

# International Arbitration Alert

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## The Court of Appeal in England & Wales Curtails Use of Liquidated Damages for Delay

April 30, 2019

In international construction arbitration, the use of liquidated damages to address the consequences of failure by a contractor to finish the works by the date set for completion is widespread. Typically, the contractor completes the works late and absent any compelling arguments that the liquidated damages regime is an unenforceable penalty, liquidated damages for the delay are readily calculated and deducted. However, the Court of Appeal in England & Wales in *Triple Point Technology, Inc. v PTT Public Company Ltd* [2019] EWCA Civ 230 has shattered orthodox thinking on how to apply a clause imposing liquidated damages for delay to completion in circumstances where the contractor never actually achieves completion because his employment is terminated. In such scenarios, it was common for arbitral tribunals to award liquidated damages between the original date for completion and either the later date of termination or the date at which completion was ultimately reached post termination using another contractor. *Triple Point Technology, Inc. v PTT Public Company Ltd* has ruled that such approaches are incorrect in such a scenario and unless express words in the clause imposing liquidated damages state otherwise, the liquidated damages regime has no application in such a scenario because the contractor has not actually completed the works or handed over the works to the employer.

This is a very important ruling from the Court of Appeal and one with fundamental consequences for those employers and contractors currently involved in relying on a liquidated damages regime where there has been a termination after the original date for completion. In this Alert we consider the Court of Appeal's analysis and how the various and commonly used liquidated damages regimes maybe adjusted to take account of *Triple Point Technology, Inc. v PTT Public Company Ltd*.

### The Approach of the Court of Appeal

In *Triple Point Technology, Inc. v PTT Public Company Ltd* the express liquidated damages clause stated:

If CONTRACTOR fails to deliver work within the time specified and the delay has not been introduced by PTT, CONTRACTOR shall be liable to pay the penalty at the rate of 0.1% (zero point one percent) of undelivered work per day of delay from

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the due date for delivery up to the date PTT accepts such work, provided, however, that if undelivered work has to be used in combination with or as an essential component for the work already accepted by PTT, the penalty shall be calculated in full on the cost of the combination.

It was not in dispute that the contract had been terminated before the contractor, *Triple Point Technology Inc.*, had completed the work and so PPT had not accepted such work. The Court of Appeal explained that the authorities in cases where a contractor fails to complete the works and a second contractor steps in showed three different approaches to clauses providing liquidated damages for delay:

- The clause does not apply at all.
- The clause only applies up to termination of the first contract.
- The clause continues to apply until the second contractor achieves completion.

The Court of Appeal considered that a House of Lords decision from 1912 was the most compelling and in any event *had* to be followed by the Court of Appeal since it “was a decision of our highest court.” In *British Glanzstoff Manufacturing Co. Ltd v General Accident, Fire and Life Assurance Co. Ltd* 1913 SC (HL) Clause 24 of the contract provided:

24. If the contractor fail to complete the works by the date named in clause 23, or within any extended time allowed by the architect under these presents, and the architect shall certify in writing that the works could reasonably have been completed by the said date, or within the said extended time, the contractor shall pay or allow to the employer the sum of £250 sterling per week for the first four weeks, and £500 per week for all subsequent weeks as liquidated and ascertained damages for every week beyond the said date or extended time, as the case may be, during which the works shall remain unfinished, except as provided by clause 23, and such damages may be deducted by the employer from any moneys due to the contractor.

The House of Lords decided that the liquidated damages regime only applied if the contractor actually completed the works – if he is “ousted from the works by the employers under their powers” then the contractor has not completed the works. Lord Justice Jackson gave the leading judgement and could “see much force in the House of Lords’ reasoning in *Glanzstoff*. In some cases, the wording of the liquidated damages clause may be so close to the wording in *Glanzstoff* that the House of Lords’ decision is binding. That is a decision of our highest court, which has never been disapproved.” Jackson LJ concluded:

“Let me now turn to Article 5.3 in the present case. This clause, like clause 24 in *Glanzstoff*, seems to be focused specifically on delay between the contractual completion date and the date when Triple Point actually achieves completion. The phrase in article 5.3 “up to the date PTT accepts such work” means ‘up to the date when PTT accepts completed work from Triple Point’. In my view Article 5.3 in this case, like clause 24 in *Glanzstoff*, has no application in a situation where the contractor never hands over completed work to the employer.”

The Court of Appeal also looked at several U.S. authorities and articles including an article in the *Montana Law Review* for 1942 by B. Johnson, *Damages: liquidated damages for delay in an abandoned construction contract*. However, as in England,

the American cases went in both directions and thus did not determine the issue for the Court of Appeal. However, as shown in the sample clause, the U.S. government expressly addresses in its standard construction contract the application of liquidated damages post termination:

#### Liquidated Damages-Construction (Sept 2000)

- I. (a) If the Contractor fails to complete the work within the time specified in the contract, the Contractor shall pay liquidated damages to the Government in the amount of \_\_\_\_\_ [Contracting Officer insert amount] for each calendar day of delay until the work is completed or accepted.
- II. (b) If the Government terminates the Contractor's right to proceed, liquidated damages will continue to accrue until the work is completed. These liquidated damages are in addition to excess costs of repurchase under the Termination clause.

### Amending the Standard Form Clauses

As discussed above in the opening, one commonly held or orthodox view has been that a liquidated damages regime applies up to date of termination and general damages may be applicable post termination. Jackson LJ said that "In my view, the question whether the liquidated damages clause (a) ceases to apply or (b) continues to apply up to termination/abandonment, or even conceivably beyond that date, must depend upon the wording of the clause itself. There is no invariable rule that liquidated damages must be used as a formula for compensating the employer for part of its loss." The wording of the clause is of fundamental importance and so we set out below suggestions for how certain standard form clauses may be amended to allow the orthodox view. One also needs to be mindful that contractors may, in turn, now be more keen to assert that liquidated damages cannot be levied in the event of termination of the contractor's employment.

### JCT Contracts<sup>1</sup>

To accommodate the orthodox position, the Schedules of Amendments would need to amend the liquidated damages clause and the provision dealing with payments on termination. Using the Design & Build form as an example, possible amendments (in bold) would be:

2. 29.2 - Delete lines 1 and 2 and substitute:

"A notice from the Employer under this clause 2.29.2 shall state that for the period between the Completion Date and the date of practical completion of the Works or that Section **or, if earlier, the date on which the Contractor's employment under this Contract is terminated or this Contract is otherwise terminated for any reason:**"

8.7.4 - Delete and substitute:

Not later than 5 days after the due date for payment in clause 8.7.3A the Employer shall provide the Contractor with an account of the following (Termination Account):

- I. the total value of the Works executed and Site Materials as at the date of termination (Termination Value);
- II. the total of the amounts previously paid to the Contractor under this Contract (plus any amounts to be credited to the Employer in respect of the period to the

date of termination, e.g. liquidated damages accrued due under clause 2.29)  
(Payments and Credits);

III. (if relevant) the total further amount (additional to the Termination Value) which would have become payable to the Contractor for the fulfilment of all his outstanding obligations under this Contract, had it not been terminated (Prospective Works Value); and

IV. (if relevant) the total amount of the costs and expenses reasonably and/or necessarily incurred by the Employer, including any under clause 8.5.3.3 or 8.7.1, and/or any other loss or damage for which the Contractor is liable, whether resulting from the termination or otherwise, **including any loss or damage arising as a result of any delay in the completion of the Works beyond the later of the Completion Date under this Contract and the date on which the Contractor's employment under this Contract is terminated or this Contract is otherwise terminated for any reason** (Employer's Costs and Losses).

(Employer's Costs and Losses).

## FIDIC<sup>2</sup>

Clause 8.8, amongst others, dealing with delay damages in the conditions of contract for engineering, procurement and construction (EPC)/turnkey projects, also needs to be amended to accommodate the orthodox position of allowing liquidated damages for delay up to the date of termination (as shown in bold below):

"If the Contractor fails to comply with Sub-Clause 8.2 [*Time for Completion*] the Employer shall be entitled subject to Sub-Clause 20.2 [*Claims for Payment and/or EOT*] to payment of Delay Damages by the Contractor for this default...**such payment of Delay Damages shall be payable even if the Contractor's employment under this Contract is terminated or this Contract is terminated for any reason whatsoever.**"

## LOGIC<sup>3</sup> Edition 2

Article 35 dealing with liquidated damages may, amongst other Articles, need to be amended to make it clear that liquidated damages can be levied if there is a failure to complete the works in circumstances where the contractor is "ousted from the works." For example, Article 35.1 may be amended with the words in bold text as follows:

"If the CONTRACTOR fails to complete any of the items listed in Appendix 1 to Section 1 – Form of Agreement in accordance with the relevant date included in the SCHEDULE OF KEY DATES and/or fails to achieve the requirements of the CONTRACT in respect to any other items listed under the heading clause 35.1 – Liquidated Damages in said Appendix 1 the CONTRACTOR shall be liable to COMPANY for Liquidated Damages **such payment of Liquidated Damages shall be payable even if the CONTRACTOR'S employment under this Contract is terminated or this CONTRACT is terminated for any reason whatsoever.**

1 The Joint Contracts Tribunal (JCT) produces standard forms of contract for construction, guidance notes and other standard documentation for use in the construction industry.

2 The International Federation of Consulting Engineers (commonly known as FIDIC, an acronym for its French name: Fédération Internationale Des Ingénieurs-Conseils) is an international standards organization for the consulting engineering & construction best known for the FIDIC family of contract templates

3 These standard contracts for the U.K. offshore oil and gas industry have been developed by the Standard Contracts Committee (formerly CRINE Standard Contracts Committee) and issued by LOGIC for use in the U.K. offshore oil and gas industry.

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