Position of Liquated Damages as a Remedy for Breach of Public Construction Contract in Ethiopia: The Law and Practice

Yenew B. Taddele*

Abstract

Contracting parties of a public construction contract can foresee how a type of uncertainty could be removed by agreeing on a specific consequence for a breach. They can address this by incorporating, inter alia a "Liquidated Damages Clause" to that outcome. Liquidated damage is a fixed sum agreed by the parties in their contract as a value of the damages that one party can claim against the other, without the need to prove that sustained damage when they enter into a contract. But, whether liquidated damage is a contractual or legal remedy; whether liquidated damage and penalty are similar and interchangeable or different in concept; can an employer seek liquidation damages together with other available general remedies after canceling such contract; and who, contracting parties or a government, in the agreement or by law, can figure out the amount of liquidated damages and its calculation mechanism are an unsolved conundrum in Ethiopian pertaining laws and its application in courts thereof. To write this article, a qualitative research design was preferred due to its suitability for addressing the research questions of this article and its high level of flexibility; relevant data has been collected under an "umbrella" of qualitative data collection techniques, mainly involving document reviewing and interviews. Both doctrinal and empirical approaches were simultaneously utilized. The finding indicates that liquidated damages are a contract-based remedy, not a legal remedy; penalty and liquidated damages are not similar concepts. Because the penalty is a payment of money stipulated as "in terrorem" of the offending party while liquidated damage is a pre-agreed sum payable as damages for a party's breach of such contract. However, The Federal Public Procurement Directive, 2010 and courts in Ethiopia have assimilated liquidated damages with penalty vaguely; in principle liquidated damages is an exhaustive remedy but parties, based on unique features of any single construction project, can agree otherwise.; and they are contracting parties through their contract, not a government by law who measures liquidated damages. Courts in Ethiopia are recommended to have common sympathetic about liquidated damages, and pertaining laws should be amended.

***Key Words*:** Exclusive Remedy, Liquidated damages, Remedy

* LLB(AAU);LLM in Construction Law and Dispute Resolution, (Bahir Dar University); e-mail: yenew.taddele@gmail.com. The author is grateful to the anonymous reviewers for their comments which enriched the initial version of this work. The responsibility for the errors and wrongheaded arguments remains all mine.

1. Introduction

Because of the need to carry out its functions, the government, via its undergrowth, will embark upon different activities which inevitably will invite the interplay of other undergrowths and private sectors. These branches otherwise known as administrative agencies assist a government in properly taking its tasks of service provision among other things.[1] It is, therefore, while these agencies carry out the functions that they use the law of administrative contracts to their ends. The ends are public services, the means of public contracts.

The construction industry plays a key role for which a government has intensively entered public contracts in building economic infrastructure like roads, railways in expanding social infrastructure like schools, and hospitals, and in expanding factories. As one side of improving people's lives is the building and renovation of premises, government-undertaken construction plays a great role in this regard as well.

Construction projects are inherently uncertain[2], based, as they are, on unique parameters for each project, be that design differences, construction method differences, differences in out-turn purpose, or just differences in the physical environment. Given a large amount of money spent on construction projects, and the impact on cost and value relatively small changes caused by these uncertainties can have, parties and their advisors have long looked for ways to eliminate these uncertainties or at least make them manageable. This can essentially be done in one of two ways; the uncertainty can be eliminated through investigation; or the risk of the uncertainty arising can be managed through ascribing that risk to one party or the other party.[3]

One part of the uncertainty in a public construction project that can make a significant difference to its commercial pricing is taking away the uncertainty of what happens if things don't go to plan. What if the project isn't finished on time, what if new work is instructed, what if the

---

[1]Harold Ward, 'Delayed Performance in Construction Contract-Enforceability of Liquidated Damages Clauses', *Insurance Counsel Journal*, 1965, Vol.1, No' 1, PP. 250-258(Here in after, Harold Ward, Delayed Performance in Construction Contract-Enforceability of Liquidated Damages Clauses). It is also available at https://www.bing.com/ck/a?!&&p=c31a155828c8de4fJmltdHM9MTY2NDE1MDQwMCZpZ3VpZD0zZmI0Mjg5NC1jMjZlLTY5MmUtMDk2OC0zOTA2YzM2YzY4MDEmaW5zaWQ9NTMxOA&ptn=3&hsh=3&fclid=3fb42894-c26e-692e-0968-3906c36c6801&u=a1aHR0cDovL2VuLnVuaXYtc2V0aWYyLmR6L3BsdWdpbmZpbGUucGhwL, (accessed on October 13, 20022)

[2] Nael G. Bunni, *Risk and Insurance in Construction*, 2nd ed., Spon Press, London, and New York, 2003, P. 27 [herein after, Nael G. Bunni, *Risk and Insurance in Construction]*

[3] Ibid

desired output is not met, what if the quality is not right, what if key performance indicators are not achieved?

In the broad sense, the answer to all these questions is relatively straightforward, one would be entitled to damages to recompense for any loss caused by these breaches. However, if we try to go behind that and say, yes but what cash sum might that amount to, the answer generally will be that nobody knows until after it has happened.

Where the parties can foresee a type of problem, the uncertainty could be removed by agreeing to a specific consequence for a breach. Then, rather than being unknown, the loss or damage is then identified or liquidated. While this doesn't remove the uncertainty entirely as the event may still occur, it does at least add some predictability to the consequence of the event so that it determines any potential risk in their public construction contract.

The contract may provide for a contract period that is triggered by a notice to commence, or in some other way the construction contract will provide a means of fixing the date on which construction operations must be finished. It is established that an employer must give the contractor possession of the site on the due date and an employer who is in breach of that obligation is liable for damages. Provided that the contractor can enter upon the site on the date stipulated for possession and thus to commence construction work, he must finish by the completion date. If he fails to complete, the employer may recover such damages under the principles set out in the standard conditions of the construction contract annexed with the contract if can be proven a direct result of the breach.

In practice, it may be difficult to allocate damages, which damages directly and naturally flow from the breach and which damages do not so flow but depend upon special knowledge that the contractor had at the time the contract was made. The amount of damage is seldom easy to ascertain and prove.[4]

Regulating, in advance, the potential damage that either of the contracting party may suffer, as the consequence of the other party's failure to perform its contractual obligations is, however the order of the day in the construction industry.[5] The contracting parties address this by

[4]David Chappell, *Building Contract Claims*, 5th ed., A John Wiley &Sons Ltd Publication, The Atrium Southern Gate, UK, 2011, P.58[Here in after, David Chappell, Building Contract Claims]

[5] Nael G. Bunni, *The FIDIC Forms of Contract: The Fourth Edition of the Red Book*, 3rd ed., Blackwell Publishing Ltd, London, 2005, p. 100

incorporating a "Liquidated Damages Clause" to that effect. It is believed that the liquidated damages doctrine is used widely in common law countries. Nowadays, however, the doctrine has received a welcoming arm in administrative construction contracts including in civil law countries. In Ethiopia, for example, it is now fully being put into use in all administrative construction contracts. The doctrine might have made its entry into the Ethiopian construction laws via any general conditions like FIDIC General Condition Documents[6].

However, it does not mean that the civil law countries do not have a counterpart doctrine i.e., the "Penalty Clause", whereby the contracting parties to a contract regulate damages that will accrue to either of the parties should the other party fail to perform its contractual obligations. It is governed by the".

An essential characteristic of liquidated damages is really to introduce predictability and foresight to the consequence of a breach of contract. The aim in doing so is to remove some risk and thereby reduce the overall contract price. That way everyone wins; the contractor limits his liability and makes the outcome of the project more predictable, and the employer reduces the overall cost of the project by removing some risk but also achieves certainty of the consequences of a failure on the project.

The research design, to write this article, was a qualitative one. This design is preferred due to its suitability for addressing the research questions of the study and its high level of flexibility. Apart from its flexible nature, the best way to study the position of liquidated damages under pertaining laws of Ethiopia and its application there off depends on the subjective interpretation of such laws and judgments.

Both doctrinal and empirical approaches were simultaneously utilized. The study used a doctrinal approach because it involves a critical evaluation of legal documents and scrutiny of court judgments as primary sources, and journal articles and books as secondary sources to see

[6]International Federation of Consulting Engineers (commonly known as FIDIC, acronym for its French name Federation Internationale Des Ingenieurs-Conseils) is an international standards organization for consulting engineering and construction best known for FIDIC family of contract templates. The fact that FIDIC has a French title bears a testimony to its foundation in 1913 by three wholly or partly francophone countries, Belgium, France, and Switzerland. Today FIDIC has members in 104 countries. FIDIC, that is in Geneva, Switzerland, aims to represent globally Consulting Engineering by promoting interests of firms/Engineers supplying technology-based service for built and natural environment. Run mostly by volunteers, FIDIC is well known for work in defining conditions for contract for construction industry worldwide.

the experiences both at the state and global levels. The empirical research approach was also used in the study because the researcher was in need to explore problems in the area from a practical point of view by incorporating legal expert opinions and judgments of courts of law in Ethiopia. By using these mixed approaches, the researcher has filled the gap of the doctrinal research approach with help of the empirical research approach and vice versa is true.

Therefore, it is because the study is devoted to the reasons, justifications, and logical arguments on the existing legal document, and experiences dealing with the status of liquidated damages under pertaining laws of Ethiopia and its application there off, doctrinal and empirical approaches were preferred.

2. Meaning and Nature of Liquidated Damages

Liquidated damages[7] is a fixed and agreed sum as opposed to un-liquidated damages which is neither fixed nor agreed upon but must be proved in court, arbitration or adjudication. The addition of the words "and ascertained" to "liquidated damages" found in some contracts is not thought to be significant and the latest JCT[8] series of contracts has dispensed with the additional wording.

To recover damages in matters involving breaches of contract, it is necessary to prove that the defendant had a contractual obligation to the claimant, that there was a failure to full fill the obligation wholly or partly, and that the claimant suffered loss or damage thereby. Very often it is clear that there is damage, but it is difficult and expensive to prove it.[9] To avoid that situation, the parties may decide, when they enter a contract that in the event of a breach of a particular kind the party in default will pay a stipulated sum to the other.[10] This sum is termed "liquidated damages".

[7] The word "damages" here in this article is a singular verb and refer to a word "compensation"; it is not plural form of the word "damage"

[8] "JCT" stands for Joint Contracts Tribunal. JCT produces standard forms of control for construction, guidance notes and other standard documentation for use in the construction industry in the United Kingdom. From its establishment in 1931, JCT has expanded the number of contributing organizations.

[9] Ahmed Elsayed ABD EL Bakey, Termination of Construction Contracts and the Related Application of Liquidated Damages, MSc Thesis, The British University in Dubia, 2018, PP.36.41 [Unpublished, available at British University in Dubia] (Here in after, Ahmed Elsayed ABD EL Bakey, Termination of Construction Contracts and the Related Application of Liquidated Damages)

[10] Ibid

Even there is not a common designated name for "liquidated damages" so different scholars and documents have called it by different names; for instance, Belayneh Adimasu called "**የመዘግዬት ቅጣት**[11]-penalty for late performance"; Almaw Wolie "**የበሰለ የጉዳት ካሳ**[12]-pre-estimated compensation". Whereas FIDIC,1999, General Conditions for Constructions Contracts and Ministry of Work and Urban Development (MoWUD), 1994, Standards of Construction Contracts has named it "delay damages"[13] and "liquidated damages for delay" [14]respectively.

Liquidated damages, under a public construction contract, are a fixed sum agreed by the parties in their contract as a value of the damages that one party can claim against the other, without the need to prove that sustained damage.[15]

David Chappell has affirmed it has been the practice in the building industry to include a provision for liquidated damages in building contracts to avoid these difficulties.[16] The way the provision is generally expressed is that the contractor must pay a certain sum to the employer for every week, or every day as agreed by which the original completion date is delayed failed to perform, or performed in a defect. That sum must represent a genuine pre-estimate of the loss that the employer is likely to suffer.

The main purpose of the liquidated damages clause under public contract is, therefore, to promote the smooth flow of transactions, which means trade with the minimum occurrence of dispute. This purpose can be achieved by narrowing down the area of disputes during such transactions by establishing such clause to determine remedies in advance under such contract; includes not an only settlement but also the prevention of disputes, and the latter is of equal or indeed of greater importance than the former, as prevention is always better than cure.

---

[11]በላይነህ አድማሱ፣ 'በግንባታ ዉል አፈፃፀምና አተረጓጉም ሂደት የሚያጋጥሙ ችግሮችን ለመፍታት አማራጭ የሙግት መፍቻ ዘዴዎች ያላቸዉ ሚና እና ተፈፃሚነት በአማራ ክልል'፣ *በአማራ ክልል የፍትህ ባለሙያዎች ማሰልጠኛና ህግ ምርምር ኢንስቲትዩት የህግ መፅሔት*፣2008, Vol.3, No' 1, PP.121-170, PP.143-144[Here in after, በላይነህ አድማሱ፣ 'በግንባታ ዉል አፈፃፀምና አተረጓጉም ሂደት የሚያጋጥሙ ችግሮችን ለመፍታት አማራጭ የሙግት መፍቻ ዘዴዎች ያላቸዉ ሚና እና ተፈፃሚነት በአማራ ክልል] [translated by the author]

[12]Almaw Wolie, የኢትዮጵያ የኮንስትራክሽ ህግና አፈፃፀሙ፣ training delivered to judges at ANRS Supreme Court, Bahir Dar, February 2010 E.C[Translated by the author] [Here in after, Almaw Wolie, የኢትዮጵያ የኮንስትራክሽ ህግና አፈፃፀሙ] [translated by the author]

[13]FIDIC, *General Conditions of Construction Contract*, 1st ed., 1999, [Here in after, FIDIC, 1999]

[14]MoWUD, *Standard Conditions of Contract for Construction of Civil Work Projects*, 1994, [Here in after, MoWUD, 1994]

[15]Ahmed Elsayed ABD EL Bakey, Termination of Construction Contracts and the Related Application of Liquidated Damages, supra-9

[16]David Chappell, Building Contract Claims, supra-4

In the construction industry in Ethiopia, the terms "liquidated damages" and "penalty" are commonly used as though they are interchangeable. In fact, they are totally different in concept. Whereas liquidated damages are compensatory in nature and should be a genuine attempt to predict the damages likely to flow because of a particular breach; a penalty is a sum that is not related to probable damages, but rather stipulated "*in terrorem*" as a threat or even, in some instances, intended as a punishment. The courts will enforce the former, but not the latter though the parties may be no less agreed upon in the matter in the first instance as in the second.[17] It is, therefore, of prime importance to establish into which category a particular sum will fall.[18]

3. Status of Liquidated Damages Under Public Construction Contract in Ethiopia

A question laden with jurisprudential tension, in judicial judgment and of legal, practical, and commercial significance for the construction industry involves is to what extent Ethiopian laws allow contracting parties to contract to specify their own remedies in damages in the event of a breach. And to what degree and status do courts in Ethiopia give attention when they have interpreted such laws to give judgments for disputes arising from such construction contract containing a liquidated damages clause.

Simply put, liquidated damages has been given a place in Ethiopian laws, for instance, Ministry of Finance and Economic Development Federal Public Procurement Directive, 1/2010.[19] And courts in Ethiopia have given judgments for cases about public construction contracts with liquidated damages clause. However, the doctrine and principle of liquidated damages of "rule against penalties" is not recognized in such courts but are considered similar concepts.[20]

The status of liquidated damages; whether contractual or legal remedy, whether it has a similar concept with a penalty, whether it is exclusive or apart from remedy, whether it is delayed performance remedy or quality related performance remedy, and who should determine its amount and calculation mechanism- the government by law or contracting parties through their contract is still an unsolved conundrum.

[17]David Chappell, Building Contract Claims, supra-4, P.57
[18]Ibid
[19]*Federal Public Procurement Directives*, Ministry of Finance and Economic Development, June 2010 [here in after, Federal Public Procurement Directive, 2010].
[20]Hamish Lal, 'Liquidated damages', *Construction Law Journal*, 2018, Vol.34, No'1, PP.3-18, PP.9-11[Here in after, Hamish Lal, Liquidated damages, Construction Journal]

3.1.1 Is Liquidated Damages Contractual or Legal Remedy?

A legal remedy is a monetary compensation to place the aggrieved party in the same position he would have been in if the contract had been performed, and permit recovery of any monetary loss suffered because of the breach though the contract has stated nothing. But the contractual remedy is monetary compensation to place the aggrieved party in the same position he would have been in if the contract had been performed and permit recoverable of any monetary loss suffered because of the breach only if the contract has stated to do so.

Damages for breach by either contracting party be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy for every construction project independently.[21] Thus, liquidated damages is typically paid as lump sum compensation for damage. And it is the sum agreed by the parties to the contract, authorizing the party suffering from the other party's default to receive a predetermined indemnity, following a particular breach.[22]

> If the contractor shall fail to achieve completion of the works within the time prescribed by the contract, then the contractor shall pay to the employer 1/1000 of the contract price per day as liquidated damages for such default and not as a penalty for every day or part of a day which shall elapse between the time prescribed by contract and the date of certified completion of the works. Depending on the nature of the works, liquidated damage higher than the minimum limit provided in MoWUD, 1994, Standard Conditions of Contract under Clause 47(4), may be fixed in the contract.[23]

MoWUD, 1994[24], Standard Conditions of Contract which many public authorities in Ethiopia have been annexing to their public construction contract as a general condition has incorporated clauses to draw a benchmark for how liquidated damages is calculated and what amount shall it be but give freedom to contracting parties to determine how should they calculate and the

[21]Lars A. Stole, The Economics of Liquidated Damages Clause in Contractual Environments with Private Information, MA Thesis, Harvard School of Law, 1998[Unpublished], P. 2[Here in after, Lars A. Stole, The Economics of Liquidated Damages Clause in Contractual Environments with Private Information]

[22]Lukas Klee, *International Construction Contract*, 2015, John Wiley and Sons, Ltd, Oxford United Kingdom, P. 28[Here in after, Lukas Klee, International Construction Contract]

[23]MoWUD,1994, supra-14, Clause 47(4)

[24]Ibid

maximum amount thereof to enable them to set up liquidated damages clause based on a unique feature of each construction projects.[25]

MOF has enacted a directive-the Federal Public Procurement Directive, 1/2010 that stipulates how liquidated damages is calculated and its maximum amount. Such Directive under clause 16.27.4 states the liability of the supplier for the delay in performing his obligation under the contract shall be

> (a) 0.1% or 1/1000 of the value of the contract price for each day of delay, (b) the cumulative penalty to be paid by the contractor shall not exceed 10% of the contract price and (c) If the delay in performing the contract affects its activities, the administrative authority may terminate the contract by giving advance notice to the supplier, without any obligation to wait until the penalty reaches 10% of the value of the contract.[26]

Courts in Ethiopia have not yet, as far as the possible extent the author looked at, interpreted liquidated damages similarly. For instance, Amhara National Regional State Supreme Court, in Amhara Towns Development and Construction Enterprise vs. Alamirew Mulate Building Contractor[27], has pronounced its judgment and rejected the plaintiff's claim in which the plaintiff argued that failing to include a liquidated damages clause in the contract can't relieve the defendant to pay liquidated damages since it is a legal remedy under Amhara Regional State Procurement Directive 1/2003, Article 14.21.[28] The court in its judgment stated that this Directive is a benchmark for contracting parties to add a liquidated damages clause when they enter into a contract but can't grant any one of the contracting parties to claim it as a legal remedy if the contracting parties failed to add a liquidated damages clause in their contract. However, Federal Supreme Court Cassation Division, in Ethiopian Road Authority vs Country Trading PLC[29] case, interpreted liquidated damages as it is a legal remedy.

---

[25]Lars A. Stole, The Economics of Liquidated Damages Clause in Contractual Environments with Private Information, supra-21

[26]Federal Public Procurement Directives, 2010, supra-19, Although, this provision seems about contract of supply, the directive, under its scope of application, has stated as it is applicable to all federal public procurements so that it includes public construction contracts. See Art.3 of such directive.

[27]*Amhara Towns Development and Construction Enterprise vs. Alamirew Mulate Building Contractor*, Amhara Regional State Supreme Court, 2011 E.C, Civil Case No' 43935[Unpublished]

[28]Amhara Regional State Procurement Directive, Amhara Regional State Finance and Economic Cooperation Bureau, 1/2003, Article 14.21[Here in after, Amhara Regional State Procurement Directive, 2003]

[29]*Ethiopian Road Authority vs. Country Trading PLC*, Federal Supreme Court Cassation Division, 2003 E.C, in የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ዉሳኔዎች፤ ቅፅ 12፤የኢፌዴሪ ፌዴራል ጠቅላይ ፍርድ ቤት፤ አዲስ አበባ፤ 2004 E.C፤ ገፅ 83-86

Alemu Tedebebe[30] has explained as liquidated damages is a contractual remedy but no legal remedy. To justify, he has forwarded two reasons; first, freedom of contract is prevalent phenomenon in this era so it is the parties who should measure such damages in their contract when either is in default; second each construction project may be constructed with a huge amount of money and has its own unique feature that makes very difficult and unattainable government's practice to enact laws to regulate liquidated damages for nonsimilar project sites.

Almaw Wolie also has supported this and described liquidated damages is a contractual remedy,

> It has been renowned that many employers allocate potential construction risks caused due delayed performance or below-standard agreed quality to a contractor in advance. The common mechanism to allocate such potential risks is including a liquidated damages clause in a construction contract. Then, liquidated damages is firmed in the construction contract that obliges the contractor to pay a pre-estimated certain amount of compensation to the employer for the reason the former is at default to perform on agreed time for each late performance or for the below agreed standard quality performance.[31]

In public construction contracts, in which huge financial, technical, and human resources are needed, it is vital to see several non-similarity ways of the construction process. To avoid non-conformities of laws to each unique public construction project, to increase the power bargain of parties, not to repeat the mistakes of others, and to allocate risks fairly between the contracting parties, a liquidated damages clause in a contract is a better "juridical act" than the enacted law which is primarily concerned with agreements in which one party, or each party, gives an undertaking or promise to the other.

It governs liquidated damages questions as to which agreements the law will enforce, what obligations are imposed by the agreement in question, and what remedies are available if the obligations are not performed. Thus, it is a contract in which contracting parties give their undertaking to perform public construction contract based on liability for breaches. Such undertakings should be emanated from a contract, not from the law due to the complex nature of construction transactions. Because the public construction process is governed by complicated contracts involving complex relationships in several tiers so that many risks are involved in such construction projects. These risks could be attributed to several reasons, which include the nature of the construction process, the complexity and time-consuming design and construction activities, and the involvement of a multitude of people from different organizations with

[30]Interview with Mr. Alemu Tedebebe, private Attorney, on *the status of liquidated damages in pertaining laws and its application in courts in Ethiopia, May 20, 2020*

[31]Almaw Wolie, **የኢትዮጵያ የኮንስትራክሽ ህግና አፈፃፀሙ**, supra-12

different skills and interests. Hence, a great deal of effort is required when entering public construction contract to co-ordinate to the wide range of activities including liquidated damages that are undertaken in such contract than leaving it to the laws which do have not enough space to act in response to address such complexities.

Measuring liquidated damages in a public construction contract is one and more decisive than enacting a comprehensive law to regulate it. Since the construction industry is the sum of all economic activities related to construction works, their conception, planning, execution, and maintenance, and a major influence on the economic growth of a country. Thus, in view of the fact, a public construction contract with liquidated damages is widely acknowledged as the most important single constituent in a developing country's investment program where contracting parties mostly take and annex general conditions of construction contract forms, for instance, The FIDIC General Conditions of Construction Contracts and the MoWUD, 1994, Standard Conditions of Construction Contracts to their specific contract that have liquidated damages clause.

Thus, enacting a law to regulate how liquidated damages is quantified and calculated can't be practicable. It is difficult to anticipate potential damages to allocate all construction project risks that have their own unique feature with a single law enactment. Because, each construction contracts have several documents that make up a construction contract such as special conditions, specifications, articles of agreement, and the lists are endless, the general conditions of a construction contract consist of or are based on a standard form of contract.[32] These conditions are those terms that are concerned with the primary rights and obligations of the parties and the administration of the contract so as to give effect to those rights and obligations including compensations measured in the liquidated damages clause.

In conclusion, where commercial parties have freely agreed, within a binding contract, to a regime for liquidated damages which is expressed in terms sufficiently certain to be enforced; the law should uphold its enforcement upon those terms. Such a notion serves a desirable commercial purpose in that it allows parties to anticipate with maximal certainty the remedial consequences where an administrative construction contract is breached. It is also consistent

[32]Julian Bailey, *Construction Law*, 1st ed., Routledge, Toylor Francis Group, London and New York, 2011, P.116 [Here in after, Julian Bailey, Construction Law].

with the underlying rationale for the enforcement of such contracts which seeks to ensure that obligations are undertaken freely and, once such voluntariness is established, allows for minimal interference by the courts.

3.1.2 Liquidated Damages vs. Penalty

A recognized threat to the continued life of the penalty rule is the principle of freedom of contract. The penalty rule is an intrusion on the freedom of contract which is an essential principle for certainty in contract law whereas the liquidated damages clause is recognized as part of the principle of freedom of contract.[33] Nevertheless, there remain certain considerations that support judicial interference with freedom of contract in limited circumstances. An arguably more genuine, but certainly less fashionable, approach to address the tension between the penalty rule and freedom of contract is to explicitly recognize that freedom of contract should only be observed to the extent that there is equality of bargaining power between the parties and in all other instances is nothing more than a legal fiction.[34]

Penalties could be interpreted as quantitatively excessive liquidated damages and are invalid under the common law.[35] While liquidated damages are pre-calculations of estimated loss under the contract, penalties go further and seek to punish a party in some way for a breach of contract above and beyond the loss suffered by one party as a result of the breach.[36] Many clauses which are found to be penalty clauses are expressed as liquidated damages clauses but are considered by courts as excessive, or punitive and so invalid. So, the distinction between liquidated damages and penalties does not rely on the name but on the legal characteristics and the intention of both parties at the time of contracting.[37]

However, when penal words are employed- the amount named is designated in the instrument by such terms as “forfeit”, “forfeiture”, “penalty”, “penal stun”, “fine”, “under a penalty”, or “under

[33]D. Geoffrey (et al), ‘Liquidated Damages: Canadian Adoption, Divergence and the Necessity for Restatement’, *Journal of the Canadian College of Construction Lawyers*, 2017, Vol. 1, No’ 1, PP.140-170, PP.148-150[Here in after, D. Geoffrey(et al), Liquidated Damages: Canadian Adoption, Divergence and the Necessity for Restatement]

[34]Ibid

[35]Hyuno Joo Kim, Study on Liquidated Damages in International Construction Contracts, at https://www.researchgate.net,> accessed on April 30, 2020 [Here in after, Hyuno Joo Kim, Study on Liquidated Damages in International Construction Contracts]

[36]Hyuno Joo Kim, Study on Liquidated Damages in International Construction Contracts, supra-35

[37]Ibid

a forfeiture", and the courts can see no other intention in the instrument they are inclined to regard such a sum as a penalty, whenever it can be properly done, in order that the question of compensation may be given to the justice may be done to the injured party.[38]

In most cases, there is no difference between a penalty and liquidated damages in Ethiopia. In Ethiopian laws, in every case, if a sum is named, in a public construction contract, as the amount to be paid in case of a breach, it is to be treated as a penalty. The rule of the recovery of liquidated damages in Ethiopia is somewhat different from the common law jurisdictions though the concepts and its trend originated from such jurisdictions through FIDIC General Conditions for Construction Contracts. Because of the strict interpretation of liquidated damages where it has been held that the party claiming liquidated damages needs to prove the clause in the construction contract was about liquidated damages, no penalty clause.

A Federal Public Procurement Directive, 1/2010, enacted by MoFEC under Article 16.27.4[39], has employed the word "penalty" though the very details of the provision are about pre-calculations of estimated loss under public construction contract than to go further and seek to punish a party in some way for breach of contract beyond the loss suffered by one party as a result of a breach.[40] Thus, this is a typical example of clauses that are found to be liquidated damages clauses named "penalty clauses" that can enable us to say the distinction between liquidated damages and penalties does not rely on the name but on the legal characteristics and the intention of both parties at a time of contracting.

The Federal Cassation Division has not established a common understanding of the status of liquidated damages. In cases, for instance, South Achefer Woreda Finance and Economy Development Office vs. Aderaw Mekonnen Contractor[41], and Dembia Woreda Health Office vs. Amsalu Gizie[42], has interpreted liquidated damages as penalty clause by stating Article 1889 of

[38]Edward C. Dowling, *Liquidated Damages*, Dissertation, Cornell University, School of Law, 1891, at <http://scholarship.law.cornell.edu/historical-these>, accessed on October 23,2019] [Here in after, Edward C. Dowling, Liquidated Damages]

[39]Federal Public Procurement Directive, 2010, supra-19

[40]Hyun-Joo Kim, Study on Liquidated Damages in International Construction Contracts, supra-35

[41]*South Achefer Woreda Finance and Economy Development Office vs. Aderaw Mekonnen Contractor*, Federal Supreme Court Cassation Division, 2011 E.C, Civil Case No' 1583509(Unpublished) [Here in after, Achefer Woreda Finance and Economy Development Office vs Aderaw Mekonnen Contractor case]

[42]*Dembia Woreda Health Office vs. Amsalu Gizie*, Federal Supreme Court Cassation Division, 2005 E.C, Civil Case No' 77185(Unpublished)

the Civil Code[43] irrespective of the Standard Condition of Contract, MoWUD, 1994, which states "liquidated damages"[44], that the contracting parties have annexed to their public construction contract. But, in other cases, for instance, Meseret Meseso and Water Drilling PLC vs. Africawit Construction PLC[45], it has been considered and interpreted as a type of remedy that contracting parties agreed on in advance-liquidated damages.

Lawyers who have participated in the interview, however, have a similar understanding; liquidated damages are different from penalty. For instance, Olanie Sorie[46] has explained as liquidated damages are different from penalty as follows.

> Even though countries from different legal traditions and jurisdictions have their own recognition and characterizing of relevant law is crucial to deal with liquidated damages; uncertainty to measure the actual damage of a construction project, being a pre-estimated amount in the construction contract, being a reasonable amount, and its status being and considered as compensation not as a penalty are common features of liquidated damages.[47]

Woubshet Shiferaw[48], however, has concluded that the status of liquidated damages and penalty are similar in Ethiopian laws, and their application in courts there off. Because he said, elements of the test i.e. "the amount fixed by the party in advance, there should be a failure to discharge an obligation on due time or fail to discharge the duty at all", that has been stated in the Civil Code, [49], of penalty are similar with elements test of liquidated damages i.e. pre-estimated amount, there should be a breach of the construction contract on the agreed time and quality. He added, both the penalty and liquidated damages "shall be due notwithstanding that no actual damages was caused to the employer."[50]

Unlike Woubshet's understanding, a practical problem faces the employer's position if liquidated damages is held to be a penalty. Is the employer restricted to the recovery of such amount as can be proved up to, but not greater than, the amount of the sum held to be penal? Some

[43]Civil Code of The Empire of Ethiopia, 1960, *Negarit* Gazzet, extraordinary issue, Proc. No. 165, 19th year, No'.2, Art.1889[Here in after, the Civil Code, 1960].
[44]MoMUD, 1994, supra-14, Clause 47(1)
[45]*Meseret Meseso and Water Drilling PLC vs. Africawit Construction PLC*, Federal Supreme Court Cassation Division, 2007 E.C, Civil Case No' 94825[Unpublished]
[46]Interview with Olani Sorie, an Attorney at Private institution, on *the status of liquidated damages in pertaining laws and its application in courts in Ethiopia, May 20, 2020*[Here in after, interview with Olani]
[47]Ibid
[48]Woubshet Shiferaw, *Construction Contract*, lecture delivered at, School of Law, Bahir dar University, June 03, 2019.
[49]Civil Code, 1960, supra-43
[50]Civil Code, 1960, supra-43, Art. 1892(1)

commentators have come to the conclusion that the amount stipulated as a penalty is not a ceiling on the amount of damages recoverable, while another thinks the question is still open, at least in so far as building contracts are concerned.[51] Stephen Furst traced the effect of courts of equity on sums stipulated as penalties and noted that if the actual damages could easily be estimated, the penalty would be cut down and the actual damage suffered would be assessed.[52] No qualification is placed upon the statement and, at face value; it could be taken as authority for the assessment of the damage of any amount, even greater than the penalty sum itself. It would probably be going too far to construe the remarks in that way, since removing a penalty in favor of actual damages is hardly likely to have been equitable if it resulted in the sum payable being thereby increased. Thus, unlike liquidated damages, penalty couldn't restrict an employer from claiming actual general damages as far as it can be proved.

The report of the Secretary-General of the United Nations Commission on International Trade Law has mentioned two common features in the regulation of liquidated damages and penalty clauses; an accessory nature of liquidated damages and penalty clauses, and special regulation to prevent abuse.[53]

First, in general, liquidated damages or penalties are only payable if there is a liability for non-performance of the principal obligation. Non-performance of the principal obligation may sometimes not entail liability e.g. because the principal obligation is void, or there is a sufficient defense for non-performance, such as force majeure or absence of fault, or a requisite "*mise en demeure*" or other notice has not been given. Since the purpose of liquidated damages or penalty clauses is to recover compensation or inflict punishment for breach of the principal obligation, no liquidated damages or penalties are payable when there is no breach.[54] However, the rules in some legal systems enable the parties by express agreement to make the penalty payable even when non-performance of the principal obligation does not entail liability.

Second, many legal systems contain special rules to prevent the use of liquidated damages or penalty clauses to oppress the weaker party in certain transactions, e.g. employment contracts, to

[51]Stephen Furst and Vivian Ramsey, *Keating on Construction Contracts*, 8th ed., Sweet & Maxwell, London United Kingdom, 2008, P. 319[Here in after, Stephen Furst and Vivian Ramsey, Keating on Construction Contracts]

[52]Stephen Furst and Vivian Ramsey, Keating on Construction Contracts, supra-51

[53]United Nations Commission on International Trade Law, 'Report of the Secretary-General: Liquidated Damages and Penalty Clauses', *Yearbook of the United Nations Commissions on International Trade Law*, 1979, Vol. X, PP.40-48, P. 41[Here in after, UNCITRAL, Report of the Secretary General]

[54]UNCITRAL, Report of the Secretary-General, supra-53, Id, P. 42

protect the employee; contracts of loan, to protect the debtor; and leases of lands and dwellings, to protect the tenant. No unification of these special rules is feasible, since they result from the special conditions and policies of each country, and accordingly these transactions must be excluded from the scope of any unified rules.[55]

The common law and equitable principles governing the enforceability of liquidated damages apply generally (though not necessarily uniformly) across commercial contracts including in the field of contracting for construction work; construction law texts along with many detailed papers and articles provide detailed commentary upon such damages almost invariably; and the standard forms of construction contract in widespread use for domestic or international construction works provide for the use of liquidated damages as a pre-estimated compensation not as a penalty against defaulting part. No exception couldn't be forwarded and justified concerning the status of liquidated damages in Ethiopia.

Taking one of the commentaries by Lord Dunedin is extremely important to distinguish liquidated damages from penalty. The rules for deciding whether a sum is to be considered liquidated damages or a penalty were formulated by Lord Dunedin in Dunlop Pneumatic Tyre Co Ltd vs New Garage & Motor Co Ltd[56] Case. These are set out below with a comment.

> Though the parties to a contract who use the words penalty or liquidated damages may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages.[57]

It is not particularly relevant that the parties have agreed on the sum as liquidated damages. Since the courts in common law jurisdiction have paid little attention to the terminology adopted by the parties, in that case, not only was the sum expressed by the parties as liquidated damages, but it was also clearly stated that it was "not a penalty or penal sum".

However, notwithstanding the clear words describing liquidated damages in public construction contract documents, courts in Ethiopia have had little hesitation in finding that the sum was a penalty, it has held that sums stated as penalties are in fact liquidated damages. So, Ethiopian laws and courts have deviated; the essence of a penalty is a payment of money stipulated as "*in*

[55]Ibid
[56]Dunlop Pneumatic Tyre Co Ltd vs New Garage & Motor Co Ltd, at <https://www.lawteacher.net,> accessed on April 10, 2020[Here in after, Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd]
[57]Ibid

terrorem" of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.

In practice, it may be difficult to allocate damage that directly and naturally flows from the breach and which damage does not so flow but depend upon special knowledge that the contractor had at the time the contract was made. The amount of damage is seldom easy to ascertain and prove. But the question of whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of making the contract, not as at the time of the breach.[58]

The court, in Dunlop Pneumatic Tyre Co Ltd vs. New Garage & Motor Co Ltd[59] Case, held its rule in two parts. The first part of the decision was whether a sum is liquidated damages or penalty will hinge not only on the terms of a particular contract but also on the inherent circumstances of that contract. The second part of the rule was that the terms and inherent circumstances to be considered are those existing at the time the contract was made, not when the term was breached. This is of importance when considering whether a sum is a genuine pre-estimate of loss, particularly when the likely damages were difficult or impossible to forecast at that time, but perfectly clear later.

In Dunlop, the court proceeded and set out four tests which could prove helpful or even conclusive to determine whether a provision in a contract is penalty or liquidated damages.

> (a) It will be held to be a penalty if the sum stipulated for is extravagant and "unconscionable" in amount in comparison with the greatest loss which could conceivably be proved to have followed from the breach; (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid; (c) There is a presumption (but no more) that it is a penalty when a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damages and (d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties. Then, a pre-estimated compensation couldn't be a penalty.[60]

The effect of that appears to be that, where a sum is held to be a penalty, a party may act on the penalty and obtain a judgment, but the court will only allow execution of the judgment up to the

[58]Dunlop Pneumatic Tyre Co Ltd vs New Garage & Motor Co Ltd, supra-56
[59]Ibid
[60]Dunlop Pneumatic Tyre Co Ltd vs New Garage & Motor Co Ltd, supra-56

penal sum. However, the party may opt to disregard the penalty, in which case, s/he/it may sue for and recover the full amount of damages suffered even if they exceed the penalty figure. Because one definition of a penalty is that it is "extravagant and unconscionable in comparison with the greatest loss which could conceivably be proved to have followed from the breach", it will be rare that actual damages exceed the penalty figure.

In conclusion, liquidated damages are different from penalties; the former operates on the principle of "*restitutio in integrum*", while the latter is based on "*in terrorem*". The definitive ruling on the distinction between liquidated damages and penalties came from Dunlop Pneumatic Tyre Company vs. New Garage and Motor Company Ltd.[61] The case established that the core feature of liquidated damages is in being a genuine pre-estimate of loss. Although liquidated damages have been an integral part of Ethiopian pertaining laws and other supportive standard construction contract documents like MoWUD, 1994, document, it has been delighted as a penalty mistakenly in courts in Ethiopia.

Ethiopian courts in dealing with liquidated damages, in most cases, have not appreciated the difference between the liquidated damages and the penalty, where the liquidated damages are recoverable, and the penalty is not. Such courts are, even to be said "reluctant" to decide by considering a liquidated damages clause as a penalty and is mostly accepting the agreed term by the party that fixes the level of damages for breach.[62]

3.1.3 Liquidated Damages as an Exclusive Remedy

A question often arises whether a party to a contract containing a liquidated damages clause can sue for actual damages suffered or whether the party is restricted to the sum expressed as liquidated damages. In principle, where parties enter into a contract, it must be assumed that they know what they are doing and that the contract is an expression of their intentions.[63] It follows that if parties agree that in the event of a particular kind of breach, liquidated damages is payable by the party in breach, that agreement will be upheld by the courts and they will be allowed no other or alternative damages but the damages liquidated in the contract.

[61]Ibid
[62]Ahmed Elsayed ABD EL Bakey, Termination of Construction Contracts and the Related Application of Liquidated Damages, supra-9
[63]David Chappell, Building Contract Claims, supra-4

This principle should be distinguished from the situation where the defendant is in breach of two or more obligations, for one of which the stipulated remedy is liquidated damages, and for the other(s) the remedy is to sue for un-liquidated damages. A situation is where there is but one breach that gives rise to a loss which may be said to trigger a remedy in liquidated damages and a separate kind of loss for which other damages are appropriate.[64]

In the case of liquidated damages in general neither more nor less than the amount stipulated is recoverable, without proof of loss. To the extent that no more than the amount stipulated is recoverable, such a clause functions as a clause limiting liability.[65]

Where there is non-performance of an obligation by one party, the law permits the other party in certain cases to enforce performance. When enforced performance is available, the question arises as to the relationship between enforcing performance and the recovery of agreed liquidated damages. The solutions differ with the type of breach for which the agreed amount is payable[66]; cases where the agreed amount is payable on complete non-performance of an obligation, and cases where the agreed amount is payable for delay in performance.

Under the common law, the employer can obtain specific performance, or recover liquidated damages, but not both.[67] Similarly, in some civil law systems, the employer can enforce either performance or the penalty, but not both.[68] In other civil law systems including Ethiopia, however, while this is the rule in the absence of any agreement on the question, parties can agree that the employer can enforce both liquidated damages and performance.

Where the agreed amount is payable on defective performance, there is general agreement in civil law systems that in such cases the employer can enforce both liquidated damages and performance.[69] Similarly, under common law, the employer can obtain both specific performances of a delayed obligation and liquidated damages payable for the delay.[70]

[64]UNCITRAL, Report of the Secretary-General, supra-53
[65]Ibid
[66]UNCITRAL, Report of the Secretary-General, supra-53
[67] Ibid
[68]However, the 1960 Ethiopian Civil Code has stated that unless otherwise agreed, the employer may require the performance of a contract which includes a penalty, but enforcement of the contract and the penalty may not be required unless the penalty was provided in respect of delay or the non-performance of a collateral obligation. See Art. 1890 of the Civil Code, 1960.
[69] UNCITRAL, Report of the Secretary-General, supra-53
[70] Ibid

Since one of the objects of an agreed amount is to avoid the difficulties of an inquiry into damages, the common law and most civil law systems do not permit the employer, in cases where recoverable damages under the ordinary rules exceed the agreed amount, to waive the agreed amount and claim damages. Nor can the contractor, in cases where the amount recoverable as ordinary damages is less than the agreed amount, assert that should only be liable for ordinary damages.

There are, however, exceptions stated by the Report of the Secretary-General of UNCITRAL[71]; where the loss exceeds the agreed amount, the employer can recover damages for the excess if s/he/it can prove that the breach of contract resulted from negligence, or an intention to injure; if the parties have so agreed (but, some civil law systems provide that, where the loss exceeds the agreed amount, the employer can recover damages for the excess, unless the parties have agreed to the contrary); and the agreed amount is not due if the contractor establishes that the employer has not suffered any loss(unlike this report, under the common law traditions, the fact that no loss, or hardly any loss resulted from the breach of contract does not, in principle, prevent the employer from the recovery of the full amount agreed as liquidated damages. In practice, there is a tendency in such cases to decide that when the clause does not provide a genuine pre-estimate of loss, and therefore, is invalid.

Although a party cannot opt for un-liquidated damages since liquidated damages have been set out in the contract, it seems that a party may opt for an injunction instead.

In General Accident Assurance Corporation v Noel[72], a court in England held that where a party was in breach of a covenant in restraint of trade, the injured party could not have both an injunction to restrain further breaches and liquidated damages in respect of the breaches already committed. The rationale behind these precedents is that if the original obligation to perform the contract falls down after the termination, then all the related minor obligations, such as the liquidated damages clause will fall down accordingly.

The court concluded that the claimants had the option to elect between but could not have both remedies. It is suggested that this is the correct answer to the problem posed when a party commits this kind of breach. If it is assumed that the breach must cause the innocent party

[71]Id, P. 43

[72]General Accident Assurance Corporation vs Noel, at <https://www.law.justia.com,> accessed on April 10, 2020

undoubted but not readily quantifiable harm, liquidated damages appears ideally suited to the situation. But if the award of damages, as in this case, is expressed as a single sum, it may be argued that if the damages are paid, the party in effect has a license to carry on committing the breach, because the injured party can recover no more. The answer to that argument seems to be a party had the opportunity to make an appropriate bargain. An appropriate bargain, in this case, might well have been to have stipulated not a single sum as liquidated damages, but a sum for every week that the breach continued or, as in Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd[73] , for each separate breach.

Tilahun Teshome has agreed as liquidated damages are an exhaustive remedy by stating "being exhaustive/exclusive remedy is one of the basic features of liquidated damages that common legal traditions, like America and the United Kingdom, have accepted".[74]

Ethiopian courts have given their judgment to all sought claims including liquidated damages though the public construction contract that caused such litigation contains a "liquidated damages clause". There are precedents pronounced by the Federal Cassation Division that provides the applicability of the liquidated damages clause in different comportment after the termination of a public construction contract. Such Division sometimes has interpreted, for instance in Ale Nile Business Group PLC vs. Ethiopia Road Authority[75], liquidated damages as a non-exhaustive remedy and sometimes, for instance in South Achefer Woreda Finance and Economy Development Office vs. Aderaw Mekonnen Contractor[76], as exhaustive remedy so that it granted both liquidated damages and other actual general damages and rejected liquidated damages but granted other actual damages, respectively.

Although, almost all public construction contracts have annexed MoWUD, 1994, which lay downs, in principle, as liquidated damages is an exclusive remedy but gives freedom to the contracting parties to agree otherwise which "shall not relieve the contractor from any other of his obligations and liabilities under the contract".[77]

---

[73]Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd, supra-56

[74]Tilahun Teshome(prof.), Liquidated *Damages as A remedy under International Construction Arbitration in Ethiopia*, lecture delivered at School of Law, Bahir Dar University, May 22, 2019.

[75]*Ale Nile Business Group PLC vs. Ethiopia Road Authority*, Federal Supreme Court Cassation Division, 2003 E.C, in የፌዴራል ጠቅላይ ፍርድ ቤት ሰበር ሰሚ ችሎት ችሎት ዉሳኔዎች፤ ቅፅ 12፤የኢፌዴሪ ፌዴራል ጠቅላይ ፍርድ ቤት፤ አዲስ አበባ፤ 2004 E.C፤ ገፅ 124-131[Here in after, Ale Nile Business Group PLC vs. Ethiopia Road Authority]

[76]South Achefer Woreda Finance and Economy Development Office vs. Aderaw Mekonnen Contractor, supra-41

[77]MoMUD, 1994, supra-14, Clause 47(1)

It is possibly suggested that where the parties simply omit to insert any rate, they have rendered the clause inoperative and that liquidated damages cannot apply. The employer is left to recover whatever un-liquidated damages can be proved. That may not necessarily be the case where the parties have crossed out the entry in the contract particulars, for instance, annexing any well-known general conditions of construction contracts. However, the sum expressed as liquidated damages has been held to be exhaustive of the remedies available to the employer for late completion or inferior quality performance where the amount of liquidated damages and its calculation rate has been stated well so that it has been held that once the parties had agreed that, in the event of late completion or failure to achieve the required quality, no damages should be applied except such liquidated one.

Some justifications could be stated for reasons why only liquidated damages should be claimed exclusively, one, once the contracting parties agreed as liquidated damages is an exhaustive remedy for any breach of any administrative construction contract, parties should keep their words that can greatly help transactions of the construction industry to be predictable, sustainable, and efficient, particularly in risk sharing mechanisms. Two, it is hardly possible to prove any damage sustained against the employer due to the complex nature of the construction industry which then creates an inconvenient environment for contractor and employer that make them busy for a long period of time to prove it in litigation before courts. Even after such a prolonged litigation period, the court may not consider that it couldn't be proved as to damages which should be or shouldn't be payable by the contractor in event of his failure to complete on time or below the agreed and standard quality. Third, allowing an employer to claim general damages while agreed and incorporating an exhaustive nature of liquidated damages may "terrorize" a contractor to assume and take risks to involve in the construction industry.

That, of course, does not preclude the employer from recovering as un-liquidated damages other losses not directly caused by the breach of an obligation to complete or inferior quality performance, but which may be connected to such breach. This happens in the situation where the defendant is in breach of more than one obligation, for one of which the stipulated remedy is liquidated damages, and for the other(s) the remedy is to sue for general damages. So, when there is one breach that gives rise to a loss that may be said to cause a remedy in liquidated damages and a separate kind of loss for which other damages are appropriate liquidated damages

may not be exhaustive. And again, the employer shall not be precluded from recovering un-liquidated damages when the parties have agreed and provided an exception to such exhaustive nature of liquidated damages or any other assertion that enables the employer to claim general damages apart from liquidated damages.

Another significant concern in relation to the exclusive nature of liquidated damages is when there is no harm at all or less damage sustained than stated in the construction contract. Two contradicting arguments have been reflected; the first argument is a mere default of a contractor gives a right to an employer to claim such liquidated damages irrespective of proving the existence of damage while the second argument is irrespective of the contractor's default, the employer shall not claim if the latter sustained no harm or the claimed amount shall be deducted equivalently to the actual harm if it is less than what stated in the contract.

As far as this researcher understands concerns the second argument is not logical and convincing. If we can agree that the employer couldn't claim any amount beyond the one stipulated in the construction contract under the liquidated damages clause when the contractor is in default. We shall not need to prove any damage sustained. Because the very purpose of the liquidated damages clause under a public construction contract is to avoid or at least minimize any potential conflicts and prolonged litigations in which a claiming party is duty-bound to prove the existence of actual harm. Thus, the employer is entitled to recover the amount specified as liquidated damages if the contract is in default irrespective of whether the damage suffered is less than the amount or nothing at all. Indeed, the employer can recover liquidated damages though it can be demonstrated that has gained from the breach.

To conclude, it appears that the liquidated damages clause is not an alternative or an additional remedy, however, exceptionally; it does not prevent recovering general damages at common law. And, in the situation liquidated damages clause is held to be ineffective, the relevant parties will be entitled to claim for general damages. Therefore, if an administrative construction contract provision provides an employer an option of receiving compensation as liquidated damages or suing for actual damages, it renders the liquidated damages provision unenforceable. The reason why the liquidated damages clause must fail, in this regard, is that the option granted to an employer either to choose liquidated damages or to sue for actual damages or to claim both indicate intent to penalize and terrorize the defaulting contractor. It also negates the intent to

liquidate damages in the event of a breach as far as the purpose of the liquidated damages provision within an agreement is to fix the employer's damages recovery at an agreed amount.

3.1.4 Calculation and Amount of Liquidated Damages

Pre-estimation of loss is seldom easy. The employer may have little idea how much loss may suffer if a construction project is not completed by the due date or completed with inferior quality. Although it has been held that liquidated damages are especially suited to situations where precise estimation is almost impossible, the employer should try to calculate as accurately figure as possible.[78] The employer should include every item of additional cost which can be predicted will flow directly from the contractor's failure to complete on the due date or to perform to the standard requiring quality; that is, the damages recoverable under the first limb of the principle of liquidated damages.[79] It also seems that the sum can be increased to include amounts that would normally only be recoverable under the second limb if the employer can show that special circumstances like gross negligence or intentional injury were involved.[80] It remains unclear whether, in the case of liquidated damages, the special circumstances must be known to the contractor when the contract is made. It also seems appropriate to reveal such circumstances at the tender stage although it could be argued that the higher figure for liquidated damages is itself a sufficient prior notification.

Courts from common law legal traditions have consistently held that liquidated damages provisions for 10% of the total price of the construction project are acceptable, with some contracts upholding percentages as high as 22% under appropriate facts.[81] Arthur J. has listed some court cases, from Florida Courts, that contain a different percentage of liquidated damages.

> Kirkland vs. Ocean Key Associates, Ltd 10% (held reasonable); Hot Developers, Inc. vs. Willow Lake Estates, Inc. 9.65% (upheld as liquidated damages and discussing ranges from 4.85% to 22% held to be reasonable); Bloom vs. Chandler (upholding a liquidated damages clause under which the employer retained a $49,500 deposit as liquidated damages on a contract for $225,000 or 22% of the contracting price); Hooper vs. Breneman (upholding a liquidated damages provision calling for forfeiture of 13.3% of the contracting price); Ivanov vs. Sobel (10% held not to be grossly disproportionate); and Johnson vs. Wortzel (18.2% was not sufficient enough to shock the conscience of the court).

[78]David Chappell, Building Contract Claims supra-4, P.78
[79]Ibid
[80]Ibid
[81]Arthur J. (et al), Liquidated Damages Project, February 2019, at <https://www.law.justia.com,> accessed on March 25, 2020

Pursuant to Sub-Clause 47.1, FIDIC, 1989, the contractor in delay should pay delay damages ("sum, stated in the particular conditions by an employer"), calculated for each day of default at the stipulated in the contract rate, however, the total amount of which should be limited to a stipulated maximum; these damages should be the exclusive remedy for this type of default and keep the contract and obligations intact.[82] According to the aforementioned statement, the minimum and the gadget how to be calculated the amount of liquidated damages claimed by an employer can be determined in the contract. And the maximum limit of the liquidated damage shall be 20% of the contract price.[83]

A Public Procurement Directive, 2010 under Article 16.27.4[84], has employed a provision on how liquidated damages are calculated i.e., 0.1% or 1/1000 of the contract price for each day of delay but limited to 10% of the contract price. The very details of this provision are about pre-calculations of estimated loss under a public construction contract which is difficult from the practical point of view due to the unique nature of each construction project.

Gadgets on how liquidated damages are calculated and the maximum amount thereof are, from all court cases the author reached, except one case of the Federal Cassation Division, 1/1000 or 0.1% of contract price per day and 10% of the contract price respectively. The Federal Cassation Division, at Ale Nile Business Group PLC vs. Ethiopia Road Authority[85], has given its judgment against the judgment debtor to pay 1% of the contract price per day still to reach 10% of the contract price.

"If one of the contracting parties breaches an administrative construction contract or fails to keep his/her/it promises stated in such contract", said Olani Sorie, "an amount of compensation to be paid to the non-default party and its calculation mechanism could be measured in the contract in advance".[86] To calculate liquidated damages, he has delignated two mechanisms; one, including a fixed amount in the contract in advance, for instance, a contracting party at default shall pay 1,000,000 ETB; two, a contracting party at default may pay a certain percentage per day or per

[82]FIDIC, *General Conditions for Construction Contracts*, 1989, Clause, 12(4) [Here in after, FIDIC, 1989]. See also FIDIC, 1999, supra-13
[83]Ibid
[84]Federal Public Procurement Directive, 2010, supra-19
[85]Ale Nile Business Group PLC vs. Ethiopia Road Authority, supra-75
[86]Interview with Olani Sorie, supra-46

week as agreed but limited to a certain percentage of the contract price, for instance, 0.1% of the contract price per day/per week until amounted 10% or 20% of the contract price.[87]

A specially drafted liquidated damages clause may be held to be entirely valid and enforceable despite the absence of any specified sum if it is expressed as two scenarios. The first scenario will be the interest calculated with reference to any trading banks of a country on daily balances of the total of items listed in the clause. Items may include payments made by the employer under any contract relating to the execution of the project and reasonable costs and expenses incurred by such employer in enforcing or attempting to enforce any contract relating to the execution of the construction project. The other items may be equally imprecise. The second scenario will be rates, statutory charges, and other reasonable outgoings.

Although referred to in the contract and by courts in common law jurisdictions as liquidated damages, it is difficult to see how such a clause can justify that description. An important aspect of liquidated damages is that it is a known amount at the time the parties enter into the contract. Although that does not preclude the damages being expressed as a method of calculation, such a method should be known to have a certain result in any given set of circumstances.

To end with, public bodies make use of a formula calculation that basically depends upon a percentage of the capital sum. Whether that would constitute liquidated damages will depend on the precise circumstances and particularly the difficulty with which a precise calculation could be made. The use of a formula is a perfectly sensible approach where it is obvious that substantial loss will be suffered in the event of delayed performance or inferior quality performance.

4. Conclusion

The process of claiming damages through courts is a lengthy and expensive process that requires the claimant to prove the breach and the loss suffered and the relation between the breach and the loss, and even if it is very often clear that there is damage; it is difficult always to prove the value of that damage. To avoid this, the contracting party may prefer to agree on the value of the damages in their contract that in the event of a particular breach the party in default will pay it to the other, and this is named the “Liquidated Damages”.

[87]Interview with Olani Sorie, supra-46

Liquidated damages are a contract-based remedy, not a legal remedy, for late completion of the contract project or inferior quality performance of such project. There is a clear contradiction between Federal Public Procurement Directive, 1/2010, Article 16.27.4, and the judgment rendered by Federal Supreme Court Cassation Division. Since both have a binding nature to lower courts in Ethiopia, courts may be challenged to interpret public construction contracts containing liquidated damages clause to consider as a contractual or legal remedy unless provisions of such directive are amended. The rules for deciding whether a sum is to be considered as liquidated damages or a penalty have been formulated differently whereas the Federal Public Procurement Directive, 2010, under Article 16.27.4 states it as penalty vaguely.

Penalty and liquidated damages are not similar concepts; the penalty is a payment of money stipulated as "*in terrorem*" of the offending party as a deterrent in punishment; extravagant and unconscionable sum; founded on equitable principles–designed to protect parties from contractual terms which are unconscionable; not a genuine pre-estimate of the loss out of all proportion amount; whereas liquidated damages is a pre-agreed sum payable as damages for a party's breach of such contract.

The liquidated damages Clause will be enforced where the court finds that the harm caused by the breach is difficult to estimate, but where the amount of liquidated damages is reasonable compensation and not disproportionate to the actual or anticipated damage. The intent of liquidated damages is simply to measure damages that are hard to prove once incurred. If the liquidated damages are disproportionate, they can, however, be declared a penalty. The clause is then void, and recovery will be limited to the actual damages that result from the breach. Thus, although, the parties to a contract who use the words penalty or liquidated damages may prima facie be supposed to mean what they say, yet the expression used is not conclusive.

In principle, liquidated damages is an exhaustive remedy so that an employer couldn't claim it together with other available general damages such as consequential loss, payment for bid difference, defective liability, and performance security unless contracting parties explicitly provide an exception for such principle and agreed otherwise.