Revisiting the question of whether liquidated damages are the sole remedy for delay

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Construction contracts and contracts for the procurement of goods and services typically provide that liquidated damages (LDs) are payable by the contractor at a fixed rate or percentage of the contract value, for each day or week of delay in achieving a specified milestone, generally up to a specified aggregate limit. These are typically agreed since court proceedings to determine general damages for a breach of contract can be complex, time consuming and costly.

In *Temloc Ltd v Erril Properties Ltd* [1987] 39 B.L.R, even though the rate of LDs for delay in achieving completion was stated to be "£nil", the English High Court held that the LDs clause for delay constituted an exhaustive remedy for delay entitling the employer to nil damages and that the employer was not entitled to claim general damages for delay as an alternative.

The question of whether or not an employer can claim general damages for delay in addition to receiving LDs for delay was again considered recently by the Singapore High Court in *Terrenus Energy SL2 Pte Ltd v Attika Interior +MEP Pte Ltd* [2023] SGHC 333. In that case, the Singapore High Court considered whether Attika Interior + MEP Pte Ltd (Attika) was liable to *Terrenus Energy SL2 Pte Ltd* (Terrenus) both for LDs for delay and also for general damages resulting from delay. The Court held that Attika was liable only for LDs for delay.

The facts

Terrenus employed Attika as the main contractor under a main builder agreement (MBA) for the construction of a solar farm in Singapore. The MBA required the solar farm to achieve partial completion and begin generating 70% of the capacity of the solar farm, approximately 13.4 MWp power, by 30 June 2021, and to achieve practical completion by 31 July 2021. In the case of a delay in achieving this, clause 17.1.2 of the MBA provided that: "[Attika] *shall pay* [Terrenus] *0.1% of the Contract Sum per day for each day of delay as liquidated damages …".*

Before the MBA was signed, Terrenus and a subsidiary of Meta Platforms, Inc (Meta) entered into a Renewable Energy Purchase Agreement (REPA) dated 20 November 2020 under which Terrenus was required to achieve a guaranteed capacity for the solar farm of 18 MWp by 30 June 2021. Terrenus was liable to pay Meta daily delay damages under the REPA if the solar farm failed to have a total nameplate capacity at least equal to 18 MWp by the "Expected Commercial Operation Date" of 30 June 2021.

Attika did not achieve partial completion on time under the MBA and Terrenus did not meet the Commercial Operation Date under the REPA.

Claim for LDs and general damages for delay

Terrenus issued a claim against Attika under clause 17.1.2 of the MBA for LDs for delay. In addition, it also brought a claim for general damages arising from the delay and sought to recover delay

damages payable by it to Meta under the REPA for not achieving the total nameplate capacity of the solar farm of 18 MWp by 30 June 2021. It also claimed damages for loss of income which it claimed it would have received but for Attika's delay.

In relation to its claim for general damages for delay, Terrenus referred to clause 17.1.4 of the MBA which stated: "17.1.4 *If* [Terrenus] *suffers* ***other*** *losses and damages which cannot be covered by such LDs, such losses and damages incurred by* [Terrenus] *shall be deemed as its losses and damages resulting from* [Attika's] *default and shall be reimbursed by [Attika] to* [Terrenus]." (our emphasis added).

Were the delay LDs Terrenus' sole financial remedy for delay?

Terrenus accepted that it could not double claim both LDs and general damages for delay but argued that on a natural reading of clause 17.1.4 of the MBA, it entitled Terrenus to recover such general damages for delay in addition to the LDs for delay.

The Singapore High Court disagreed with Terrenus and held that Terrenus was entitled to LDs for delay under clause 17.1.2 of the MBA but not to general damages for delay. Therefore, Terrenus could not recover from Attika the daily delay damages which it was liable to pay Meta under the REPA or damages for loss of income due to Attika's delay.

In reaching its decision, the Singapore High Court referred to a previous decision of the Singapore Court of Appeal which held that it is an established principle of law that an innocent party cannot claim unliquidated damages in addition to LDs which are designed to deal with the loss that has occurred. However, it accepted that the courts will allow general damages to be claimed in addition to LDs if the general damages arise from some other breach that does not fall within the scope of the LDs provision.

The Singapore High Court also relied on a plain reading of clause 17.1.4 of the MBA. If found that the clause did not apply to claims for losses and damages arising from delay since it specifically referred to "*other* losses and damages" and not to "additional" losses and damages.

The Court's observations on Terrenus' claim for general damages

Notwithstanding its findings, for the sake of completeness, the Court provided its observations on Terrenus' claim for general damages for delay. It noted that even if Terrenus could claim general damages arising from delay, it could not claim against Attika for sums owed by Terrenus to Meta under the REPA. This was partly because Terrenus could not prove that Attika's delay resulted in the payment of such delay LDs by Terrenus under the REPA as Attika was only required to achieve 70% capacity, i.e, approximately 13.4 MWp for the solar farm by 30 June 2021 while Terrenus was required to achieve at least 18 MWp under the REPA by such date.

The Court also found that delay damages payable by Terrenus to Meta under the REPA were too remote to be recoverable by Terrenus against Attika. It did not consider such delay damages to be within Attika's reasonable contemplation and therefore did not consider that they fell within the first limb of *Hadley v Baxendale*. The Court also did not consider that such general damages fell within the second limb of *Hadley v Baxendale*. There was no evidence that at the time of entering into the MBA, Attika was aware of the REPA, much less its terms.

The Court considered that the relationship between Terrenus and Meta was unusual and was essentially a financial arrangement for price hedging, instead of their being in an

employer/contractor relationship. The unusual nature of the REPA called into question whether it could even be within the reasonable contemplation of Attika that delay damages would be owed by Terrenus to Meta in such a situation.

Comment

This case, despite being heard by the Singapore High Court, highlights for parties contracting under English law the importance from an employer's perspective of aligning the milestone dates and obligations which trigger liability for LDs across its project contracts.

In our view, it is also good practice for the parties to state expressly in their contracts that LDs are the employer's sole remedy for delay, except for its termination rights, if that is the parties' intention. If the parties agree that the employer may recover general damages for delay in addition to LDs for delay, the contract should state that clearly. Where that is the case, subject to its confidentiality obligations, the employer may wish to consider bringing the other contracts (or their key terms) to the contractor's attention, especially where they are unusual, if it wishes to recover damages for liabilities which it may incur under such contracts.