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Liquidated Damages*

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# Is the Employer Entitled to Apply More than Liquidated Damages?

By Hilal Itani

*Nowadays, there is a misconception of the application of Liquidated Damages (or Delay Damages) under construction contracts, namely under FIDIC form of contracts, which is the most commonly used contract in the Middle East and Gulf Region. Employers tend to go far beyond contract provisions by intimidating contractors for the application of other damages than liquidated damages.*

The following is used to define Liquidated Damages (or Delay Damages):

"When the parties to a contract stipulate for the payment of a certain sum, as a satisfaction fixed and agreed upon by them, for the not doing of certain things particularly mentioned in the agreement, the sum so fixed upon is called liquidated damages.... It differs from a penalty, because the latter is a forfeiture from which the defaulting party can be relieved. An agreement for liquidated damages can only be when there is an engagement for the performance of certain acts, the not doing of which would be an injury to one of the parties; or to guard against the performance of acts which, if done, would also be injurious. In such cases an estimate of the damages may be made by a jury, or by a previous agreement between the parties, who may foresee the consequences of a breach of the engagement, and stipulate accordingly. .... The civil law appears to agree with these principles. ...." [1]

Under FIDIC 4<sup>th</sup>, Liquidated Damages is defined:

"If the Contractor fails to comply with the Time for Completion ....., then the Contractor shall pay to the Employer the relevant sum stated in the Appendix to Tender as liquidated damages for such default and not as a penalty (which sum shall be the only monies due from the Contractor for such default) for every day or part of a day which shall elapse between the relevant Time for Completion and the date stated in a Taking-Over Certificate ....., subject to the applicable limit stated in the Appendix to Tender. ...." [2]

While FIDIC 1999 identifies Liquidated Damages as Delay Damages as follows: "If the Contractor fails to comply .... Time for Completion, the Contractor shall .... 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.

These delay damages shall be the only damages due from the Contractor for such default, other than in the event of termination ... prior to completion of the Works. ...." [3]

Under several court cases, the application of liquidated damages is considered as a pre-estimate of losses to be incurred by the employer judged at the date of signing the contract and not as penal action by the employer towards the contractor at the date of breach, even if it proven that actual losses are much lower than stipulated liquidated damages. [4]

Under Article 9:509 (1) of the Principles of European Contract Law:

"Where the contract provides that a party who fails to perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party shall be awarded that sum irrespective of its actual losses" [5].

However, reducing the amount of such damages is highly dependent on the Contract itself and the Law(s) it falls under.

Consequently, contractors while entering into commercial contracts should carefully examine such clauses along with their quantification to ensure that such pre-estimate is a reasonable estimate of employer's losses to be incurred at the date of breach - if any.

Finally, employers and contractors should be fully aware that based on the mere interpretations and circumstances of the contract, Liquidated Damages (or Delay Damages) are the sole remedy to contractors' failure to meet contractual



completion dates which are to be agreed at the time of signing the contract and not left till the date the contractor fails to meet his obligations. This can be done by following the proper form of contract that provides such provisions. ■

## References

- 1) **Bouvier Law Dictionary** Sixth Edition, Revised, Improved, And Greatly Enlarged, Vol. I.
- 2) Federation Internationale Des Ingenieurs-Conseils; **The Conditions of Contract for Works of Civil Engineering Construction** 4<sup>th</sup> edition 1987, reprinted 1992.
- 3) Federation Internationale Des Ingenieurs-Conseils; **The Conditions of Contract for Construction First Edition 1999.**
- 4) **Principles of European Contract Law** (eds O Lando and H Beale, 2000) 434-48

## About the Author

Hilal A. Itani is the Contracts Manager at Hourie Entreprises - General Contractors. Mr. Itani holds a Diplomat Degree in civil engineering from the Lebanese University and Master's Degree in engineering management from the American University of Beirut. Mr. Itani is also an associate member of the "Chartered Institute of Arbitrators" - Lebanese Branch # 024088, and a member of "Royal Institute of Chartered Surveyors" - Lebanese Branch (LACS).

يشهد قطاع الإنشاءات حالياً سوء فهم في تطبيق تعويض التأخير الذي تنص عليه عقود الإنشاءات، وبالأخص العقود من نوع FIDIC، الأكثر استخداماً في الشرق الأوسط ومنطقة الخليج. يميل أصحاب العمل إلى تخطي أحكام العقد عبر تهديد المقاولين لإحداثهم أضرار لا تتعلق بتعويض التأخير.

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