



# What is your Liquidated Damages Exposure?

**Presented by:**

**Jacques Nel**

*Senior Solicitor at NECA Legal*

## Overview

- **What are Liquidated Damages?**
- **Pros and Cons of Liquidated Damages**
- **How to limit your exposure to Liquidated Damages**
- **Traps in Liquidated Damages clauses**
- **When are Liquidated Damages unenforceable?**

# Liquidated Damages

## Definition of Liquidated Damages (LDs)

- Origin of LDs - breach of contract for failing to complete by the date for practical completion
- Agreed, fixed amount of damages payable by the contractor to the principal for delay in completion
- Usually expressed as a daily rate, for example \$1,000 / day or \$10,000 per day
- Must be a genuine pre-estimate of the loss that will flow from late completion
- Amount must not be extravagant or unconscionable in comparison to greatest loss that could conceivably be proved

# Example: AS 2124-1992

## Liquidated Damages – AS 2124-1992

### 35.6 Liquidated Damages for Delay in Reaching Practical Completion

*“If the Contractor fails to reach Practical Completion by the Date for Practical Completion, the Contractor shall be indebted to the Principal for liquidated damages at the rate stated in the Annexure for every day after the Date for Practical Completion to and including the Date of Practical Completion or the date that the Contract is terminated under Clause 44, whichever first occurs”*

# AS 2124-1992 Liquidated Damages

## Liquidated Damages – AS 2124-1992

### 35.7 Limit on Liquidated Damages

*“The Contractor’s liability under clause 35.6 is limited to the amount stated in the Annexure.”*

### Annexure Part A to AS2124-1992

*“ Liquidated damages per day: .....*  
*(Clause 35.6)*

*Limit of Liquidated Damages .....*  
*(Clause 35.7)*

# Pros & Cons of Liquidated Damages

## Pros of Liquidated Damages

- Provides a fixed amount that may be claimed
- Contractor gets certainty of exposure
- Limits the liability for delay at least to fixed rate per day
- Replace General Damages for breach of contract – actual loss suffered due to late completion can be substantial

# Pros & Cons of Liquidated Damages

## Cons of Liquidated Damages

- Provides a liquidated amount that Principal may deduct from progress claims upon late completion
- Principal does not have to prove actual loss
- Substantial liability if contract is delayed over extended period

# Limiting Liability for LDs

## Limiting exposure to Liquidated Damages

- Exclude liability for delays cost due to late completion expressly and in clear terms
- Negotiate a grace period
- Limit/cap liquidated damages to a fixed sum or percentage of the contract sum (2.5% - 10%)
- Limit Liquidated Damages as sole remedy for delay
- Always claim EOTs under your Contract



# Traps – Liquidated Damages

## Beware of the following traps!

- Using “N/A” in AS 2124 - *Silent Vector Pty Ltd t/as Sizer Builders v Squarcini [2008] WASC 246* – General Damages for delay apply

### Annexure Part A to AS2124-1992

*“ Liquidated damages per day:* .....N/A.....  
(Clause 35.6)

*Limit of Liquidated Damages* .....N/A.....  
(Clause 35.7)

# Traps – Liquidated Damages

## Beware of the following traps!

- Surely “\$Nil” means No liability for LDs?
- *Baese Pty Ltd v RA Bracken Building Pty Ltd* (1990) 6 BCL 137– General Damages for delay apply

## Annexure Part A to AS2124-1992

*“ Liquidated damages per day: ...\$Nil.....  
(Clause 35.6)*

*Limit of Liquidated Damages ...\$Nil.....  
(Clause 35.7)*

# When are LDs Unenforceable?

## Unenforceable Liquidated Damages Clauses

- Penalty – *Grocon Constructions Pty Ltd v Juniper Developer [2015] QCA 102* (\$33.6M LDs awarded)
- Prevention Principle – *Probuild Constructions v DDI Group [2017] NSWCA 151* – (\$2.3M LDs not awarded)
  - Discretionary power to give EOT not exclusively for Principal
- Pay when Paid provisions – *Maxcon Constructions v Vadasz [2018] HCA 5* may impact on liquidated damages

# When are LDs Unenforceable?

## Maxcon v Vadasz

- Security of Payment Legislation – general prohibition against pay when paid provisions, that is any provision which generally makes the ***liability to pay money owing contingent or dependant on the operation of another contract***
- Maxcon Facts – Contractual dates for release of retention money under subcontract depended on issue of a certificate of occupancy that could not be issued until completion of the whole project in accordance with the Head Contract. Accordingly the payment of retention money was therefore contingent on the operation of another contract
- Effect is the whole of the retention monies clauses, including provision allowing Head Contractor to withhold retention money from progress claims, became unenforceable
- Maxcon v Vadasz may arguably also apply to exclude LDs where Practical Completion is contingent or dependent on the operation of the Head Contract

# Conclusion



- **Watch out for unlimited liability for LDs**
- **Cap LDs as percentage of Contract Sum**
- **Claim EOTs on time**
- **\$Nil / N/A does not mean no LDs**

## Further NECA Legal Services

- **Building Defects and Home Warranty Insurance Claims**
- **Commercial and Contractual Advice**
- **Debt Collection**
- **Representation**
- **Security of Payment Advice (SOPA)**
- **Training**
- **Workplace Health and Safety**
- **Workplace Relations**



# Contact Us

## Contact NECA Legal

**Stafford Poyser**      [stafford.poyser@neca.asn.au](mailto:stafford.poyser@neca.asn.au)

*Solicitor/Director*

**Jacques Nel**      [jacques.nel@neca.asn.au](mailto:jacques.nel@neca.asn.au)

*Senior Solicitor*

Mobile: 0400 462 122

**Marina Galatoulas**      [law.clerk@neca.asn.au](mailto:law.clerk@neca.asn.au)

*Junior Solicitor*

**Margaret Ward:**      [margaret.ward@neca.asn.au](mailto:margaret.ward@neca.asn.au)

*Legal Secretary*

**Jane Button**

*Consultant Solicitor*

**Jakov Miljak**

*Industrial Relations*      [Jakov.Miljak@neca.asn.au](mailto:Jakov.Miljak@neca.asn.au)

**Telephone:**

(02) 9744 1099

**Facsimile:**

(02) 9744 1830

**Websites:**

[www.neca.asn.au](http://www.neca.asn.au)

[www.constructionlawyersydney.com](http://www.constructionlawyersydney.com)