court disentitled the employer from recovering LD, and it was said:

> "Since the earliest times it has been clear that a party to a contract is exonerated from performance of a contract when that performance is prevented or rendered impossible by the wrongful act of the other party."[62]

Another application of the prevention principle can be identified when there is a delay in granting site access on the agreed date. In the case of *Rapid Building Group v Ealing Family Housing Association*,[63] the work was to construct 101 houses. The contract included an agreed site handover date; due to squatters` occupation, the site access was delayed 19 days. At the end of the project, the accumulated delays in the delivery were 43 weeks. Despite the insignificant effect of the 19 days delays in granting the site handover, the court concluded that any award of LD would fall within the prevention principle, and the delay in granting access constituted a breach by the employer, which was not dealt with under the contract. The court dismissed the employer`s counterclaim for LD.

Furthermore, applications can be identified, when the employer interferes with the default subcontractor process and nominates a subcontractor. The general rule is that the contractor is the sole responsible for the work, including any subcontractor performance. However, in the absence of clear contractual provisions, any defects or delays in the nominated subcontractor performance may not fall within the main contractor responsibilities. The effect of delays in the nominated subcontractor performance may result in losing the right to recover LD. In the

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[61] [1956] 1 WLUK 22
[62] Brian Eggleston, Liquidated Damages and Extension of Time In Construction Contract (3rd edn, Blackwell Publishing 2009) page 131
[63] [1984] 1 WLUK 630

Peak Construction case,[64] the defective performance of the nominated subcontractor stopped the performance to allow an investigation. In the case of *Percy Bilton Ltd v Greater London Council*,[65] the nominated subcontractor went into liquidation and the employer was late in appointing a new subcontractor. In both cases, the courts rejected the employers` claims to recover liquidated damages for the late deliveries, as the delays were within the prevention principle boundaries. On the other hand, when the delays occur due to reasons out of the employer`s control, then the contractor may not rely on the prevention principle to limit the award of the liquidated damages.[66]

The prevention principle may consider as a statutory limitation on recovering LD, where its concept is closely linked with the causation test. However, it should be noted that the parties may contract out the said principle when their agreement addresses the employer delays and their consequences. Civil law jurisdictions are considered to treat the causation principle less prominent in relation to delay damages, where the court may consider the parties` contribution in the delays to adjust the awarded amounts. Within UAE law there is no specific article deals with the prevention principle, and the absence of a clear ruling from the UAE court may emphasize that the prevention principle does not apply within UAE.[67] Nonetheless, the employer`s entitlement to recover liquidated damages when his actions caused the delay may fall within the judge`s discretion to adjust the awarded damages, where the judge may appropriate the said entitlement with the parties` contribution with the delays. Considering the nature of UAE law and the influence of the Islamic Sharia laws, it will be disturbing to allow LD recovery when the employer caused the delays, and the contract is silent on the employer`s delays. Enforcing LD in such circumstances may be considered as contradicting a number of mandatory articles within UAE law, which the party in breach can rely on to persuade the court to adjust the awarded LD.[68]

Additionally, the contracting parties are obliged to discharge their obligations and duties in a manner that is consistent with the good faith principle pursuant to Article 246 of UAE Civil Code. There is no clear definition of the good faith principle, and it will be left to the discretion

[64] *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd*, [1971] 1 WLUK 456
[65] [1982] 1 W.L.R 794
[66] Julian Bailey, Construction Law (1st edn, Routledge 2011) page 1033
[67] Steven Graham, 'The Prevention Principle: Recent Developments` <https://www.tamimi.com/law-update-articles/the-prevention-principle-recent-developments/#:~:text=The%20prevention%20principle%20is%20that,he%20prevents%20the%20contractor%20performing.&text=In%20those%20circumstances%2C%20and%20in,'within%20a%20reasonable%20time'.>
[68] Ibid

of the judge to determine the application of good faith principle. However, some commentators have hinted that; UAE courts may consider the definition of bad faith under Article 106 in their determination. The said article deals with the abuse of exercising the rights and defines the use of unlawful right when:[69]

a. There is an intention to trespass;
b. The result is counter to the law, public order, morals, and the Islamic Sharia Laws;
c. The expected interest is disproportionate to the prejudice sustained by other party; or
d. It exceeds the customs and common practice.

Another principle within UAE law, which is analogous to the application of the prevention principle to an extent, is the unjust enrichment. Here, the contractor may rely on in order to persuade the court to adjust the employer right in recovering LD when his actions contributed to the delays. The said principle is provided under articles 318 and 319. The unjust enrichment principle emphasizes that a party is prohibited to benefit from its own breach. The articles read as follows:

> "No one is entitled, without cause, to enrich himself to the detriment of another person, without cause. If he does so, he is liable to restitute it."[70]

> "Unless otherwise provided by law, whoever enriches without just cause, is bound to restitute what he obtained, if existing, or replacement thereof of its value, if not existing."[71]

As both articles emphasize that a party should not benefit from his breach, when an unjust enrichment act occurs, then it is required from the court to restitute both the parties to their positions prior to the breach occurring. The mentioned restitution may be considered as a limitation to the employer`s entitlement in levying LD when his actions caused the delays. Both the articles are considered mandatory, where the parties are not allowed to contract out. Due to the importance of the unjust enrichment in contracts, and its wide application in construction contracts, UAE law provides in Article 878, which deals with the unjust enrichment in

[69] Eric Teo, `UAE & Chinese Construction Law`< https://www.tamimi.com/law-update-articles/uae-chinese-construction-law/>
[70] UAE Federal Law No.5 of 1985, Article 318
[71] UAE Federal Law No.5 of 1985, Article 319

construction projects.[72] The article states that the contractor shall not be held liable if any damage or loss arise out of event he could not prevent.

It is safe to conclude that both the jurisdictions, English and UAE, share the principle that a party should not benefit from his own breaches unless the parties agree. Under English law, when a prevention act is established, the courts may limit the enforcement of LD. While UAE courts do not recognize the prevention principle, but the principle`s purpose is shared through mandatory articles to regulate contractual relations. In the event a party benefited from his own breach, the UAE court may be persuaded to use its own discretion and vary the awarded damages to equal the incurred losses.

In concluding this chapter, it could be said that the inclusion of LD provision is one of the rights granted to the parties under the freedom to contract principle and legal provisions, depending on the jurisdiction. Common and civil laws don`t interfere with the granted rights unless their application contradicts a statutory principle and affects the principle of equity. While the English law approach is to allow or reject the enforcement of liquidated damages, UAE law is based on allowing, rejecting, or adjusting the LD award. Some arguments may praise the flexibility of the civil law approach, while others may find it a blatant interference with the freedom to contract principle. It`s worth noting that the difference may not present a platform to criticize a law and praise the other, as each system has its own uniqueness. The parties are free to select the applicable law for their agreement. However, it is safe to say that there is an essential need for the parties to familiarize themselves with the related law articles and principles prior to agreeing on the applicable law.

The discussion will continue to focus on the other limitations that may be raised from the parties` agreement itself. The research will shed some light on the said limitation and discuss under the title "Contractual Limitation on Enforcing LD Provisions". The discussion will establish both laws, English and UAE, positions on the contractual limitations.

[72] UAE Federal Law No.5 of 1985, Article 878

Chapter 4
Contractual Limitations on Enforcing LD Provisions

Contracts are concluded to regulate the parties` relation and secure their entitlements. In order to serve its purpose, contract`s provisions must be compatible with each other. While recovering LD being a contractual right, poorly drafted provision along or discrepancies with other contract`s provisions may render the entitlement liquidated damages unrecoverable. The inapplicability to recover LD due to contractual provisions can be defined as contractual limitations. Some of the contractual limitations arise due to the uncertainty in operating LD provisions, or defects in drafting the LD provisions. Other limitations arise when the innocent parties exercised their rights in other remedies.

Defects in the contracts may arise when the provisions are drafted poorly creating uncertainty in its purpose and function. The courts enforce the parties` agreements as long as it presents clear and enforceable provisions, without contradicting any mandatory statutory rule. When the provisions are clear and unambiguous, the courts attempt to interpret the provisions without modifying them. Lord Person said:[73]

> "The basic principle is that the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other term would have been more suitable."

The uncertainty and ambiguity may arise when the contract`s provisions are drafted or amended unthoughtfully. Despite the reliance and usage of standard form contracts, LD provisions were held unenforceable due to uncertainty. Any amendment to a standard form or drafting of a bespoke agreement should be performed by specialized personnel. This chapter will focus on the limitation that may arise from operating the contract and the likely positions that both jurisdictions' courts may take in their rulings.

[73] *Trollope and Colls Ltd v North West Metropolitan Regional Hospital Board*, (1973) 9 BLR 60.

This chapter`s discussion will commence by illustrating what is known as “condition precedent” and its effects on rendering LD provisions unenforceable. The discussion will further shed some light on contract termination, and its affects. After that, the discussion will cover the limitation that may arise from the sectional completion, early occupation, and variation orders consecutively.

4.1 Condition Precedent

Condition precedent can be defined as the requirement of an event to occur before a binding contract provision could be operated.[74] The entitlement to recover liquidated damages may fall away when the conditions within the contract are not observed. Usually, the contract defines the condition as a notification to be sent within a specified period, and failure to follow the said condition may render the entitlement to LD unenforceable. Condition precedents are considered in favor of both the parties, as it is considered as a warning to contractors before the deduction, where rescheduling and acceleration can take place to minimize the delay period. On the other hand, employers` benefit from the condition precedent provision as it draws the contractors` attention to the employers` entitlement.

Most of the standard form contracts adopt the approach of including conditions prior to the entitlement to recover LD. Under the Joint Contract Tribunal (JCT) 2005, the condition precedent can be found under Sub-clause 2.32, where two conditions are to be met prior to the entitlement to recover LD.[75] Under FIDIC books, the condition can be found in Sub-clause 2.5 [Employer`s Claim] under 1999 books and Sub-clause 20.2 [Claims for Payment and/ or EOT] under 2017 books. The main difference between the two editions is that the latest adopted more impartiality in the provision where the employer is required to send the notification within 28 days while in the previous edition the employer is required to send the notification as soon as practical. It is worth noting that, under some FIDIC conditions the engineer,[76] the contract administrator can send the notification on behalf of the employer.[77]

[74] Simon Tolson, Jeremy Glover, and Stacy Sinclair, Dictionary of Construction terms (Informa Law 2012), page 62
[75] First condition is the issuance of Non-Completion Certificate by the Architect/ Contract Administration. Second condition is the submission of written notification to the contractor by the employer within 5.day from date of the Final certificate.
[76] Under FIDIC Silver Books the contract administrator is the employer`s representative. The said books don`t include the typical Engineer role as the other books.
[77] Ellis Baker, Ben Mellors, Scott Chalmers, and Anthony Lavers, FIDIC Contracts: Law and Practice (fifth edition, Informa Law 2009), page 404.

The common law jurisdictions approach to condition precedent is based on enforcing the parties` agreement, save it presents a departure from the equity principles. In the case of *Bremer Handels GmbH v Vanden-Avenne Izegem PVBA*,[78] the contract was a purchase agreement, Lord Salmon said:

> "Had it been a condition precedent, I should have expected the clause to state the precise time within which the notice was to be served and to have made plain by express language that unless the notice was served within the time, the sellers would lose their rights under the clause."

Compliance with the agreed conditions is required, and English courts will intervene when there is none or partial compliance. When the condition requires the issuance of a certificate, sending a notification can be held as non-compliance. In the case of *Token Construction Co. Ltd v Charlton Estates Ltd*,[79] the contract was related to constructing four office blocks. The contract provided the employer with the right to deduct/ set off an amount of £800 per week as LD. The right was conditioned to the issuance of a written certificate by the architect to certify the delays. Upon the actual completion of the project, the architect sent the employer a letter summarizing the total delays as 24 weeks, accordingly the employer sought to set off the liquidated damages amount. The court held that the letter didn`t appear as a certificate, accordingly the employer`s entitlement to set off any amount as LD was rejected.

It is settled when the condition requires the employer to send notification per event, the compliance is required, and the previous notification will be considered invalid in the event of awarding a new time extension. In the case of *A Bell & Son (Paddington) Ltd v CBF Residential Care and Housing Association*,[80] the agreement was a construction contract with March 25th, 1986, as the agreed completion date. The contractor was late in delivering the work, and the architect certificated the delay. Consequently, the employer sent a notification with his intention to deduct LD for the certified delays. At a later stage, additional scopes were added, the architect granted a time extension and fixed another completion date, the latest was May 20th, 1986. In February 1988, the architect issued the project final certificate. In November 1988, the architect issued a notice certificating the delay period by the contractor and the employer`s entitlement to recover LD. The court held that the employer entitlement for LD was

[78] [1978] 2 LLR 109
[79] [1980] 1 WLUK 377
[80] [1989] 1 WLUK 537

waived as he didn`t comply with the contract clause, where he was required to notify the contractor before levying the liquidated damages. Additionally, the first notification lapsed as a new completion date was fixed.

The Civil law courts are expected to share the same position with the common law and to limit the award of LD in the event of non-compliance with conditions linked to the entitlement to LD recovery. Under UAE Law, the essence of the parties` agreement is to execute and honor their agreement, any non-compliance is considered a contract breach. Article 243 stresses the importance of honoring and performing the agreement, as it reads:[81]

> "1-Unless the law provides otherwise, the contract's provisions apply on the object of the contract and its consideration immediately upon its formation without making them dependent on payment or anything else.
>
> 2-As regards the contract's rights (obligations), each of the contracting parties shall fulfill what the contract has bound him to do."

The article stresses that, in the absence of conflict with mandatory law provisions, the parties have to perform their obligation as per their agreements. Also, Article 265, which is related to contract interpretation, emphasizes that where the contract`s provisions are constructed clearly to follow. Other mandatory principles can be relied on in front of the court to challenge the award of LD when the condition precedent is not met.[82]

In conclusion, shall the parties` agreement provide for conditions to recover LD, then any non-compliance with these conditions may render LD irrecoverable. English and UAE laws share the same position in limiting LD award due to on-compliance with the condition precedent.

The next section will discuss the right to terminate the contract and its effect on limiting LD award.

4.2 Contract Termination

Contracts are created based on mutual agreement. Thus, the agreement can be terminated by one party or both. Terminating the contract is considered one of the remedies that the parties may exercise. The termination may relieve the parties from their obligation, as the contract`s

[81] Federal Law No. 18 of 1993, Article 243.
[82] The parties may rely on articles 246 (good faith), 106 (unlawful exercise of rights, 318 and 319 (unjust enrichment) from the Federal Law No. 5 of 1985.

provisions will not be binding on them. LD as contractual provisions is no exception, where the default situation is resolving that the contract should relieve the parties from their obligation or entitlement to LD. A number of factors can be identified to determine the termination effects on LD enforceability. The initial factor is the termination date in relation to the agreed completion date, which will be discussed in this section. The second is whether the right to terminate is rightful or wrongful, which is not within the scope of this research.

To establish English and UAE laws` positions on enforcing LD provisions when the contract is terminated, three scenarios can be identified. The first scenario can be identified when the termination occurs prior to the agreed completion date and the contractor is late in the performance. Dissolution of the contract prior to the agreed completion date will render the LD provisions unenforceable. The unenforceability arises as to the prime obligation, to finish by the agreed date, which falls away from the contractor. Accordingly, paying LD, as a secondary obligation will also fall away. Employers may rely on a number of arguments to persuade the courts to allow the recovery of LD, such as if the delays can be foreseen in the performance, as the contractor was not complying with the project program. The court will not accept such hypothetical arguments as the performance prior to the agreed completion date falls within contractor discretion. Additionally, the project program is considered a live document, which aims to provide guidance to the performance, but it cannot be used to establish delays in the delivery, as the contractor may accelerate his performance and overcome the delays.

The second scenario is when the termination occurs past the agreed completion date and prior to the actual completion. If the contractor is running late by his actions, and it`s been accepted, then the employer may recover the LD amount up to the termination date, provided the employer followed the contractual procedure.[83] The guidance under English law can be found in the case of British *Glanzstoff Manufacturing Company LTD. v General Accident, Fire and Life Assurance Corporation, Ltd* .[84] The case was related to a construction contract, where the defendant was an assurance company, who guaranteed any loss that might be suffered by the appellant resulting from the contractor performance. During the work course, the contractor went under liquidation and couldn`t complete the work, the appellant hired another contractor to finish the work. The second contractor delivered the work 6 weeks past the original completion date. The appellant claimed liquidated damages for the 6 weeks. The House of

[83] Julian Bailey, Construction Law (1st edn, Routledge 2011), page 1023
[84] [1913] A.C. 143

Lords affirmed the First Division of the Court of Session and ruled that in the absence of clear provision allowing the employer to recover LD, there was no obligation on the contractor to pay LD for the delays past the termination date, as the work performance was out of their control.

The position under UAE law is expected to match the English law position. Article 124[85] lists the contract as one of the sources for the parties` obligations. Accordingly, any obligation will fall away when the source is nullified, save the obligation that arises by other sources within the article. In a sale contract, to determine employer entitlement for compensation upon contract termination the Abu Dhabi Court of Cassation ruled:[86]

> "Thus, upon a rescission, all agreements, obligations and undertakings included in the contract lapse, and when the principal obligation lapses the consensual compensation [agreed damages] will also lapse."

The third scenario is when the employer terminates the contract, appoints a second contractor, and claims LD for delays from the second contractor performance. The concept of claiming LD from the original contractor, while the completion has been achieved by another contractor may sound irrational. However, the said scenario was debated in a case in front of English Courts. In the case of *Triple Point Technology, Inc. v PTT Public Company Ltd,*[87] the contractor was entrusted to develop a software system in two phases. The contract included an LD clause of 0.1% rate of the undelivered work per day for the lapse period from the due date till the work acceptance date. The appellant progress was slow, and the first phase completion was 149 days late. The respondent paid for the delivered work. The appellant asked for further payment for phase II work, and the respondent refused as the agreed milestone was not achieved. The appellant suspended the work, refusing to work without further payment. The respondent terminated the contract. The appellant commenced legal proceedings to recover the claimed payments, the Technology and Construction Court dismissed the claim for further payment and ordered the contractor to pay LD. The appellant appealed to the Court of Appeal, which affirmed the Technology Court`s judgment. The importance of the ruling was laid in Sir Rupert

[85] Article 124 of the Federal Law No. 5 of 1985, list the following as source for individual obligations: Contracts; Tort; Law; Unilateral Act, and Beneficiary Act. As established earlier Liquidated damages are contractual tools and only arise from the parties` agreement.
[86] Abu Dhabi Court of Cassation, 519/Judicial Year 2
[87] [2019] EWCA Civ 230

Jackson`s judgment, where guidance on the effect of terminating the contract on recovering LD in three approaches that can be summarized as follows:

The first approach is that the LD clause doesn`t apply after the termination date as the completion was never achieved by the original contractor and the employment of the original contractor was terminated. This approach was established in the early discussion based on the House of Lords decision in the *British Glanzstoff* case.[88]

The second approach allows the employer to recover LD up to the termination date, after which the employer can recover unliquidated damages. This approach as described by Sir Rupert Jackson is as follows:[89]

> "The textbooks generally treat category (ii) as the orthodox analysis, but that approach is not free from difficulty. If a construction contract is abandoned or terminated, the employer is in new territory for which liquidated damages clause may not have made provision."

The third approach is that the LD clause will apply until the second contractor achieves completion. However, this approach is conditioned to a link between the original and the second contractor. This approach was established in the case of *GPP Big Field LLP, GPP Langstone LLP v Solar EPC Solutions SL (Formerly Prosolia Siglio XXI)*.[90] The case was related to delays in five engineering, procurement, and construction contracts. The employer entered into agreements with a contractor to construct five solar generation plants, the contractor`s guarantor was its parent company, the defendant. Upon the contractor`s insolvency, the employer assigned the contracts to the parent company under the same contractual terms. There were delays in four contracts, accordingly, the employer sought to recover the delay damages. The court accepted the employer`s arguments to recover LD under the original contract and held the defendant liable to pay LD for the delays raised from the original contract, where he acted as guarantor. It will be rare to see the court allowing the employer to recover liquidated damages from the original contractor when the completion was achieved by the second contractor. Save when the original contractor is taken over by the

[88] Ibid
[89] Ibid
[90] [2018] EWHC 2866 (Comm)

second contractor, then the first contract`s provisions are almost carried through into a new contract without changes.[91]

Under UAE Law, if the employer claims LD from the original contractor when the completion is achieved by another contractor, the court is likely to reject such claim, as illustrated earlier, upon termination of all obligations that fall away from the parties. Accordingly, the contract termination will nullify the contract`s provisions, save clauses expressly that deal with termination consequences and obligations upon termination which the court will look in the matter whether it presents a separate agreement or part of the original contract and held it void.

In conclusion for this section, it can be established that both English and UAE laws share the same position, where terminating the contract presents a limitation to recover LDs on delays past the termination date.

The next section will focus on the effect of dividing the work into sections, and whether sectional completion may present a limitation to recover LD.

4.3 Sectional Completion

The general rule is that the contract has a single completion date, and delay damages will apply when the performance lapse the agreed completion date. However, due to the unique nature of construction projects, employers may divide the work into sections and packages aiming to utilize the completed section once it is ready. Contractors may prefer this approach, as it reduces the burden of maintaining the completed sections, it may also improve the cash flow as the sectional related retention money can be released at each section`s handover. The LD provision can be drafted to allow employers to recover LD for delays in each section delay separately. However, the entitlement to recover sectional LD may face limitations.

The limitations to sectional LD may arise when the contract makes unclear references to the sectional completion date. The failure to identify the completion date(s) may render the sectional LD provision inoperable due to the uncertainty in calculating the delay period. In the case of *M J Gleeson (Contractors) Ltd v London Borough of Hillingdon*,[92] the bill of quantity included details regarding the sectional completion and the applicable damages amounts. However, the contract failed to identify the completion date for each section, and the mention

[91] Brian Eggleston, Liquidated Damages and Extension of Time In Construction Contract (3rd edn, Blackwell Publishing 2009) page 172
[92] (1970) 215 EG 165

was only for one completion date. The judge ruled that the bill of quantity provisions couldn`t be used to impose obligations to pay LD. In the absence of clear provision within the contract, the reference to LD provision in the bill of quantity ought to be ignored.[93]

The requirement for LD provision to be clear and consistent applies to sectional provisions, and any uncertainty or ambiguity may limit the award of the provision. In the case of *E. Turner & Sons Ltd v Mathind Ltd*,[94] the tender documents identified one amount for LD. After several meetings, the parties agreed on the commencement and completion dates, but no LD amount for each section. Upon delays in delivering the section, the employer sought to recover LD. Albeit, there was a number of approaches by the employer to calculate the sectional damages amount, the court held that the employer couldn`t recover LD for delays, save delays past the final completion date.

Contracts` provisions are drafted to complement each other, and any defect within one provision may affect the operability of others. In the case of *Bramall & Ogden Ltd v Sheffield City Council*,[95] the work was related to the erection of 123 dwellings. The contract provided LD at £20 for uncompleted dwelling. However, the contract failed to include a sectional completion provision. Despite the late completion for a number of the dwellings, the employer`s right to levy liquidated damages was rejected due to the absence of the sectional completion provision.

The absence of scale down provision may render the LD provision void, as the court may hold it a penal provision. In the case of *Stanor Electric v R Mansell*,[96] where the work was related to construct two houses. The contract provided for the LD amount but failed to include a mechanism to reduce the LD for sectional completion. The contractor completed one house late, and the court ruled that the LD provision was a penalty.

To allow the award of sectional LD provision, English courts require the contract to provide an appropriate definition of the sectional work. In the case of *Taylor Woodrow Holdings Ltd v Barnes& Elliott Ltd*,[97] the court affirmed the arbitrator`s decision that the sectional delay damages provision be held void and inoperable due to the absence of a clear contractual

[93] Brian Eggleston, Liquidated Damages and Extension of Time In Construction Contract (3rd edn, Blackwell Publishing 2009) page 62
[94] [1986] 12 WLUK 174
[95] (1983) 29 BLR 73
[96] (1988) CILL 399
[97] [2004] EWHC 3319

definition of what comprised a section. Nonetheless, not every disagreement on defining the sectional work will render the provision inoperable. In the case of *Vinci Construction UK Ltd v Beumer Group UK Ltd*,[98] the subcontract provided LD amount and completion date for each section. Upon some delays, the parties agreed to revise the completion date. The dispute was raised upon an adjudicator`s decision to consider the LD provisions inoperable due to technical uncertainty, as the part of the work was delayed and fell within two sections (5 and 6). Mrs. Justice O`Farrell held that the provisions were operatable, and it didn`t express a conceptual uncertainty, as an expert opinion could provide a resolution for the matter.

Under UAE law, the right to divide the work and identifying sections fall within the contract freedom principle under article 257.[99] To enforce sectional LD, the provisions must provide the applicable damages amount and completion date for each section, failing to provide one or both may render the LD provision unenforceable. Additionally, any uncertainty or ambiguity may limit the award.

The approach to sectional completion is established in standard form contracts. FIDIC rainbow suite allows the parties to divide the work to sections within their contract. Sub-clause 8.2 [Time For Completion] of the 1999 Red Book emphasis that the employer can fix the completion date for each section and the contractor has to achieve the practical completion by the fixed date, any delays in delivering by the completion date will entitle the employer to claim LD pursuant to Sub-clause 8.7 [Delay Damages]. The employer entitlement to recover LD for the section is conditioned to have the completion date and the applicable LD for the section is clearly stated in the contract, besides following the agreed procedure for the claim under Sub-clause 2.5 [Employer`s Claims].[100] The need to clearly fix the sectional completion date and applicable delay damages are due to the absence of a mechanism to scale down the amount of the LD in FIDIC books.

In conclusion, the parties have the right to divide the work into sections, whether to benefit from the completed section or to reduce the burden to maintain it. Save a clear agreement, there is no obligation on the contractor to finish any section of the work earlier, neither an obligation to pay LD for an uncompleted section of the work. English and UAE laws share the same

[98] [2017] EWHC 2196
[99] Article 257 of UAE Civil Code grants the contracting the parties the freedom to contract. The freedom to contract is conditioned with being in line with the public order within the emirates.
[100] FIDIC 2017 Red Book provide the right to fix delay damages for the Section under Sub-clause 8.8, and the Employer to follow the claims procedure under Sub-clause 20.2.

position to prioritize the parties` agreement in enforcing sectional LD provisions. Both laws require the sectional LD provision to clearly mention the completion date and the LD amount for each section. Standard forms contracts allow sectional completion under two approaches. The first approach is where the said date and amount be clearly identified. The second approach is by providing a sectional completion date and one LD for the whole project with a mechanism to scale down the LD for each section.

The next section can be considered as a continuation to the sectional completion, which will discuss whether the employer has the right for early occupation and benefits from the work, or it may present limitations to the entitlement in recovering LD.

4.4 Early Occupation

As the earlier discussion established, the parties may allow for sectional completion, the agreement may provide the employer with the right to benefit or occupy the work earlier than the actual completion. In the event the early occupation provision is drafted poorly without observing other contract's provision it may present some limitations to the right of recovering LD`s.

As the right for early occupation is within the boundary of freedom to contract, English courts` approach is to enforce the parties` agreement wherever applicable. In the case of *Skanska Construction (Regions) Ltd v Anglo Amsterdam Corp Ltd,*[101] the contract provided the employer with the right for early occupation. The related provision emphasized that the early occupation should occur with the contractor approval and the practical completion deemed to have occurred the day the occupation occurred. The contractor was late in delivering the work. During the delay period, the fitting subcontractor commenced working on site. Upon project delivery, the employer sought to recover LD for the full delay period. The arbitrator granted the employer an award to recover the full LD amount. The Court of Appeal rejected the arbitrator`s award and disentitled the employer from recovering LD`s for the period past the date of the fitting subcontractor commencement. The court explained that by allowing the fitting subcontractor to commence work, the work was deemed to be occupied and completed.

The requirement for the early occupation provision to provide clear and flawless words is needed, as any uncertainty or ambiguity may limit the entitlement to recover LD, as contractors

[101] [2002] 6 WLUK 358

may argue that the early occupation and recovering LD provisions present double benefiting to the employer. In the case of *Multiblex Construction Pty Ltd v Abgarus Pty Ltd*,[102] the contract provided the employer with the right to engage a fit-out subcontractor before the practical completion was achieved. When the dispute was presented in front of the court, the contractor argued that the employer entitlement to recover LD should lapse, as the early occupation presented a benefit, and the LD provision failed to include a scale down mechanism to consider such benefit. The Judge rejected the said arguments as the early occupation wasn`t a benefit, but a contractual right.[103] While, in the case of *BFI Group of Companies Ltd v DCB Integration Systems Ltd*,[104] the employer benefited from the early occupation and suffered no losses. The entitlement to recover LD was disputed and referred to an arbitrator, who declined to award liquidated damages to the employer as no losses were incurred. The court rejected the arbitrator`s decision and allowed the employer to recover LD.[105]

Under UAE law there are no specific provisions that deal with the early occupation. Accordingly, the right to occupy early falls within the freedom to contract, which the law prioritizes. Save it contradicts a mandatory law provision. When the contract is silent or the provision is unclear, then the entitlement may be limited as benefiting from the work during the delay period in addition to recovering LD, which may be considered as falling within the unjust enrichment boundaries. In addition to the unjust enrichment, the contractor may relay his arguments on other mandatory law provisions like; the prohibition to exercise a contractual entitlement in bad faith article (106) of the Civil Code, and unlawful exercise of rights under article (346) of the same code.

FIDIC books allow for early occupation provisions. Under Red Book 1999, Sub-clause 10.2 [Taking Over of Parts of the Works] provides the employer with the right to take over any part of the work before the practical completion. Exercising the said right will render the work in that part practically completed and a takeover certificate (TOC) to be issued by the contract administrator.[106] The issuance of the said certificate will lapse any entitlement for LD after the

[102] (1992) 33 NSWLR 504
[103] Brian Eggleston, Liquidated Damages and Extension of Time In Construction Contract (3rd edn, Blackwell Publishing 2009) page 115
[104] (1987) CILL 348
[105] Brian Eggleston, Liquidated Damages and Extension of Time In Construction Contract (3rd edn, Blackwell Publishing 2009) page 78
[106] 1999 Red and Yellow books provide the employer with the right to take part of the work before practical completion. The silver book limits the right to take over part of the work to the parties` agreement or the mention of such right under the Employer`s Requirements.

TOC date. The Sub-clause adds that in the event a TOC for a part has been issued, then a reduction to the delay damages for the remaining work should take place. The reduction will be based on the engineer determination. The engineer should determine the reduction carefully with impartiality, as The FIDIC Guide advises under common law jurisdiction as: "The Laws of some countries require liquidated delay damages to be predetermined, and not to be subject to assessment by someone appointed by the payee."[107] Some commentators hinted that arguments to nullify the LD provision based on the reduction may not succeed.[108] The safest approach is that, the determination to be exercised fairly with care to avoid the parties` disagreement, which can be escalated to a dispute, where courts may interfere with the LD award.

In conclusion, the right to early occupation is governed by the contract and the parties` agreement. In the absence of a clear provision, both English and UAE courts may limit the entitlement to recover LD when early occupation occurs. FIDIC rainbow suite provides the employer with the right of early occupation and exercising such right will disentitle the right to levy LD for the occupied section.

The last part of this chapter will discuss the right to vary and its effect on the entitlement to recover LD.

4.5 Variation Orders

Variation orders are one of the contractual rights granted to the employer, or contract administrator on the behalf of the employer, where they can instruct changes to vary the work. Variation orders can be issued for a number of reasons, mainly to achieve the project target and to meet any challenges. However, exercising the right to vary may impact the project completion date, which may affect the entitlement to LD. Additionally, variation orders may alter the contract price, which may affect the LD provision enforcement, as the discussion earlier established that, some jurisdictions require the LD provisions to reflect a pre-defined amount. Consequently, variation order may render the LD provision unenforceable as it may make it penal. When the contract`s provisions are observed and operated carefully there may be no room to limit or affect the enforcement of the LD`s provision. However, exercising the

[107] Corbett & Co International Construction Lawyers Ltd, Commentary on FIDIC 1999 Red Book (2016), clause 10, page 6
[108] Ibid

right to vary in the absence of a clear time extension, or amount adjustment may limit the award of liquidated damages.

Under English Law, where the right to vary has been exercised and no contractual provision deals with the time extension, then the courts may disentitle the employer from recovering LD, as the variation instruction, falls within the prevention principle. Furthermore, the contractual obligations to complete on the agreed date and to pay LD for the delay period will lapse, and the contractor will be obliged to complete the work within a reasonable time, which is known as time become at large. In the case of *Dodd v Churton*,[109] where the contract`s provisions did not allow for a time extension, the employer was disentitled from levying LD for 25 weeks as he instructed a late variation order. In the case of *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd,*[110] both the parties` actions caused delays, and the contract failed to provide a time extension mechanism for the employer`s delay. The employer`s entitlement for LD was rejected, Lord Justice Salmon said:

> "The liquidated damages and extension of time clauses in printed forms of contract must be construed strictly contra proferentem. If the employer wishes to recover liquidated damages for failure by the contractor to complete on time in spite of the fact that some of the delay is due to the employers' own fault or breach of contract, then the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such a fault or breach on the part of the employer."[111]

When the LD amount is a fixed sum, variation orders may limit the enforceability of the said damages when altering the contract price, which may present the LD provision as penal. In the case of *Unaoil Ltd v Leighton Offshore Pte Ltd*,[112] the parties had an agreement to support each other in submitting a tender as follows: If the defendant won the tender, then the claimant had to be subcontracted, failing which, the defendant should pay a lump sum amount of $40 million as LD. The LD clause included "the parties agree such amount is proportionate in all respects and is a genuine pre-estimate of the loss that UNAOIL would incur."[113] Upon tender award, the contract price was reduced from $75 million to $ 55 million due to various variation orders. During the work course, the defendant couldn`t subcontract the claimant. The claimant sought

[109] [1897] 1 QB 562
[110] [1971] 1 WLUK 456
[111] Ibid
[112] [2014] EWHC 2965
[113] Ibid

to recover the agreed liquidated damages amount. The court rejected the claim and explained that the agreed sum couldn`t be accepted as a genuine pre-estimate due to the reduction in the contract price.

In hypothetical case, where the LD amount is a percentage of a re-measure contract, the employer may not set-off or deduct any amount as delay damages before the actual completion is achieved, as the contract value is not ascertained.

Under UAE law the employer has the right to vary the work in construction projects pursuant to articles 886 and 887.[114] Issuing variation orders without a clear mechanism for a time extension may limit the employer entitlement to liquidated damages as it may be considered as acting in bad faith, unlawful exercising of right, and unjust enrichment.[115] In case no. 1259/2009 (26),[116] the contractor was (01) year late in executing additional works, and the agreement to execute the extra work was appended to the original contract which didn`t include any mechanism for granting time extension.  At the First Instance Court and the Court of Appeal, judges relied their decisions on experts` reports, which concluded that the contractor`s delays were not justified and advised that the contractor should pay an amount of 120 thousand AED as LD for the late delivery. The Abu Dhabi Court of Cassation rejected the lower courts` decisions and limited the award of LD. The rationale behind the highest court`s decision was that the contract didn`t address the mechanism for a time extension, accordingly, the enforcement of the LD provision would lapse. The case is a strong reminder that the contract`s provisions work as unified units, and LD provision works parallel to the time extension provision, the absence of a clear time extension mechanism may limit the award of LD, even if the contractor is late in delivering the work.

Under standard forms of contracts, the right to vary is usually given to the contract administrator, who by varying the work is deemed to act on behalf of the employer. It is settled that the employer may not attack variation instructions or time extension awards to claim LD. In case 198/2009,[117] the employer sought to recover LD for some delays by attacking certificates issued by the engineer. The Dubai Court of Cassation ruled that the consulting engineer is chosen by the employer to supervise the performance of the work. It`s within the scope of the engineer to issue certificates entitling the contractor to a monetary sum within the

[114] Federal Law No. 5 of 1985, Articles 886 and 887.
[115] For further discussion please see the Sub-title 3.3 “The Prevention Principle”.
[116] Abu Dhabi Court of Cassation, case no. 1259/2009 (26)
[117] Dubai Court of Cassation, case no. 198/2009.

contract scope or state the completion of the work without delay. It is not open to the employer to dispute or evade the certificate unless there had been collusion or fraud by the engineer, and the burden of proof lay on the employer.[118]

In conclusion, the right to vary the work is given to the employer to grant achieving the project target and overcome any design mistakes. Variation orders may limit the award of LD when the contract provides no time extension provision or a mechanism to allow contract price alteration. English and UAE Laws share the same position by limiting the award of LD in the absence of time extension provision. The importance to observe LD provisions when variation orders are instructed is that it may render the amount out of all proportion which may threaten its enforcement.

At the end of this chapter, it is safe to conclude that the freedom to contract principle grants the parties the right to conclude their agreement to suit their targets and needs. However, the court may intervene with the said principle when it presents a departure from the principle of equity, or interference with the public order. Some advisers urge the parties to draft the provisions of their own agreement, while others recommend adopting standard form contracts. Whether the parties will adopt a standard form contract or prepare a bespoke contract there is a need to carefully draft, amend, or review, as any uncertainty or ambiguity may limit the award of LD. The research now will shed some light on challenges the contractor may present to limit the entitlement to recover LD.

[118] Ibid

Chapter 5
Challenges to Liquidated Damages Provisions

Despite the materialization of the delays, occasionally, contractors decline to acknowledge their agreements to pay LD. Such denial and refusal can be attributed to the belief that the applicable law provisions are not observed, the contract`s provisions don`t support the alleged entitlement, or the contract is not administrated fairly and correctly. The refusal and denial state may lead to disagreements, which can be escalated to become a dispute. In the event of disputes, the parties will present arguments to challenge the award of LD. Challenges focus to establish the inconsistency of levying LD with statutory laws` provisions and principles, or with contractual provisions. This chapter will briefly discuss the possible challenges that contractors may rely on to limit the award of LD.

The presented limitations in chapter three can be used to persuade the court to limit the award of LD. Under English law, the contractor may challenge the LD provisions relying their arguments on the guidance from the Dunlop case. LD provisions may be held penal when the amount is extravagant in relation to the losses, or the fixed amount doesn`t present a genuine pre-estimate. Further challenges can be argued when there is an act of prevention not addressed within the contract. The prevention principle will apply when the contract fails to provide a time extension mechanism, or the contractual mechanism for time extension doesn`t address the alleged prevention act.

On the other hand, the statutory limitations under UAE law may differ from English law. The LD provision validity depends on the contract validity. Contractors may persuade the court to use their power to vary the damages amount by relying on some mandatory provisions within the law like unjust enrichment. In the event the suffered losses are significantly less than the damages, the contractor may request the court to use its power to adjust.

The contractual limitation discussed in chapter four can be developed to limit the award of the LD when the contract`s provisions are uncertain or missing a needed mechanism. When the employers are not complying with the contractual procedure, contractors may focus their attacks on establishing the employer`s breach, and the said breach should limit the award, as under any jurisdiction a party may not benefit from their breach. Contractors may attack the LD provision when there is uncertainty in the provision. Under UAE law, if the court held the provision ambiguously and uncertain, then the interpretation may be concluded in favor of the contractor.[119] Under English law, the interpretation of unclear provision may be ruled against the employer,[120] who might have the upper hand in the bargaining power at the time of concluding the agreement. Further challenges can be developed when the contractor attacks the performance of the contract administrator. The contract administrator, known as an Engineer or Architect, is hired by the employer to perform a number of duties like supervising and certifying the work.

Most of the standard form contracts require the contract administrator to act impartially in issuing certificates or determining to evaluate one of the parties` claims. Despite no contractual relationship between the contractor and the contract administration, challenges to the administrator performance may limit the award of LD. When wrongdoings or fraud is established in the contract administration performance, then the determination/ decisions will be set aside. Lord Justice Denning said:

> "Fraud unravels everything… it vitiates judgments, contracts and all transactions whatsoever."[121]

On the other hand, the establishment of incompetency in the performance may not nullify the contract administrator`s decision. In the case of *Lubenham Fidelities & Investments Co. Ltd v South Pembrokeshire District Council*,[122] the architect made a number of mistakes. It was ruled that the entitlement to recover liquidated damages lapsed due to the architect negligence, as he relied on an interim certificate and certified deduction of the LD before the actual completion materialized.

The challenges to the contract maladministration can be constructed to attack and invalidate the issued certificates, which may render the LD enforcement invalid. In the event of partiality and bias by the administrator, the court may limit the recovery LD. In the case of *John Baker Construction Ltd v London Portman Hotel Ltd,*[123] the architect certified a time extension. However, the court held that the architect`s decision was flawed and not fair, as it didn`t rely on logical analysis, which limited the award of the liquidated damages. Other challenges may be built to attack the timing of issuing the certificate. In the case of *H. Fairwaether Ltd v Asden*

[119] Federal law article 266-1, however, in the event of previous trading or clear tradition practice the court may rely on article 265-2 and interpret the provision as pe the parties` intentions, previous transactions, or customs.
[120] Julian Bailey, Construction Law (1st edn, Routledge 2011) page 1028
[121] *Lazarus Estates Ltd v Beasley* [1956] 1 Q.B. 702
[122] (1986) 33 BLR 33
[123] (1996) 12 Const. L.J.277

Securities Ltd,[124] the final completion certificate was issued in July 1977. In June 1978, the architect certified the delay amount. The employer relied on the certificate to deduct the certified liquidated damages. The contractor challenged the certified delays. It was ruled that, upon the issuance of the final completion certificate, the architect lacked the power to issue another certificate. The final completion certificate emphasized that the work was carried out as per the contract terms and specifications with no mention of delays.

Additional challenges can be presented when the certificates are issued by delegated individuals where most of the standards form contracts stress that the duty to determine and certify may not be delegated, and any certificate issued by other than the contract administrator may invalidate it.

On the other hand, the employer may not attack the contractor administrator performance to recover liquidated damages. This was established in the Dubai Court of Cassation in case No. 198/2009,[125] the ruling included:

> "It is well settled that the consulting engineer chosen by the employer in connection with muqawala contracts [contracts for the performance of particular jobs of work] is his representative in supervising the performance of the contract works. Thus, the certificate issued by him entitling the contractor to a specific sum of money or stating that he has completed the works that he was instructed to do without delay, will be within the scope of the proxy on behalf of the employer, whereby it is not open to the latter to dispute it or to evade it unless there has been fraud or collusion on the part of the engineer, the burden of proof of which lies upon the employer."

Although the contract administrator is not a party to the construction contract, his performance plays a vital role. Wrongdoings and mistakes may result in disentitling the employer from recovering LD.

As the discussion in this paper illustrated the limitation and challenges to enforcing liquidated damages provision, the question will arise, "What it takes to draft an enforceable provision?" There is no straight-forward answer, as LD provision can be affected depending on the jurisdiction and applicable law, other contract provisions, the transaction nature, customs, and

[124] [1980] 1 WLUK 136
[125] Dubai Court of Cassation, case no. 198/2009.

the parties` intentions. However, to enforce LD provision, it should contain the following as a minimum:

a. Clear identification of the breach, which triggers the entitlement to recover LD.
b. Mentioning the reason for which the parties are agreeing to fix the damages, which can be drafted to deliver that, the remedy presents a compensation for the likely losses to be suffered in the event of breach materializing.
c. Identifying the monetary sum or a clear mechanism to be followed to calculate the amount of the remedies.
d. Inclusion of exclusivity statement, as the remedy presents the only compensation for the breach occurrence.
e. Inclusion of statement that both the parties acknowledge and agree to the remedy amount as it presents no penalty.

Chapter 6
Conclusion

Liquidated damages are contractual remedies, where a monetary sum is identified to remedy the delay in delivering the work. LDs are agreed before breach materialization during contract conclusion. LD meet the general damages principle to compensate the aggrieved party but differ in its characteristics like; the time to establish the remedies, the duty to mitigate losses, the need to incur losses, and the burden of proof. LD provisions may benefit both the parties, as it provides a quick and effective remedy. Also, it limits the contractor`s liability for delays in the delivery. The benefits are not limited to when the breach may occur, as the said provision enhances the parties` positions at the contract negotiation and conclusion phase. Identifying the likely losses has to be exercised carefully or the aggrieved party may not be compensated enough. Where the delays are significant, capping the LD may demotivate the contractor form accelerating the performance.

English law imposes limitations on recovering LD when the provision departs from its compensatory nature and becomes penal. LD provision may be considered penal when the amount is considered extravagant to the likely losses to be suffered, or when the clause wording coercing the performance, finally when the amount is a result of unequal bargaining power. The definition of penal provision may include extravagant and unconscionable amounts as long as it is considered a secondary obligation. If the award is held as a primary obligation, the argument of genuine pre-estimate and the extravagant amount may not be accepted by courts. The LD amount can`t be presented as a range, as it will be held uncertain and unenforceable. The prevention principle is considered one of the statutory limitations, wherein the absence of the parties` agreement, and the employer`s actions that impede the performance may render the LD irrecoverable.

The essence of LD provision under UAE law is the compensatory nature, where the parties can agree ahead on the compensation amount. Courts are expected to enforce the parties' agreements, save when it departs from the compensatory nature or contradict the public order. The guidance to distinguish between penal and LD provisions can be found within the parties' previous transaction, the nature of trade, customs and expert opinion. Penal provisions are enforceable under some circumstances, where additional fees can be awarded to protect the public interest. The requirements to award LD provisions are breach materialization, incurring losses, and the causation link between the breach and suffering losses. Non-meeting any of these requirements may render the LD provision unenforceable. With no restrictions on the LD amount being a genuine pre-estimate as it presents the agreed amount, the court may use its own discretion to vary the awarded amount when needed. UAE law doesn`t recognize the prevention principle, however, the principle`s nature can be found in articles, where the parties can rely on to prevent unjust enrichment.

The entitlement to recover LD may fall away due to contractual limitations. Failure to observe and comply with the contractual procedure to claim and recover LD can limit the award of LD. The termination of the agreement will result in rendering all the contract`s provisions unenforceable, including LD, save special circumstances where the recovery of LD may be allowed past the termination date. The right to divide the work into sections, occupy part of the work earlier and vary the work are based on the parties` agreement. However, exercising the said rights need to be exercised with care to avoid any limitations to the liquidated damages award. English and UAE laws share the same position and prioritize the parties` agreement unless it contradicts statutory provisions.

Contractors may deny their obligations to pay liquidated damages for a number of reasons like employer`s non-compliance with statutory provisions, contractual provisions, or contract maladministration. Contractors may challenge the entitlement to liquidated damages by attacking the provision, thereby, courts may limit the award. Despite having no contractual relationship between the contractors and the contract administrators, contractors may challenge the performance of the administrators to nullify LD provisions.

Finally, to operate LD provisions it takes more than a well-drafted provision. The contract must be consistent without missing any key provision. The key and essential provisions can be identified like, time extension for delays attributed to the employer and the contractor, which may save the liquidated damages from falling within the boundaries or the prevention principle, or the unjust enrichment. Another provision to include and address is the parties’ intention to the right of early benefit and occupation. Nevertheless, the contract must address key dates like work commencing date, and contractual completion date. Additionally, the parties may adopt one or more dispute resolution methods, where mediation and senior executives` negotiation are to address the disagreement without the project related heat and focus on the commercial implication and the parties` relation.

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