

Construction Delays and Liquidated Damages: Navigating the Legal Landscape

by Jessica Mank & Leyla Salmi

Construction projects can be complex endeavors that involve multiple parties, extensive planning, and substantial financial investments. Delays are a common challenge in the construction industry, leading to increased costs and disruptions. To manage these delays, construction contracts may include provisions for liquidated damages, which can have significant legal implications.

This article provides an overview of liquidated damages clauses in the context of construction delays. Successfully navigating the legal landscape in this context requires a thorough understanding of the contractual agreements in question and relevant laws based on your jurisdiction. It is important to consult a lawyer for advice regarding your individual situation.

UNDERSTANDING CONSTRUCTION DELAYS

Construction delays can occur for numerous reasons, including, among other things, adverse weather conditions, unforeseen site conditions, labor shortages, design changes, or deficiencies in design and construction. These types of complications may impact the critical path of the construction schedule, increase costs, and cause disputes among project stakeholders.

LIQUIDATED DAMAGES FOR CONSTRUCTION DELAYS: WHAT ARE THEY?

To mitigate the financial consequences of delays, construction contracts may include liquidated damages clauses. Liquidated damages are

pre-determined sums of money that a party agrees to pay in advance in the event of a breach of contract. For example, a construction contract may include a liquidated damages clause contemplating a scenario where the contractor fails to complete its work on time (often, by the “substantial completion” date).

The amount payable under a liquidated damages clause is specified in the contract and is intended to serve as a genuine pre-estimate of anticipated damages and liabilities¹, so both parties “know what they are facing, even if actual damages turn out to be more or less”.²

Merely including a liquidated damages clause is not necessarily a guarantee for the recovery of damages. The party seeking to enforce the clause must establish that the delays were the fault of the other party in order to recover damages. Depending on the terms of the contract, the other party may seek to enforce rights of set-off from the contract price or seek recourse by starting a court action.

Other considerations that may impact the ability of a party to recover damages under a liquidated damages clause include the following:

- **Scope:** liquidated damages clauses may be drafted broadly to permit a party to recover damages for any delay to a construction project or recovery may be triggered by a particular event. Parties should ensure their contracts are clear about the event(s) that will trigger a liquidated damages clause.

¹ *Canadian General Electric Co. v. Canadian Rubber Co.*, 52 SCR 349 (S.C.C.), at para. 3.

² *PS Asia Group PTE Ltd. v. Belair Fabrication Ltd.*, 2015 CF 1141, at para. 64. See also: *Mitchell v. Paddington Homes Ltd.*, 3 B.C.L.R. 330 (BCSC).

- **Conditions Precedent:** construction contracts may require a party to comply with certain conditions precedent, such as notice obligations, prior to seeking recovery under a liquidated damages clause. Parties should ensure they have an understanding of how liquidated damages clauses interact with their rights and obligations under the contract as a whole.
- **Enforceability:** the sum stipulated to be paid on breach must be reasonable.³ If the agreed-upon damages are excessive or appear punitive, a liquidated damages clause may be deemed unenforceable by the courts.⁴

ADDITIONAL CONSIDERATIONS FOR NAVIGATING CONSTRUCTION DELAYS

Where construction delays occur, the following additional considerations may assist with preventing costly disputes:

- 1. Clear Contractual Agreements:** it helps to have a clear and comprehensive contract that outlines the parties' respective responsibilities relating to the scope of work, timelines and consequences of any delays, such as liquidated damages. Clear contracts can help avoid ambiguity and prevent potential disputes.
- 2. Proactive Project Management:** project management, which includes planning, organizing

and managing activities relating to the project, can help prevent or mitigate any delays that arise in construction projects. Parties should have contingency plans in place prior to commencing construction to address issues that often impact scheduling, such as weather, labour disputes, shipping delays, supply backlogs and accidents. When delays occur, effective communication between project stakeholders can help mitigate the impact.

3. Dispute Resolution: to mitigate the impact of disputes, parties should establish clear dispute resolution mechanisms in their contracts. In doing so, parties should consider whether alternative dispute resolution mechanisms such as negotiation, mediation or arbitration would be desirable to avoid engaging in litigation, which can be more costly and time-consuming.

Ultimately, when facing construction delays, consulting with legal experts specializing in construction law can provide valuable guidance and ensure that your rights and interests are protected. Looking for more information? If you have any questions, please get in touch with [Leyla Salmi](#), [Jessica Mank](#), or any other members of our Construction Group. Read more about our specific construction law expertise [here](#).

³ *Badesha v. Snowland Sporting Goods Ltd.*, 2015 BCSC 1229; reversed on other grounds 2016 BCCA 294

⁴ *H.F. Clarke Ltd. v. Thermidaire Corp.*, [1976] 1 S.C.R. 319 (SCC); *G Collins Insurance Agencies Ltd v. Elsley Estate*, [1978] 2 SCR 916 (SCC).



[Jessica Mank](#)

Associate

jmank@harpergrey.com

604.895.2872



[Leyla Salmi](#)

Associate

lsalmi@harpergrey.com

604.895.2854

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