



ICCP

**EMPLOYERS CLAIMS FOR LIQUIDATED
DAMAGES**

Presented by
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- WHAT ARE LIQUIDATED DAMAGES/DELAY DAMAGES?
- HOW DO THEY ARISE?
- ELEMENTS OF A CLAIM FOR DELAY DAMAGES.
- ENFORCEMENT OF DELAY DAMAGES.
- PENALTY CLAUSES.
- THE PREVENTION PRINCIPLE.
- TIME AT LARGE.

WHAT ARE LIQUIDATED DAMAGES?

- In the FIDIC 2017 Redbook, 1.1.28, Delay Damages mean the damages for which the Contractor shall be liable under Sub-Clause 8.8 [*Delay Damages*] for failure to comply with Sub-Clause 8.2 [*Time for Completion*].
- The term Liquidated Damages is used in the JCT Contract while Delay Damages is used in the FIDIC Contract but they all relate to a pre-agreed fixed sum to which the Contractor is liable to pay the Employer should it fail to complete the Works by the Time for Completion.
- These funds are typically deducted from what the Employer owes the Contractor for the work executed.

WHAT ARE LIQUIDATED DAMAGES?

- Time for Completion means the time for completing the Works or a Section under *Sub Clause 8.2 [Time for Completion]*, as stated in the Contract Data as may be extended under *Sub-Clause 8.5 [Extension of Time for Completion]*, calculated from the Commencement Date.
- Commencement date means the date as stated in the Engineer's Notice issued under *Sub-Clause 8.1 [Commencement of Works]*.
- *FIDIC 1999 Redbook Sub-Clause 8.7* provides that 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.

WHAT ARE LIQUIDATED DAMAGES?

- *FIDIC 2017 Sub-Clause 8.8*, states that Delay Damages is the amount stated in the Contract Data, which shall be paid for every day which shall elapse between the Time for Completion and the date for Completion of the Works or Section.
- The benefit of delay damages is that they avoid the complexity of proving and assessing the actual loss where a delay occurs.

WHAT ARE LIQUIDATED DAMAGES?

- To avoid payment of delay damages, in case of an Employer caused delay, a Contactor must follow the Claim Procure under the *FIDIC 2017 SC 20.2 [Claims for Payment and/or EOT]* and obtain an Extension of Time.
- The purpose of an Extension of Time is to negate any claim for Delay Damages during the extended period.

SC 8.7 FIDIC 1999

- Employer to issue a Notice subject to SC. 2.5 [Employer's Claims].
- Notice to be given as soon as practicable.
- Simpler claim procedure under SC 2.5.
- Delay Damages are capped as stated in the Appendix to Tender.

SC 8.8 FIDIC 2017

- Employer to give a Notice subject to SC 20.2 [Claims for Payment and/or EOT].
- Notice to be given within 28 days.
- Detailed Claim procedure similar for both Employer and Contractor.
- Delay Damages are capped as stated in the Contract Data. However, that cap will not apply “in any case of fraud, deliberate default or reckless misconduct...”

- There must be a contract with a clause that allows a claim for delay damages.
- The Contract must have a date for practical completion or a mechanism to extend such a date.
- The Contract must include a mechanism for computation of delay damages.

- The FIDIC *Sub-Clause 2.5 FIDIC 1999* and the FIDIC *Sub-Clauses 8.8 and 20.2 FIDIC 2017*, the Employer's right to claim Delay Damages from the Contractor is well stipulated.
- The Delay Damages are expressed in the Contract Data as a percentage of the final Contract Price. These damages can also be capped at a maximum percentage of the final Contract Price.
- In both FIDIC 1999 and 2017, the Employer is required to issue a Notice as a prerequisite for its claim for Delay Damages.

NH International (Caribbean) Ltd v National Insurance Property Development Company Ltd (Trinidad and Tobago), the Court held:

“...it is hard to see how the words of clause 2.5 could be clearer. Its purpose is to ensure that claims which an employer wishes to raise, whether or not they are intended to be relied on as set-offs or cross-claims, should not be allowed unless they have been the subject of a notice, which must have been given ‘as soon as practicable’.”

- Whereas an Employer is obliged to issue a Notice to the Contractor and present a claim for Delay Damages before the Engineer who is obliged to issue a Determination under the FIDIC SC 3.5 (Red Book 1999).
- The Court had a different view in ***J Murphy & Sons Ltd v Beckton Energy Ltd*** that: -
 - “The Employer’s right to delay damages was not conditional upon an agreement or determination by the Engineer, Sub-clause 8.7 set out a self-contained regime for the trigger and payment of delay damages. A call on the bond would not be found to be fraudulent where the Employer believed it was entitled to delay damages under Sub-Clause 8.7, even though no entitlement had been determined under Sub-clauses 2.5 and 3.5”*

ENFORCEMENT OF DELAY DAMAGES.

- The amount of Delay Damages must be a reasonable estimate of the anticipated or actual loss caused to the Employer by the delay.
- The UK Supreme Court laid down the test in ***Cavendish Square Holding BV v Talal El Makdessi***. The test is whether the delay damages clause protects any legitimate business interest.
- If so, whether the clause is extravagant, exorbitant or unconscionable. In cases where delay damages are proved to be unconscionable, such a clause may be declared by a Court to be unenforceable.

- In *Triple Point Technology, Inc v PTT Public Company Ltd* the Supreme Court in UK clarified that Liquidated damages are payable up to the date of termination, with general damages available thereafter.
- The Employer's interest is to have the Contractor perform the Contract, the Employer cannot have an interest in simply punishing the Contractor.

ENFORCEMENT OF DELAY DAMAGES.

The High Court in Uganda, ***Roko Construction Limited v Kobusinge Janet***, while setting aside part of an Arbitral Award held as follows:

“Liquidated damages are a way of pre-estimating the loss that will be suffered, usually as a result of delay, at the time the contract is entered into. In this sense liquidated damages provide certainty to both parties whose rights and liabilities are now fixed. A valid and mandatory liquidated damages clause which stipulates a positive amount of liquidated damages will evidence an intention by the parties that general damages cannot be claimed. The award of general damages on top of or in addition to liquidated and ascertained damages is a fundamentally erroneous proposition of law stated in the award such that a serious irregularity has occurred which has caused substantial injustice to the Applicant.”

DELAY DAMAGES AS A PENALTY.

- A penalty is a contractual clause that imposes liquidated damages that are unreasonably high.
- Such damages represent a punishment for breach, rather than a reasonable forecast of damages for the harm that is caused by the breach.
- A Contractor may challenge a Delay Damages clause if he argues that it is a penalty and not a genuine estimate of the losses that will be incurred by the Employer as a result of delays.

- In South Africa under the Conventional Penalties Act, the court can reduce the amount of Delay Damages that might be applicable if the Contractor can show that the Employer will be unjustly enriched if he receives the Delay Damages as specified in the Contract.
- In the UAE, the Court is empowered to vary the parties' agreement on Delay Damages to reflect the actual loss by reducing the Employer's claim or by setting them aside.
- If the amount to be paid as delay damages is greater than that which ought to have been paid, then it is a penalty. ***Dunlop Pneumatic Tyre Co. Ltd v New Garage and Motor Limited.***

DELAY DAMAGES AS A PENALTY

- In *Grocon Constructions (Qld) Pty Ltd v Juniper Developer*, the Queensland Supreme Court held that in determining whether a rate of Liquidated Damages stipulated in a contract constitutes a genuine pre-estimate of the non-defaulting party's loss, consideration must be given to the parties' negotiations in respect of Liquidated Damages.
- Employer had provided to the Contractor a detailed breakdown of its potential losses if practical completion of the project had not been achieved.
- The parties had equal bargaining power at the time of negotiating the contract.

DELAY DAMAGES AS A PENALTY

- The losses that will be suffered by the non-defaulting party, as a result of it being unable to use the works or the site from the date it could expect to as per the time frame for completion, must be accurately reflected by the rate specified in the contract.
- The Supreme Court held that the liquidated damages clause was a genuine pre-estimate of loss and therefore upheld it.
- The onus, of course, is on the Contractor to show that the penalty is out of proportion to the loss suffered by the Employer.

THE PREVENTION PRINCIPLE

- The 'prevention principle' is a legal doctrine that protects a contractor from liquidated damages for delays caused by the Employer.
- The rationale for the rule is that a party to a contract should not be permitted to profit from its own default.
- An Employer may not enforce a Delay Damages clause against a Contractor where it is proved by the Contractor that it was prevented by the Employer from performing its obligations under the Contract.

- Lord Denning, in ***Amalgamated Building Contractors Ltd v Waltham Holy Cross Urban District Council***, said: “... *the building owner cannot insist on a condition if it is his own fault that the condition has not been fulfilled.*”
- Brooking J in ***SMK Cabinets v Hili Modern Electrics Pty Ltd*** described the prevention principle as being “*grounded upon considerations of fairness and reasonableness*”.

- A Contractor may rely on the prevention principle in cases of breach of contract by the Employer such as failure to give access to site (*FIDIC Red 1999 SC 2.1*) or a delay in issuing designs or instructions (*FIDIC Red 1999 SC 1.9*).
- The prevention principle would apply even when the Employer's actions are legitimate, such as issuing a Variation Instruction. (*FIDIC Red 1999 SC 13.1*).

The prevention principle was set out in **Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board**,

“It is well settled that in building contracts – and in other contracts too – when there is a stipulation for work to be done in a limited time, if the other party by his conduct – it may be quite legitimate conduct, such as ordering extra work – renders it impossible or impracticable for the other party to do his work within the stipulated time, then the one whose conduct caused the trouble can no longer insist upon strict adherence to the time stated. He cannot claim any penalties or liquidated damages for non-completion in that time.”

- If the Employer does not extend the contract or there are no mechanisms for extension of the Contract, the Contractor may rely on the prevention principle and avoid paying delay damages.
- The *FIDIC SC 8.5 (e)* allows a Contractor to Claim for Extension of Time for any delay, impediment or prevention caused by or attributable to the Employer.
- The above clause was meant to provide a solution to the prevention principle in that a Contractor must claim for EOT when prevented, if not this will safeguard the Employer's right to Delay Damages.

- Where the Contract does not provide for how to deal with an Employer's delay or
- If the Engineer ignores the Contractor's request for extension of time, the Employer will no longer be entitled to require the Contractor to complete the works by the contractual Time for Completion.
- Time will be at large.

Miller v London County Council (1934) where the Court held thus:

“...even if the clause had provided for an extension of time on account of the delay caused by the contractor, the failure in this case of the architect to extend the time would be fatal to the claim for liquidated damages. There had clearly been some delay on the part of the corporation. Accordingly, as the architect has not made ‘by writing under his hand such an extension of time’ there is no date under the contract from which the defendants’ liability to pay liquidated damages for delay could be measured. And therefore, none can be recovered.”

- In situations where the Original Completion date ceases to apply, Time will be at Large and the Contractor is required to complete the works within a reasonable time.
- When time is at large, the Employer is not entitled to Delay Damages but to General Damages in case the Contractor fails to complete the works within a reasonable time.
- Reasonable time for completion is a matter of fact to be decided by a Court or Arbitrator when the claim arises but the Contractor bears the burden of proof. (***Shawton Engineering Ltd v DGP International Ltd.***)

- The primary purpose of an extension of time provision is to preserve a Contractor's obligation to complete within a specified time and to avoid Time being at Large.
- The Extension of Time Sub-Clause 8.5 FIDIC 2017, preserves the Employer's right to Delay Damages under the contract, even when, by act of prevention, the Employer has delayed the Contractor and is responsible in part for the late completion.
- The Contract Data on Delay Damages must be reasonable in relation to the Employer's loss in case of delay in Completion.

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