



Liquidated and General Damages: Nil or n/a

Liquidated damages are damages which are fixed by the parties to a contract. They are a (genuine) pre-estimate of the injured party's loss in the event of a breach of contract. Conversely, general damages are damages awarded by the court where no dollar value for a breach of contract is provided for in the contract. General damages are assessed on the facts and circumstances surrounding the breach and attempt to place the injured party in the position it would have been in if the breach had not occurred.

Generally, when completing a contract schedule item dealing with liquidated damages, the parties either state the rate at which the sum for liquidated damages is to be calculated (eg. \$1000/day) or that the sum is to be "nil" or "n/a". Where a specified amount (or rate) is inserted into the annexure, in effect the parties to the contract are electing to limit any claims to liquidated damages in the amount/rate specified in the contract annexure. The Principal is denied the ability to make a general damages claim in lieu of, or in addition to the liquidated damages claim.

Where the annexure is completed by reference to 'nil' or 'n/a', it is potentially ambiguous as to whether the 'nil' or 'n/a' reference is intended to apply only to liquidated damages claims or to all claims, including general damages claims. In such uncertainty, it may be necessary for the courts to determine if the clause dealing with damages is exhaustive or limited to the application of liquidated damages. If the liquidated damages clause to a contract is an exhaustive agreement as to damages between the parties, then the manner in which the annexure is completed may be seen as encompassing all damages claims. This means that, inserting 'nil' or 'n/a' into the schedule may be regarded as evidence of an intention between the parties to agree that the Contractor has no liability for liquidated or general damages. If the clause is deemed to cover only liquidated damages (ie is not exhaustive of all damages), inserting "nil" or "n/a" may arguably only apply to the Contractor's liability for liquidated damages and the Contractor may still be exposed to a claim for general damages

Case law has shown that inserting "nil" instead of "n/a" is preferable if a party is attempting to protect itself from a claim of general damages. In *Temloc Ltd v Errill Properties Ltd* (1987) 30 BLR 30, it was held that the effect of inserting "nil" into the schedule for liquidated damages was that the parties had agreed that there should be no damages for delayed completion (arguable that intention can be said to apply to liquidated and general damages claims).

To claim general damages in circumstances where "nil" or "n/a" have been inserted into the contract schedule for liquidated damages, a party will need to show that the liquidated damages clause in the relevant contract is not exhaustive in relation to the party's right to claim damages.

Therefore, to increase certainty regarding the application of damages clauses generally, it may be preferable to insert a nominal amount into the schedule for liquidated damages so that the liability for damages is limited to liquidated damages on the terms and for the amount set out in the schedule. If a party wants to contract out of a common law right to general damages, clear and unambiguous language must be used. The completion of the annexure in this manner will assist in establishing this intention. However, if the parties to a contract want to exclude any liability for general damages, regardless of whether an amount is inserted for liquidated damages or not, the parties should expressly strike through or delete any clause which provides for general damages in the contract.

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