

RECOVERY OF DAMAGES BEYOND THE LIMIT OF UNENFORCEABLE
LIQUIDATED DAMAGES CLAUSE

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ABSTRACT

Standard forms of construction contracts typically include a liquidated damages provision entitling the employer a specified sum if the contractor is late in completing a work. However, such clause can be unenforceable due to a myriad of reasons, such as when time is at large. If that happens, the employer could not claim liquidated damages but may claim unliquidated damages instead. The issue is then whether the employer may claim unliquidated damages exceeding the sum specified in the liquidated damages provision although the clause is held to be unenforceable. The methodology utilized in this research is mainly through documentary analysis of court rulings. Six cases were shortlisted for analysis based on their relevance to the issue. The findings show that liquidated damages sum in construction contracts is always intended to cap the contractor's liability for delay, thus, the employer may not recover more than the stipulated sum if the sum represents the parties' intention even when the liquidated damages clause is unenforceable.

ABSTRAK

Borang kontrak pembinaan standard lazimnya mengandungi klausa ganti rugi jumlah tertentu yang memberi hak kepada majikan kepada sejumlah ganti rugi yang telah ditetapkan di dalam kontrak jika kontraktor lambat menyiapkan kerja. Bagaimanapun, klausa tersebut boleh menjadi tidak sah kerana pelbagai sebab, contohnya kerana masa sudah menjadi bebas. Bila perkara tersebut berlaku, pihak majikan tidak lagi boleh menuntut ganti rugi jumlah tertentu tetapi sebagai ganti, boleh menuntut gantirugi am. Isu yang timbul ialah sama ada majikan dibenarkan menuntut ganti rugi melebihi jumlah ganti rugi jumlah tertentu yang telah ditetapkan di dalam kontrak sekiranya klausa tersebut didapati tidak sah. Metodologi yang telah digunakan ialah melalui analisa dokumentari keputusan mahkamah. Enam kes berkaitan telah di senarai pendekkan untuk analisa berdasarkan tahap kaitannya dengan isu penyidikan ini. Hasil daripada penyelidikan ini, didapati bahawa hasrat ganti rugi jumlah tertentu di dalam kontrak pembinaan ialah untuk menegakkan liabiliti kontraktor jika berlakunya kelewatan kerja, oleh itu, pihak majikan tidak dapat menuntut lebih daripada jumlah ganti rugi yang telah ditetapkan walaupun klausa tersebut menjadi tidak sah jika jumlah tersebut mewakili hasrat kedua-dua pihak untuk menegakkan liabiliti.

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LIST OF ABBREVIATIONS

ABBREVIATIONS	EXPLANATION
AC	Law Reports: Appeal Cases
ACT	Australian Capital Territory
All ER	All England Law Reports
AMR	All Malaysia Reports
BCLC	Building and Construction Law Cases
BLR	Building Law Reports
CA	Court of Appeal
Ch	Cases in Chancery
Ch D	The Law Reports, Chancery Division
CIDB 2000	Construction Industry Development Board (CIDB) Standard Form of Contract for Building Works (2000 Edition)
CLJ	Current Law Journal (Malaysia)
CP	Law Reports, Common Pleas
CPD	Law Reports, Common Pleas Division
FMSLR	Federated Malay States Law Report
JCA	Justice of Court of Appeal
HKC	Hong Kong Cases
HKCA	Hong Kong Court of Appeal
HKCFA	Hong Kong Court of Final Appeal
KB	King Bench
LJCP	Law Journal Reports, Common Pleas Decisions (England)
LJQB	Law Journal Reports, Queens Bench
Lloyd's Rep	Lloyd's List Reports
PAM 2006	Pertubuhan Arkitek Malaysia (PAM) (2nd Edition, 2006)
PWD 203A (Rev.	Public Works Department (P.W.D) Form 203A (Rev.

ABBREVIATIONS	EXPLANATION
1/2010)	1/2010)
T	Law Times Reports (England)
MLJ	Malayan Law Journal
MLJU	Malayan Law Journal Unreported
NZLR	New Zealand Law Report
QB, QBD	Law Reports: Queen's Bench Division
S.C.R	Supreme Court Reports
TLR	Times Law Reports
WALR	Western Australian Law Reports
WASCA	Western Australian Supreme Court, Court of Appeal
WLR	Weekly Law Report
WR	Weekly Reports

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CHAPTER 1

INTRODUCTION

1.1 Background of the Problem

When a party breaches a contract, the law of contract provides remedies to the injured party. The remedies the injured party may claim against the defaulting party may be in the form of equitable remedies, for example, a specific performance or an injunction. Other form is monetary remedies. Under monetary remedies, there is unliquidated damages¹ or liquidated damages.² Construction contract generally contain express provision that entitles the employer to claim from contractor liquidated damages for delay.³

The main duty of a contractor in a construction contract is to perform the work and comply with the completion date.⁴ The contract provides an express remedy that the employer may recover from the contractor if the work is delayed beyond the specified date. The normal remedy is in the form of liquidated damages.⁵

Liquidated damages is an amount fixed by the employer at the time of contracting to be paid as damages in the event the work is not completed on time. The amount is stipulated during tendering stage and the contractor knows its liability

¹ Contracts Act 1950, section 74

² Contracts Act 1950, section 75

³ PAM 2006, clause 22.1; PWD 203A (Rev. 1/2010), clause 40.2; CIDB 2000, clause 26.2(a).

⁴ Trisaga Construction Sdn Bhd v Kerajaan Negeri Selangor & Ors [2013] MLJU 1566

⁵ Ibid, No. 5.

upfront in case it delays the work. Very rare a contractor proposed for a different liquidated damages amount so as not to being disqualified from the tender.

Though the liquidated damages clause in standard forms of construction contracts may vary in form, they are substantially the same.⁶ Liquidated damages clause kicks-in when the contractor failed to achieve practical completion date.⁷ Practical completion occurs when the contract administrator opines that the employer can use the building for their intended purpose although there are still works and minor defects to be executed.⁸

Generally in Malaysian standard forms of construction contracts, the following conditions must be met prior to the imposition of liquidated damages:

- i. The contractor did not finish the works by the date stipulated date
- ii. The extension of time application from the contractor have been processed by the contract administrator
- iii. The non-completion certificate have been issued by the contract administrator once the contractor did not meet the completion date
- iv. The employer must notify the contractor in writing that liquidated damages is required to be paid or deducted from outstanding payment

The liquidated damages clause is very important to the employer since contractor's failure in achieving practical completion by the stipulated date may cause a lot of negative consequences. The employer will have to face combination of losses such as loss of use and enjoyment, loss of profit, rental expenses and financing charges.⁹ In *Sakinas*¹⁰, Abdul Aziz J has the following to say:

“If there is a delay in the completion of the construction, the purchaser may suffer in various ways. He may have to commence paying the loan

⁶ Ibid.

⁷ Ibid.

⁸ PAM 2006, clause 15.1(a); PWD 203A (Rev. 1/2010), clause 39.5(b).

⁹ Yap Yew Cheong & Anor v Dirga Niaga (Selangor) Sdn Bhd [2005] 7 MLJ 660

¹⁰ Sakinas Sdn Bhd v. Siew Yik Hau & Anor [2002] 5 MLJ 497

installments without getting the enjoyment of the house. If he is renting a house, he will have to pay both the rental and the loan installments, whereas if there had been no delay in completion, he could have moved into his new house and pay the loan installments, without also having to pay rental. If he bought the house as an investment, he would have been deprived of the rental that he would have got from renting out the house. The person who is already living in his own house but is hoping to live in a better new house, and rent out his present house, will be deprived of early enjoyment of the new house and the receipt of rental from his present house, while having to pay his loan installments. Whatever may be the circumstances and intention of the house buyer, it can be said that in every case, a delay in completion would deprive the purchaser, for the period of the delay, at least of the rental that he would have got from the house had he chosen to rent it out. It would be a substantial loss in theory.”

Without liquidated damages clause, the employer may claim under unliquidated damages.¹¹ In other words, he has to resort to his common law rights and section 74 of the Contract Acts 1950. In that case, he must prove his loss during litigation, which is an expensive and lengthy process.¹²

Another issue with unliquidated damages is that attempt to establish the actual loss sustained due to project delay is difficult and expensive.¹³ The court has recognized this issue in *Clydebank v Don Jose*¹⁴ where the House of Lords explained:

“although undoubtedly there is damage the nature of the damage is such that proof of it is extremely complex, difficult and expensive”.

¹¹ *Arnhold v Attorney General of Hong Kong* (1989) 5 Const LJ 263

¹² David Chappell, Vincent Powell-Smith, and John H. M. Sims, “Building Contract Claims.” Fourth edition. (Oxford: Blackwell Publishing Ltd, 2005), pp. 43.

¹³ Vincent Powell-Smith, “Current Developments in the law of Liquidated Damages – A More Flexible Approach?” (Malaysian Law Journal Articles 3 MLJ cxv, 1993), pp. 2.

¹⁴ *Clydebank Engineering and Shipbuilding Co Ltd v Don Jose Yzquierdo Y Custaneda* [1905] AC 6

The reasons an exercise to prove actual loss is complex, difficult and expensive are due to the requirements to prove the following in court or in arbitral forum in order to recover damages involving contractual breach¹⁵:

- i. there is contractual obligation between the defendant and the plaintiff
- ii. defendant's failure to fulfill the obligation
- iii. the plaintiff suffered loss or damage

As the employer will face the risk of expensive and arduous remedy in unliquidated damages, in certain situation, it may not be sensible or worthy to pursue.¹⁶ Therefore, to avoid the situation above, when entering into a contract, the parties may set a sum for a particular kind of breach, in this case, for delay in completing the work.¹⁷ This sum is known as liquidated damages. This provision if included in a contract entitled the employer a relatively simple recovery for the agreed amount.¹⁸

Although it seems that liquidated damages clause is to the advantage of employer, it actually benefits the contractor as well. The contractor knows in advance their risks for delay in completing the work and may price accordingly in his tender amount. Moreover, liquidated damages is regarded as the exhaustive agreement to the financial consequences of delay whether in fact it suffices or not.¹⁹ When there is risk of project delay, the contractor may elect either to pay the liquidated damages or increase his manpower or machinery to keep up the schedule, whichever to his advantage. Lord Justice Diplock said the following in *Robophone Facilities*²⁰ about liquidated damages:

“Not only does it enable the parties to know in advance what their position will be if a breach occurs and so avoid litigation at all, but, if litigation cannot be avoided, it eliminates what may be the very heavy legal costs of

¹⁵ Ibid, No. 12.

¹⁶ J-Corp Pty Ltd v Mladenis and another [2009] WASCA 157

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Nigel M. Robinson, Anthony P. Lavers, George K.H. Tan, and Raymond Chan, “Construction Law in Singapore and Malaysia.” Second edition. (Singapore: Butterworths Asia, 1996), pp. 315.

²⁰ Robophone Facilities Ltd v Blank [1966] 3 All ER 128

proving the loss actually sustained which would have to be paid by the unsuccessful party.”

Lord Justice Diplock advised that it is advantageous for both parties to fix an easily ascertainable sum for payment in the event of contractual breach. Particularly if a party is in difficulty to provide evidence and assess the damages it will sustain. Especially in public works contracts, part of the loss may be non-financial and thus, is exceptionally complicated to evaluate.²¹ The use of liquidated damages will save time and money in arbitration or litigation. In *Sakinas*²², Abdul Aziz J also contemplated that delays in completion of work were considered as a species of breach for which “*no known measure of damages employable because a complex cocktail of losses was involved*”²³.

As such, liquidated damages is beneficial to the employer as well as the contractor. Although such clause is agreed in the contract and the parties are subject to the terms of the contract which they established, a liquidated damages clause has to follow certain criteria to be valid. If a liquidated damages clause is found to be unenforceable, the employer may be unable to claim the stipulated amount. A liquidated damages sum must have the following features to be enforceable:

- i. it is a genuine pre-estimate of the probable damage²⁴
- ii. the intent of the liquidated damages clause is to compensate the employer and not to penalise the contractor²⁵
- iii. the damages must not be calculated at the time of the default but at the time the contract was entered into²⁶

²¹ Sir William Reynell Anson, J. Beatson, and Andrew S. Burrows, “Anson’s Law of Contract.” 29th edition. (Oxford: Oxford University Press, 2010), pp. 569.

²² Ibid, No. 10.

²³ Ibid.

²⁴ Barry B. Bramble and Micheal T. Callahan, “Construction Delay Claims.” Fourth edition. (United States: Aspen Publishers, 2010), pp. 2-87.

²⁵ Ibid.

²⁶ Ibid.

Under English common law, proof of actual loss is not required to claim liquidated damages and employer may claim the pre-agreed amount simpliciter. Lord Dunedin in the *Dunlop Pneumatic Tyre*²⁷ highlighted as follows:

“It is no obstacle to the sum stipulated being a genuine pre-estimate of damages 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.”^[11]
SEP

In Malaysia, the position related to liquidated damages is somewhat different. The liquidated damages provision in Malaysia is governed by section 75 of the Contract Acts 1950. Based on the Federal Court’s decision in *Selvakumar v Thiagarajah*²⁸, the employer needs to prove its loss in order to claim liquidated damages. In an earlier case of *Maniam v The State of Perak*²⁹, it was held that the Malaysian law does not differentiate between penalty and liquidated damages. This different position taken by the Malaysian court compared to the English court is due to the stipulation in section 75 of the Contract Acts 1950:

“.... to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for”

The existence of the word “*reasonable compensation*” leads to the Malaysian position that the court itself must determine the amount of damages.³⁰

Without a doubt, liquidated damages provision is a crucial clause in construction contract to protect the employer’s interest as the employer can claim damages based on a pre-agreed amount stipulated in the contract in case of delay. It is not easy to claim unliquidated damages in the event of delay because to proof loss

²⁷ *Dunlop Pneumatic Tyre Co Ltd v New Garage & Motor Co Ltd* [1915] AC 79

²⁸ *Selvakumar a/l Murugiah v Thiagarajah a/l Retnasamy* [1995] 2 MLJ 817

²⁹ *Maniam v The State of Perak* [1957] 1 MLJ 75

³⁰ *Ibid*, No. 28.

is extremely complex, difficult and expensive. Further, as liquidated damages is generally regarded as the sole compensation in the event of delay in construction contract, section 75³¹ also cap the amount of damages according to the amount in the contract due to the existence of the sentence “*not exceeding the amount so named*”.

Thus, it is not easy to claim liquidated damages in Malaysia since the employer needs to prove its loss and the damages is limited up to the amount stipulated in the contract. It seems that it is advantageous to claim unliquidated damages because unlike liquidated damages, the amount of damages is not capped, unless otherwise stated in the contract. Unlike the English law, the contractor in Malaysia will argue to invalidate the liquidated damages by requiring the employer to prove its actual loss.

Further, the amount stipulated in construction contract as liquidated damages in the event of delay sometimes is too small compared with the loss the employer had to bear for being kept out of the building.³² The contention was that if the employer state a large amount as liquidated damages, it would deter the contractors from tendering.³³ As such, the amount may not suffice to compensate the employer in the event of actual breach.

As discussed above, both in English law and Malaysian law, liquidated damages clause limit the extent of the contractor’s liability for the specified breach, in this case, delay to completion date. The court also held that in case the liquidated damages clause is unenforceable, invalid or inoperative, the employer would be able to recover the damages for the breach such loss as he could establish, which also known as unliquidated damages. An issue arise from this is whether the employer can claim unliquidated damages beyond the limit set by the liquidated damages clause in the event the clause is found to be invalid or inoperative. This issue is unclear since there are case laws that support both outcome, that are, the agreed sum

³¹ Ibid, No. 4.

³² David Chappel, “Construction Contracts: Question and Answers”. (Oxon: Taylor & Francis, 2006), pp. 163.

³³ Ibid.

act as the limit of the damages amount and also the agreed sum imposes no ceiling at all.³⁴

1.2 Statement of the Problem

According to Knowles (2012), there is little consistent authority whether unliquidated damages may exceed the amount set for liquidated damages if the liquidated damages clause becomes unenforceable.³⁵ In *Wall v Rederiaktiebolaget Luggude*³⁶, the court held that unliquidated damages can exceed the stipulated sum but was not allowed in *Elsley v Collins Insurance Agency*.³⁷ The main disparity of the two cases are that in the former, the clause is intended as a penalty in the first place and thus, was void whereas in the latter case, the clause was held to be intended to be a liquidated damages provision, hence, although it was found to be a penalty, the court held that the claimant can only recover damages up until the stipulated amount. In an interesting case of *Wadsworth v Lydall*³⁸, the plaintiff managed to claim interest charges and special loss although generally, it can be considered a penalty if the party who has breached the contract has to pay a larger sum for a breach of non-payment of debt.³⁹

O'Farrell (2004) in her article concluded that a claimant can claim unliquidated damages exceeding the cap set in the liquidated damages provision in the event the clause is void for uncertainty, which means the clause falls from the contract. In contrast, the following are the events where a claimant's unliquidated damages is cap to the liquidated damages provision⁴⁰:

³⁴ see Roger Knowles, "200 Contractual Problem and their Solutions." (West Sussex: Willey-Blackwell, 2012), pp. 157 and Arthur McInnis, "The New Engineering Contract: A Legal Commentary." (London: Thomas Telford Publishing, 2001), pp. 325.

³⁵ Roger Knowles, "200 Contractual Problem and their Solutions." (West Sussex: Willey-Blackwell, 2012), pp. 157.

³⁶ *Wall v Rederiaktiebolaget Luggude* [1915] 3 KB 66

³⁷ *Elsley v. J.G. Collins Ins. Agencies*, [1978] 2 S.C.R. 916

³⁸ *Wadsworth v Lydall* [1981] All ER 401

³⁹ Chow Kok Fong, "Law and Practice of Construction Contracts." Third edition. (Singapore: Sweet & Maxwell Asia, 2004), pp. 390.

⁴⁰ Fiona O'Farrell, "Challenging and Defending Liquidated Damages." (Amicus Curiae, Issue 56 November/December, 2004), pp. 23.

- i. if the liquidated damages clause is found to be a penalty
- ii. if the liquidated damages clause is inoperable as a result of employer's act of prevention

Based on Powell-Smith (1993)'s article, he believes that unliquidated damages claim could not exceed the cap of the unenforceable liquidated damages provision because it is unfair to entitle an employer to "*impose an excessive liquidated damages clause in terrorem and then to avoid its effect in order to recover more*".⁴¹ He further added that this issue did not affect the Malaysian jurisdiction due to section 75 of the Contracts Act 1950. Lim (2004) echoed such view in his book and opined that the amount of damages that can be recovered by the employer is limited to the liquidated damages provision in the contract if the provision becomes unenforceable.⁴² Nonetheless, this view has yet to be tested in the court of law and section 75 did not expressly state that the clause still applies if it becomes inoperable.

Murdoch and Hughes (2000) also supported this view. They doubt that the claim for unliquidated damages can exceed the stipulated liquidated damages sum when the employer cause the liquidated damages to be unenforceable since the law does not usually allow the injured party to benefit from his own breach.⁴³ Nevertheless, no opinion was given in case the contractor himself causes the liquidated damages clause to be unenforceable. Egglestone (2009) in his book provide view on both situations. He is of the view that the laws in this area are divided into two⁴⁴:

- i. the injured party cannot claim unliquidated damages exceeding the liquidated damages sum when the provision is found to be a penalty
- ii. if the contractor himself defeats the liquidated damages, there's no

⁴¹ Vincent Powell-Smith, "Current Developments in the law of Liquidated Damages – A More Flexible Approach?" (Malaysian Law Journal Articles [1993] 3 MLJ cxv, 1993), pp.1 - 2.

⁴² Lim, C. F. (2004). *The Malaysian PWD Form of Construction Contract*. Petaling Jaya: Sweet & Maxwell Asia.

⁴³ Murdoch, J. R. & Hughes W. (2000). *Construction Contracts: Law and Management* (Third Edition). Oxon: Spon Press.

⁴⁴ Egglestone, B. (2009). *Liquidated Damages and Extension of Time in Construction Contracts* (Third Edition). London: Wiley-Blackwell.

certainty that the unliquidated damages will not exceed the liquidated damages sum

Where Egglestone (2009) view depends on which party causes the liquidated damages clause to be unenforceable, Furst and Ramsey (2001) in their book stated that the “*nature and effect of a liquidated damages clause depends on its construction*”.⁴⁵ Their view is in line with Murdoch and Hughes (2000) where it is inequitable to allow an employer to avoid the effect of imposing an excessive liquidated damages provision as a threat to secure performance so that the employer can recover more.

Based on the opinion of McGregor, Spencer and Picton (2004), if the amount of liquidated damages is small that it cannot be held as a genuine pre-estimate, then the clause is deemed to limit the party’s liability.⁴⁶ In his earlier book, McGregor (1988) opined the penalty amount does not form a cap to the amount of damages that can be recovered by the plaintiff.⁴⁷

The Malaysian standard forms of construction contracts such as PAM 2006 and PWD 203A (Rev. 1/2010) did not address this issue, except for CIDB 2000. CIDB 2000 appears to remove the benefit of limiting contractor’s liability for late completion and at the same time the liquidated damages clause becomes unenforceable⁴⁸ at 26.3.:

“In the event that the Employer for whatever reason shall not be entitled at law to recover Liquidated Damages, the Employer shall remain entitled to recover such loss, expense, costs or damages as he would have been entitled at law.”

⁴⁵ Furst, S. & Ramsey, V. (2001). Keating on Building Contracts (Seventh Edition). London: Sweet & Maxwell.

⁴⁶ McGregor, H., Spencer, M. & Picton, J. (2004). McGregor on Damages (17th Edition). London: Sweet & Maxwell.

⁴⁷ McGregor, H. (1988). McGregor on Damages (15th Edition). London: Sweet & Maxwell.

⁴⁸ CIDB 2000, clause 26.3

1.3 Objective of the Study

The objective of this research is:

To identify whether the employer may claim more than the stipulated sum of liquidated damages for delay in achieving Practical Completion when the liquidated damages clause is found to be unenforceable.

1.4 Scope of the Study

The scope of the study is limited to case laws from countries in line with the English common law, such as United Kingdom, Hong Kong, Singapore and Malaysia. Since there is disparity between the Malaysian law and the English common law on the imposition of liquidated damages provision, the cases will be distinguished accordingly. The focus of the study is mainly on the impact of the unenforceable liquidated damages provision to the employer and contractor but where relevant, cases that involve contractor and the sub-contractor will also be used. Due to the scarcity of cases in respect of the subject of the thesis, there are no limitations as for the case laws referred to in this study so long it is related with unliquidated and liquidated damages but priority is given to court cases related to construction industry.

The Malaysian standard forms of construction contracts that are referred to in this thesis is as follows:

- i. Pertubuhan Arkitek Malaysia (PAM) (2nd Edition, 2006) ^[L]_[SEP]
- ii. Public Works Department (P.W.D) Form 203A (Rev. 1/2010) ^[L]_[SEP]
- iii. Construction Industry Development Board (CIDB) Standard Form of Contract for Building Works (2000 Edition)

1.5 Significance of the Study

Construction contractors serve two sectors that are public and private sector. Public sector refers to the government and public projects are usually handled by the Public Works Department under the Ministry of Works. There are two types of clients under the private sector that are household and developers. The government, household and developers are usually referred to as employer in construction contracts.

For households in Malaysia, owning a house can be considered as luxury at the current economic climate. House is a necessity and critical to households but based on Bank Negara report, houses are out of reach to majority of Malaysians. In 2014, half of Malaysians monthly take home pay is RM4,585 and below, thus, houses considered affordable to median Malaysians are priced up to RM165,060 (house price-to-income ratio of 3.0 and below)⁴⁹.

However, in 2014, 79% of new housing launches are priced above RM250,000, which is far from the median.⁵⁰ To make matters worst, 36% of the new launches are priced above RM500,000.⁵¹ Such price range can only be afforded by 5.4% Malaysians.⁵²

The impact of project delay to homeowners is huge, there will be loss of opportunity to rent the property, loss of use or the need to rent for a replacement accommodation during the delay period while waiting for the property to complete. The situation will be a major inconvenience to the homeowners since based on the Monthly Household Consumption Expenditure Malaysia in 2014 (refer to Table 1.1), the household expenditure for water, electricity, gas, housing, and other fuels

⁴⁹ Bank Negara Annual Report 2015, pp. 34

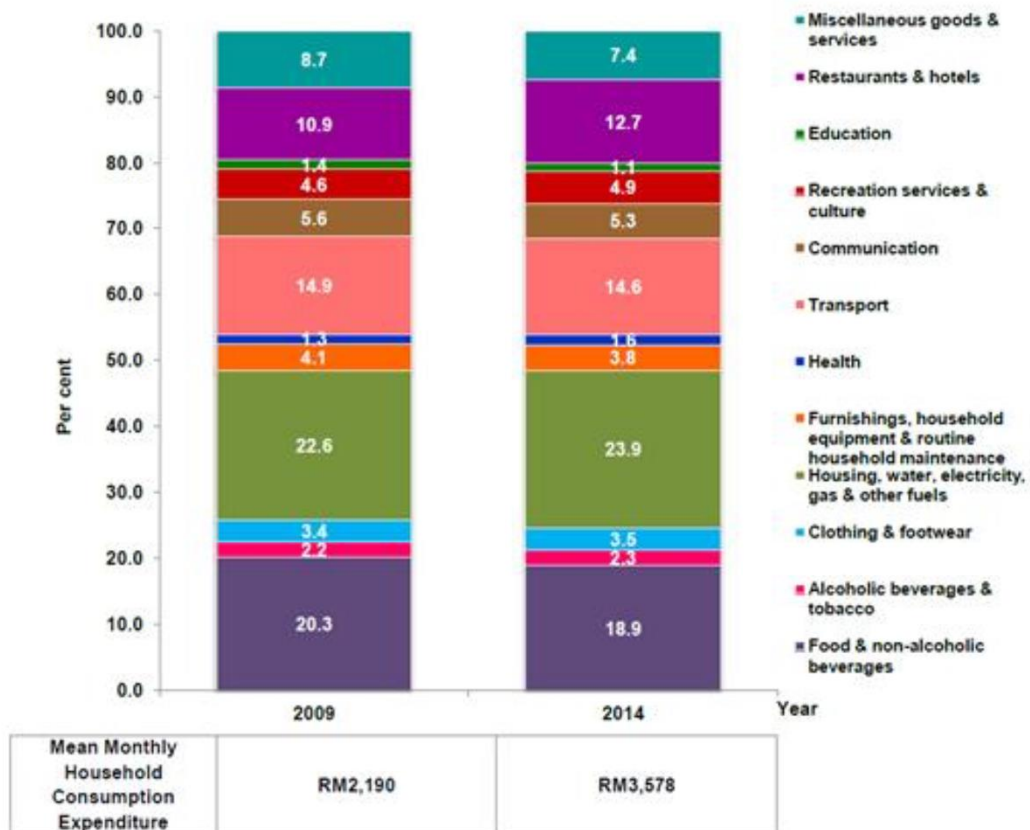
⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid.

represents the biggest expenses of the total household expenditure at 23.9%. Without a doubt, housing is the largest investment for a household.

The Composition of Monthly Household Consumption Expenditure, Malaysia, 2009 and 2014




Source: Department of Statistics, Malaysia


Figure 1.1: The Composition of Monthly Household Consumption Expenditure Malaysia, 2009 and 2014

The statistics for problematic private housing project reveals high number of housing units experiencing delay in completion. The charts and figures are as follows:

Table 1.1: Statistics of Private Housing Project According to Category until 31 October 2016



STATISTIK PROJEK-PROJEK PERUMAHAN SWASTA MENGIKUT KATEGORI HINGGA 31 OKTOBER 2016



BIL.	NEGERI	PROJEK LANCAR			PROJEK LEWAT			PROJEK SAKIT		
		BIL. PROJEK	UNIT RUMAH	BIL. PEMBELI	BIL. PROJEK	UNIT RUMAH	BIL. PEMBELI	BIL. PROJEK	UNIT RUMAH	BIL. PEMBELI
1	Johor	503	120,313	40,904	6	2,907	1,141	17	3,770	2,691
2	Kedah	185	27,964	15,851	7	385	55	12	680	357
3	Kelantan	74	3,463	2,615	2	373	66	12	1,398	852
4	Melaka	95	9,815	4,225	7	2037	1332	6	1,870	798
5	Negeri Sembilan	140	12,247	5,703	0	0	0	17	2,052	1,530
6	Pahang	358	13,888	9,130	3	73	41	11	1,697	830
7	Perak	298	23,594	10,068	8	1,600	890	52	3,144	1,790
8	Perlis	25	1,337	711	1	80	24	0	0	0
9	Pulau Pinang	181	42,966	19,130	11	3,689	2,054	28	4,413	3,197
10	Selangor	712	135,582	69,832	21	8,520	5,401	95	24,919	13,712
11	Terengganu	79	4,145	1,748	0	0	0	16	975	638
12	W.P. Kuala Lumpur	211	106,395	49,101	4	1343	998	6	1,456	463
	JUMLAH	2,861	501,709	229,018	70	21,007	12,002	272	46,374	26,858

Sumber : Jabatan Perumahan Negara, 2016

Table 1.2: On Track, Late and Ailing Project until 31 October 2016

Description	No. of Projects	Housing Units	No. of Purchasers
On Track	2,861	501,709	229,018
Late	70	21,007	12,002
Ailing	272	46,374	26,858
Total	3,203	569,090	267,878

Note: Project categorized as Ailing (Projek Sakit) refers to projects which experience delay exceeding 30% of the original schedule or the sale and purchase agreement has already expired.

The above statistic from the National Housing Department shows that the risk of project delay is high in Malaysia. 342 projects or 10.7% are identified as late and

ailing which affects 38,860 purchasers or 14.5% of the total population. As of 31 October 2016, 67,381 units of houses were classified as delayed.

For developers, they will be unable to monetize the project quickly and unable to claim from the bank their full payment, which may affect their cash flow. Their profit will be affected too since developers usually forecast their profitability based on the completion of the projects by the contractor⁵³. The developers are also facing the risk of imposition liquidated damages from purchasers and loss of reputation. The employers will have to endure high financial losses and will be exposed to contractual liability by purchasers in case of delay. The National Housing Department which reports to the Ministry of Urban Wellbeing, Housing and Local Government, will take action on errant developers by blacklisting them or classify them as ailing. Potential purchasers will be put off with developer with that kind of track record. To make matter worst, the purchasers can even terminate the sale and purchase contract and demand the refund of all monies paid⁵⁴.

Things do not augur well for public project as well such as school, light rail transit project and public utilities project. In 2009, it was reported that 80% of public projects in Malaysia are delayed.⁵⁵ Though there is argument that there's no loss in public project in the event of delay because the funds come from public purse,⁵⁶ in reality, the public is deprived from using the facilities which is intended to improve their welfare in the first place. The judge rejected such argument in *Multiplex Constructions v Abgarus*⁵⁷, saying:

“Conceptually, I do not think it is correct to say that public works, because they may not yield a cash flow, cannot result in damages to the state or public authority if delay in construction occurs. Whilst the example may be peripheral to the one being considered, it demonstrates that, at least in some

⁵³ Lim, C. F. (1993). Enforcement of Liquidated Damages – To Prove Actual Loss? Malaysian Law Journal Articles [1993] 1 MLJ lxxxii, 1

⁵⁴ Tan Yang Long & Anor v Newacres Sdn Bhd [1992] 1 MLJ 289

⁵⁵ Ibid.

⁵⁶ Ibid, No. 40.

⁵⁷ Multiplex Constructions Pty Ltd v Abgarus Pty Ltd (1992) 33 NSWLR 504

instances, an appropriate measure of liquidated damages is the cost of capital tied up for the period of delay.”

Additionally, the relevant government department has to answer to the Auditor-General as delay in project will be reported in the Auditor-General Report, which is available to the public. The opposition party and the public will scrutinize the audit report and demand the government to provide explanation for the project delay and increase in cost associated with the delay, which will affect public confidence to the ruling party. While the taxpayers' money will have to be used to fund the increase in cost, there will also loss of revenue to the government for infrastructure related project.

For example, the National Audit Department reported that the Ministry of Agriculture & Agro-Based Industry Malaysia estimated 54,000 ton metric of fishes will be landed at Tanjung Manis Integrated Deep-Sea Fishing Port in 2008 but in reality, only 3,600 ton metric of fishes were landed from January to December 2008,⁵⁸ which is a mere 6.7% of the ministry's target. One of the failures to meet the target was the delay to the construction of centralized cold room and processing plant.⁵⁹ Additionally, project delay almost always leads to cost overrun and in some cases, cancellation of other projects because the budget from the other projects may need to be taken to cover the additional expenses incurred.⁶⁰

Based on the paper by Mehdi Riazi and Lamari (2013), amongst the common effect of delay was extended project time frame which eventually leads to increased overhead cost. The increased overhead cost will affect the contractors as they may be unable to complete the project due to financial shortage or bursting of budgets. There will also be loss of opportunity cost as delay could cause resources to be trapped in a project⁶¹.

⁵⁸ Jabatan Audit Negara (2008). Laporan Ketua Audit Negara 2008. 88

⁵⁹ Ibid.

⁶⁰ Mehdi Riazi, S. R. & Lamari, F (2013). Public sector project delay : the Malaysian perspective and the way forward. In Kajewski, Stephen L., Manley, Karen, & Hampson, Keith D. (Eds.) Proceedings of the 19th CIB World Building Congress, Brisbane 2013 : Construction and Society, Queensland University of Technology, Brisbane Convention & Exhibition Centre, QLD, Australia, 6

⁶¹ Ibid.

Since contractor may include in its pricing the liquidated damages risk in case of project delay, it is possible that even though the contractor has the option to re-programme and accelerate the construction by increasing his resources to catch up with the schedule, he will choose not to and prefers to pay liquidated damages because re-programme and acceleration cost is much higher.

Therefore, without a doubt, employer needs to protect itself from substantial losses due to late completion by the contractor. Though liquidated damages cannot be claimed without proving employer's loss in Malaysia, it still limits the contractor's liability in case of late completion. As such, if it is too high, it might be challenging for the employer to prove his damages and if it is too low, no adequate compensation will be payable to the employer for contractor's failure even though the liquidated damages clause is invalid, inoperable and unenforceable. Depending on the circumstances that invalidate the liquidated damages clause, it is a fact that the employer may suffer losses as a consequence of contractor's breach, hence, he should be compensated reasonably.

1.5 Conclusion

Construction contracts usually provide the employer with liquidated damages provision to compensate the employer when the contractor delays the completion of the works. Liquidated damages permits the employer a simple mechanism to recover damages. It is intended to limit the contractor's liability in the event of delay.

However, liquidated damages provision can be unenforceable due to various reasons. If that happens, the employer lose the right to recover damages under liquidated damages. He can only claim under unliquidated damages.

The court's position whether an employer can claim more than the sum fixed for liquidated damages when the provision is unenforceable is not clear. Even experts and academicians opinion on this matter differ.

Therefore, this research paper will explore the issues and identify the possibility of the employer claiming more than the liquidated damages sum when the provision is found to be unenforceable.

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