

USING LIQUIDATED DAMAGES CLAUSES IN AUSTRALIAN STANDARD CONTRACTS

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HOW DOES IT AFFECT YOU?

- Inserting 'N/A' in the liquidated damages item is likely to be interpreted as meaning that the liquidated damages general conditions as a whole do not apply, and not that liquidated damages are payable at a rate of nil. This interpretation leaves the principal still able to claim general (unliquidated) damages for a delay in reaching practical completion.
- The effect of using 'Nil', 'N/A', 'Not Applicable' or 'Not to Apply' in annexures can be uncertain—in each case it will depend on the wording of the corresponding clauses in the particular standard contract under consideration and other drafting factors.
- Considerable care needs to be taken when deleting, amending or adding clauses to standard form contracts to ensure that this is done consistently and clearly.

BACKGROUND

The applicant, Silent Vector Pty (the builder), entered into a building contract with a developer, Mr Squarcini (the principal), for the construction of a 12-storey apartment building. The parties used the Australian Standard General Conditions of Contract AS2124-1992 (the contract).

A number of disputes arising between the parties were referred to arbitration. Among the principal's claims was a claim for general damages for delay for non-completion by the date for practical completion. The arbitrator heard this issue as a preliminary point of law, and made an interim award in favour of the principal.

The builder sought the leave of the Supreme Court to appeal the interim award, under section 38(2) of the *Commercial Arbitration Act 1985* (WA) (Commercial Arbitration Act).¹ The builder

claimed that the arbitrator had erred in law by construing the contract between the builder and the principal as entitling the principal to claim general damages for delay, and that the principal had no such entitlement. Leave to appeal was refused.

THE CONTRACT

The annexure to the contract is divided into Parts A and B. Part A contains two columns. The left-hand column contains a list of various items and, in places, corresponding contractual clauses. In the right-hand column, the parties are required to insert certain information related to the corresponding item in the left-hand column, and, where relevant, the contractual clause. All of the information inserted by the parties into Part A had been handwritten.

Part B is a table intended for use as a reference to clauses that may have been deleted, amended or added to the standard.

A number of clauses in the contract were prefixed by an asterisk, indicating that they were optional and:

... may be omittedas necessary without making consequential amendments: but such omission should be clearly shown on the face of the contract by striking out these clauses or indicating clearly elsewhere that they were not to apply.²

Clause 35.6 of the contract was the liquidated damages clause at issue between the parties; this provided:

... 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

Clause 35.7 of the contract³ further provided:

The Contractor's liability under Clause 35.6 is limited to the amount stated in the Annexure.

In respect of clause 35.6, the left-hand column in Part A of the contract included the item 'Liquidated Damages per day'. Against this item in the right-hand column the parties had written 'N/A'. In respect of clause 35.7, the left-hand column of Part A stated 'Limit of Liquidated Damages'. Against this item, the parties had once again written 'N/A'.

Clause 35.6 was not listed in Part B as having been deleted or amended. The parties had inserted in Part B some, but not all, of the deleted and amended clauses.

ARBITRATOR'S DECISION

The arbitrator identified the question of law for his determination as being which of two possible constructions should be given to clause 35.6, when read with the annexure.

The first construction, as argued by the builder, was that insertions of 'N/A' beside items relating to clauses 35.6 and 35.7 in the annexure meant that the rate for which liquidated damages were payable was intended to be nil, leaving the principal confined to liquidated damages at that rate and precluding it from claiming unliquidated, general damages.⁴ The arbitrator described this as the 'narrow meaning'.

The 'wide meaning', as argued by the principal, was that use of 'N/A' meant that the parties intended that clause 35.6 as a whole was not applicable, leaving the principal able to claim general damages for delay.

The arbitrator found that the 'wide meaning' was the preferable construction, and so the principal was able to claim general damages for delay. Alternatively, the arbitrator held that if he was wrong in arriving at that conclusion, he was led to the same result because of the failure of the parties to use clear and unequivocal words, as was required before it could be found that either party intended to abandon a remedy in general damages.⁵

The arbitrator noted that the purpose of inserting a liquidated damages clause in a building contract is for the benefit of the principal.⁶ According to the arbitrator, this served to underline the need for finding a clear and unequivocal intention to waive the principal's rights when a clause inserted for the principal's benefit had the effect of depriving it of very substantial common law rights.

The arbitrator considered the use of N/A and 'Nil' in a number of decided cases.⁷ However, he was able to distinguish each of these decisions on a number of bases, relating both to the ambit of the relevant liquidated damages clauses in the relevant standard form contract in each case, and the differing ways the parties had amended, or inserted information corresponding to, the clauses of that standard.

COURT'S DECISION

Justice Jenkins refused the builder leave to appeal. To satisfy the requirements under section 38(5) of the *Commercial Arbitration Act* for leave to be granted, the builder had to show, among other things, that:

- (1) there was strong evidence that the arbitrator made an error of law; and
- (2) the determination of the question may add, or be likely to

The Western Australian Supreme Court has considered the effect of using 'nil' and 'N/A' in Annexure Part A to the Australian Standard General Conditions of Contract AS2124.

add, substantially to the certainty of commercial law.

Justice Jenkins held that the builder had failed to show that there was strong evidence that the arbitrator made an error of law. The construction of the contract chosen by the arbitrator was open to him and he did not reach that construction by invalid means. Her Honour held that the construction favoured by the arbitrator was one at which a reasonable person would arrive, having regard to the language used in the contract. Justice Jenkins discussed the case authority interpreting the wording 'Nil' and 'Not applicable' as used in standard form contract. She concluded that these decisions could offer only limited assistance in answering the question of construction before her, given that, while relevant, they all turned on the particular contractual terms under consideration in each instance.

Further, her Honour did not consider that delivery of another decision interpreting such a clause that had been amended in a particular fashion by the parties would be likely to add to the certainty of commercial law. She noted that the construction of amended Australian standard contracts that have rates for liquidated damages inserted as 'Nil' or 'N/A' was not certain, given the unlimited ways in which they can be altered and completed, and given the different forms of unliquidated damages clauses in the standard form contracts.

As an aside, her Honour noted that she was more inclined to take the view that 'N/A' in Part A of the annexure means 'Not to Apply'.

Her Honour concluded by saying: *What is clear to me is that parties to such contracts should be*

careful to delete, amend or add clauses to such contracts in a consistent and clear manner. The uncertainty that exists in this area of commercial law primarily exists because the parties have failed to adhere to this principle.⁸

PRACTICAL CONSIDERATIONS

The way in which annexures to the Australian Standard Conditions of Contract are filled out is important. There may be significant adverse consequences for a party if the meaning of language used in an annexure or of amendments made to operative provisions is later the subject of dispute.

The effect of using the words 'Nil' or 'Not Applicable' (or 'N/A') may be uncertain in some circumstances, and, in others, quite clear. The result will turn on the wording of the corresponding clauses in the particular standard contract under consideration, and whether the parties have clearly and consistently expressed their intention/s.

It is important then, whenever completing annexures to a standard form contract, that it be done using precise wording to reflect the parties' intention/s, and as clearly as possible. For example, if the parties do not intend that a liquidated damages provision apply, then the appropriate approach when using Australian Standards would be to:

- (a) insert the words 'Not to apply' in the relevant item in the annexure;
- (b) insert the relevant clause reference in that part of the annexure used to indicate when a clause is being deleted;
- (c) if preferred, delete the relevant clause (and initial the deletion); or
- (d) use a combination of (a), (b) or (c),

but in the case of (c), only do so if this method of deletion is also being used for other deletions.

REFERENCES

1. *Silent Vector Pty Ltd t/as Sizer Builders v Squarcini* [2008] WASC 246
2. In Preface of Contract to AS2124
3. Clause 35.7 was an asterisked clause but it had not been deleted from the contract by being ruled through in the manner used by the parties to delete other clauses of the contract.
4. Broadly speaking, the existence of a valid and mandatory liquidated damages clause in a building contract that stipulates a positive amount of liquidated damages for failure to reach practical completion by the due date will preclude any claim to unliquidated damages: *Bruno Zornow (Builders) Ltd v Beachcroft Developments Ltd* (1989) 51 BLR 16; Dorte and Sharkey, *Building and Construction Contracts in Australia*, paragraph 9–730
5. Applying *Gilbert–Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689
6. *Baese Pty Ltd v RA Bracken Building Pty Ltd* (1990) 6 BCL 137
7. Including *Temloc Ltd v Errill Properties Ltd, CS Phillips Pty Ltd v Baulderstone Hornibrook Pty Ltd* (1987) 39 BLR 30 (Unreported, NSWSC, 26 October 1994) and *Baese*
8. *Silent Vector Pty Ltd* at [99]

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