



# Assessment and enforcement of liquidated damages in construction contracts in Ghana

M.M. Tuuli

*Taysec Construction Ltd (a Taylor Woodrow Company), Accra, Ghana, and*

B.K. Baiden and E. Badu

*Department of Building Technology,*

*Kwame Nkrumah University of Science and Technology, Kumasi, Ghana*

## Abstract

**Purpose** – The enforcement of liquidated and ascertained damages (LADs) can be problematic when the amounts are poorly assessed and there are lapses in the administration of contracts. This paper seeks to investigate the relevance of LAD clauses in construction contracts in Ghana, as well as the methods employed in their assessment and enforcement.

**Design/methodology/approach** – A parallel survey method was adopted. Three sets of similar questionnaires (slightly modified) were administered to professionals in client, consultant and contractor organisations in contract administration roles, to explore their experiences in the assessment and enforcement of LADs.

**Findings** – LADs are not serving their purpose in construction contracts in Ghana. Clients have created situations that render LADs unenforceable. LAD amounts are also not genuine pre-estimates of expected loss to be incurred, as assumptions and guesses rather than genuine calculations on a case-by-case basis are adopted in their assessment.

**Originality/value** – This research indicates that the enforcement of LADs can be enhanced if clients become more diligent in their contractual, mostly financial, obligations. Since a purposive sampling procedure was adopted, the findings and conclusions of this research are only tentative, but nevertheless raise serious issues regarding contract administration practices in Ghana.

**Keywords** Damages, Contracts, Construction industry, Ghana

**Paper type** Research paper

## Introduction

The construction industry in Ghana, like that of many developing countries, plays an important role in the national economy, through its contribution to gross national product and employment. Despite this important role, the industry is still largely inefficient, especially regarding contract management, as characterized by lengthy payment delays, cost and time overruns and poor project implementation (World Bank, 2003). Recent measures, such as the passage of the Public Procurement Law (Act 663, 2003), are signs of change for the better. Key industry players such as clients, contractors and consultants are thus bracing themselves for the challenges of the new era.



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Traditionally, the contractor carries the risk of completing construction works on time. This arises from the responsibility the contractor has for scheduling the work, managing sub-contractors and developing the means and methods of construction (Lynch, 2003). Shortcomings that may result in delay or added costs are thus considered non-excusable (Thomas *et al.*, 1995). These factors make liquidated and ascertained damages (LADs) a common feature in construction contracts.

In Ghana, the most common form of contract for building works is the Articles of Agreement and Conditions of Contract for Building Works (1988), commonly called the "Pink Form". The Pink Form (Ministry of Works and Housing, 1988) provides for the payment of LADs for delays in the completion of works beyond the completion date stipulated in the conditions of contract or a substituted date following the grant of an extension of time (Ministry of Works and Housing, 1988, 1988, Article 18). LAD clauses guarantee that a predetermined amount will be paid to the client in the event of inexcusable project delays for which the contractor is responsible. It therefore reduces costs that will be associated with litigating and proving damages, as the use of lawyers, witnesses and experts to recover losses through a long and costly process is avoided (Loulakis and Santiago, 1997; Lynch, 2003). LAD clauses also provide contractors at the tender stage with a measure of delay risks in the contract so that appropriate provisions can be made in the tender (Rumgay, 2003a).

LAD clauses are particularly necessary in construction climates such as in Ghana, where time overruns in construction projects are commonplace. In his study of causes of delays and cost overruns in groundwater projects in Ghana, Frimpong (2000) discovered that 33 out of 47 groundwater projects completed between 1988 and 1998 were delayed, while 38 overran their initial cost estimates. A recent analysis by the World Bank shows that 53 percent of 291 contracts for goods, works and services completed between 1997 and 2002 suffered completion delays (World Bank, 2003). Time and cost overruns are pervasive in the construction industries of many developing countries, and this is reflected in the array of studies aimed at finding the causes, and of mitigating them (e.g. Dlakwa and Culpin, 1990; Mansfield *et al.*, 1994; Assaf *et al.*, 1995; Kaming *et al.*, 1997).

The enforcement of the LAD clause in construction contracts in Ghana is problematic partly due to lapses in contract administration practices (cf. Seidu, 2001; World Bank, 2003). Anecdotal evidence also suggests a lack of understanding of the purpose of LADs in construction contracts. The problem is further aggravated by the pervasiveness of delayed payments, perpetuated especially by the major client, the Ghana Government, without any form of compensation to contractors (Addo-Abedi, 1999). Delayed payment without compensation is particularly problematic in two ways. First, it renders the deduction of LADs by clients who perpetuate delayed payments unjustified. Contractors are also generally reluctant to seek redress in courts regarding delayed payments for fear of being *blacklisted* and denied the chance of participation in future tenders. Second, the lack of express provision for extension of time due to delayed payments creates *time at large* scenarios (explained later) that render LADs unenforceable.

From the foregoing, the following research questions were asked in this study:

- (1) Is the LAD clause relevant in construction contracts in Ghana?
- (2) If not, are there viable alternatives to mitigate the shortcomings?

- (3) What methods are employed in the assessment of LADs in Ghana?
- (4) How are LADs enforced?

In the following sections LADs and their assessment methods are explained further in the context of construction contracts. This is followed by a description of the research method employed in this study. The results of the study are then discussed and conclusions drawn, with suggestions for further research.

### **LADs in construction contracts**

Traditionally, litigation is the route to recovering costs incurred by a client due to late completion. The inclusion of LAD provisions in construction contracts therefore avoids delays inherent in the use of litigation and its associated costs (Thomas *et al.*, 1995; Loulakis and Santiago, 1997; Furst and Ramsey, 2001). The enforcement of such a clause can, however, be problematic and clients must ensure that the LAD amount is not a penalty. For a sum inserted as LAD to be enforceable it must be a genuine pre-estimate of damages. In many building and civil engineering contracts, however, LADs are not a genuine pre-estimate of the damages to be suffered by the client, but are often related to amounts included in previous contracts of a similar nature (Seeley, 1997). The essential differences between LADs and a penalty have become contentious. In the absence of relevant case law in Ghana, cases from English law can be drawn upon to explain LADs since the legal system in Ghana is based on English common law. English common law, equity and statutes of general application were received into the legal system of Ghana through the Courts Ordinance (Cap. 4, section 83) on 24 July 1874 (Uche, 1971; Elias, 1990; Dupont, 2001). The Courts Act of 1971 (section 111) and subsequent constitutions after independence including the current 1992 constitution have all upheld the common law as part of the laws of Ghana (The Constitution of the Republic of Ghana, 1992, Section 11 (1)).

Of direct relevance to the discussion here is *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co. Ltd* (1915) A.C. 79, a classic in illustrating the differences between LADs and a penalty. In the House of Lords, Lord Dunedin stated:

Though the parties to a contract who use the words penalty or liquidated damages may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages.

Thus, stating explicitly in the contract that the sum is not a penalty, as happened in *Kemble v. Farren* (1829) All ER 641, does nothing to persuade the courts from determining the true nature of the stipulated payments.

Lord Dunedin then differentiated a penalty from LADs, stating:

The essence of a penalty is payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.

He went on further to define a test for identifying what constitutes a penalty:

If the sum is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed the breach, it will be regarded as a penalty and unenforceable.

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The Society of Chief Quantity Surveyors in Local Government (1993), set up to investigate the procedures adopted for the assessment of LADs on local authority contracts in the UK, concurred with this view and summarised the precedent set by the courts for a valid assessment of damages as follows:

- If the parties make a genuine attempt to pre-estimate the loss likely to be suffered, the sum stated will be liquidated damages and not a penalty, irrespective of actual loss.
- The sum will be a penalty if the amount is extravagant having regard to the greatest possible loss that could be caused by the breach.

In the recent case of *Alfred McAlpine Capital Projects Ltd v. Tilebox Ltd* (2005) EWHC 281 (TCC), Jackson J made four pertinent observations which further clarify the issue of LADs versus penalty clauses. In this case, Alfred McAlpine applied for a declaration that the LADs specified in their building contract with Tilebox were excessive and thus an unenforceable penalty. In dismissing Alfred McAlpine's claim, his lordship first referred to two strands of authority, stating:

In some cases judges consider whether there is an unconscionable or extravagant disproportion between the damages stipulated in the contract and the true amount of damages likely to be suffered. In other cases the courts consider whether the level of damages stipulated was reasonable.

He then concluded that:

A pre-estimate of damages does not have to be right in order to be reasonable. There must be a substantial discrepancy between the level of damages stipulated in the contract and the level of damages which is likely to be suffered before it can be said that the agreed pre-estimate is unreasonable.

Secondly, he observed that:

Although many authorities use or echo the phrase "genuine pre-estimate", the test does not turn upon the genuineness or honesty of the party or parties who made the pre-estimate. The test is primarily an objective one, even though the court has some regard to the thought processes of the parties at the time of contracting.

Thirdly, he argued that there is a predisposition of the courts to uphold contractual terms between two parties of comparable bargaining power and more so where the level of damages for breach is fixed (also see *Philips Hong Kong v. Attorney-General of Hong Kong* (1993) 61 BLR 41 on this point). Lastly, his lordship observed that there are four case law authorities where LADs were struck down as a penalty, noting that:

In each of these four cases there was, in fact, a very wide gulf between (a) the level of damages likely to be suffered, and (b) the level of damages stipulated in the contract.

Essentially then, the issue of what constitutes reasonableness of a pre-estimate borders on the disparity between the stipulated damages and the level of damages which is likely to be suffered if a breach actually occurs. The test of genuineness of a pre-estimate has been clarified, as bordering on objective rather than the honesty of the parties. This case also adds the dimension of the disparity of the bargaining power of the parties and whether a level of damages is fixed as a further test of whether a clause is a penalty or LADs.

In determining whether an LAD clause is legally enforceable, the US courts apply a three-pronged test:

- (1) The *intent test*, which essentially assesses whether the parties intended to liquidate damages in advance of the parties' acts and words (Farnsworth, 1990; see also *Bethlehem Steel Corporation v. City of Chicago* (1965) 234 F. Supp. 726).
- (2) The *difficulty test*, which places great weight on the ascertainment of the contractual damages regarding the degree of uncertainty involved in the estimate (Corbin, 1964). The greater the degree of difficulty in calculating the likely future damages accurately, the more valid the LAD clause becomes in the eyes of the court and *vice versa* (see *Osceola County, Fl v. Bumble Bee Construction* (1985) 479 So.2d 310).
- (3) The *reasonable test*, which assesses LAD amount in view of the actual damages suffered due to the breach. Should the court construe the proposed damages as significantly greater than actual damages, then the LAD provision generally is determined to be a penalty and ruled invalid (Corbin, 1964; see also *Wise v. United States* (1919) 249 U.S. 361).

From the foregoing, some similarities can be drawn from English law and the US system regarding LADs and penalties, albeit some differences as well. The intent test of the US system is similar to Jackson J's observation of the primary test of genuine pre-estimate being an objective one. The reasonableness tests in the two systems are essentially the same. Evidence of the difficulty tests can also be drawn from *Clydebank Engineering and Shipbuilding Company Limited v. Don Jose Ramos Ysquierdo-y-Castaneda and Others* (1905) AC 6, in which Halsbury LC dismissed the claim that the likely damages were extremely difficult to quantify and may in some scenarios be nil. He expressed the view that the LAD clause served a useful purpose, precisely because the true amount of damages was uncertain and difficult to assess in this case.

Different jurisdictions have therefore established standards as to what constitutes LADs and what does not and courts will generally enforce an LAD clause if the amount bears a reasonable relation to the probable loss and the damages are difficult or impossible to determine (Wallace, 1995; Loulakis and McLaughlin, 2004).

### **LAD amounts**

For many clients, early completion of a project can have profound effect on to the return on their investments, and the delayed delivery of a project will cause loss of business opportunities and potential profits, or for public projects, create social/public problems (Shen *et al.*, 1999). However, LAD amounts specified in construction contracts must also not be disproportionate so as to over compensate, profit, or unjustly enrich the injured party (Thomas *et al.*, 1995). High LAD amounts increase the reluctance of contractors to bid for projects or increase the contingency amounts in their bids to cover the possibility of paying damages. High LAD amounts compared with the likely damages may also be considered a penalty and render the clause unenforceable. Low LAD amounts on the other hand, also do not fully compensate clients for delays (Thomas *et al.*, 1995). LAD amounts must therefore be reasonable and consistent with the costs that an owner is likely to incur in the event of late completion (Carty, 1995), and the courts will enforce LAD provisions when they are fair and reasonable

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estimates of anticipated losses and delays considered inexcusable. There are, however, circumstances when the costs cannot be calculated or the damages are impossible to calculate, and this is particularly the case in non-commercial projects such as public works. The impact on follow-on contracts and loss of interest on the cost of land are examples of cost that are difficult to assess (Society of Chief Quantity Surveyors in Local Government, 1993; Thomas *et al.*, 1995). In such circumstances an arbitrary amount may be selected but such an amount must still be reasonable in the eyes of the courts (*Osceola County, Fl v. Bumble Bee Construction* (1985) 479 So.2d 310).

Indeed, the SCQSLG report highlighted the difficulty in the assessment of LAD amounts and concluded that only the loss of interest on cost of contract work can be genuinely pre-estimated to a high degree of certainty. According to Thomas *et al.* (1995), typical LAD amount factors include:

- lost of revenue or rental value;
- user costs, engineering and administrative costs;
- additional wages;
- moving costs; and
- interest and extended management and overhead fees.

In addition to the above factors, the Society of Chief Quantity Surveyors in Local Government (1993) suggested that, lost of use of building, lost of business profit, lost of interest on the cost of the land and lost of interest on the cost of contract works should also be taken into account. The calculated LAD amount should then be expressed as a weekly or daily figure for the entire contract.

### Research method

This study was designed to explore the extent to which LAD provisions in construction contracts in Ghana protected clients from contractors' poor time performance. It also sought to examine the assessment methods of LAD amounts and the enforcement modes in view of the need to balance the adequate protection of clients, while ensuring that contractors are not also penalised by over compensating clients. The methods employed were therefore cognisant of these aims.

Data for this research were collected through a questionnaire survey targeting construction professionals practising with construction client (private and public), consultant and contractor organisations, with contract administration roles, in Ghana. A parallel sampling survey method was therefore adopted where three similar questionnaires (slightly modified) were designed, one for professionals in each organisation category to seek specific information. Modifications were generally in terms of reference. For example, on the question of whether the enforcement of LADs has ever been contested, the question for professionals in client and consultant organisations read "Has the enforcement of the LAD clause ever been contested by a contractor?". That for contractor organisations read "Have you ever contested the enforcement of an LAD clause?".

Judgemental or purposive sampling procedure was employed to ensure that views were solicited from professionals with adequate experience in contract administration practice to obtain meaningful responses. This was partly undertaken at a seminar organised by the Ghana Institution of Surveyors (GhIS) in November 2004.

Fifty professionals with contract administration roles in client, consultant and contractor organisations were targeted. For many of these organisations in Ghana, contract administration roles are often performed by quantity surveyors. One hundred Certified Quantity Surveyors[1] registered with the Ghana Institution of Surveyors (GhIS) were contacted at this seminar and agreed to participate in this survey, and were duly served copies of the questionnaire. An additional 30 questionnaires were mailed, while 20 electronic version of the questionnaire were emailed to ensure that 50 organisations in each category were covered. The questions sought to establish the extent of awareness and application of LADs in construction contracts in Ghana. Perceptions of the relevance of LAD clauses in construction contracts were also explored and alternatives sought where they were perceived as irrelevant. Questions also sought the methods used to assess LAD amounts, as well as the modes of enforcement.

### Response

Seventeen responses were received from client organisations, 29 consultant organisations responded and 35 responses were received from contractor organisations. Overall, 81 out of the 150 questionnaires administered were returned, representing a response rate of 54 percent. The response distribution is illustrated in Figure 1.

The professionals who actually responded to the questionnaires included quantity surveyors, engineers, architects and professionals from non-construction backgrounds. The distribution of the professional affiliation of respondents is illustrated in Figure 2.

The average length of practice in contract administration duties was seven years. It is also worth noting that out of the 20 questionnaires sent by e-mail only three were returned. This represents a 15 percent response rate from e-mails. Although this is not very high it indicates the potential of conducting surveys by e-mail in construction research in Ghana, where ICT infrastructure is poorly developed and internet/e-mail services are only available in selected cities.

### Results and discussion

The questionnaire was divided into five sections:

- (1) general issues;
- (2) relevance of LADs;

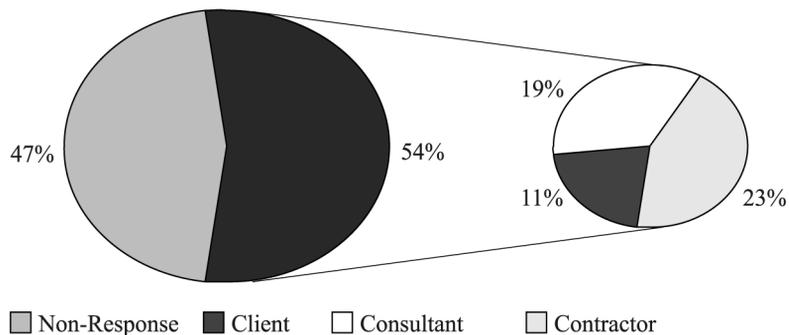
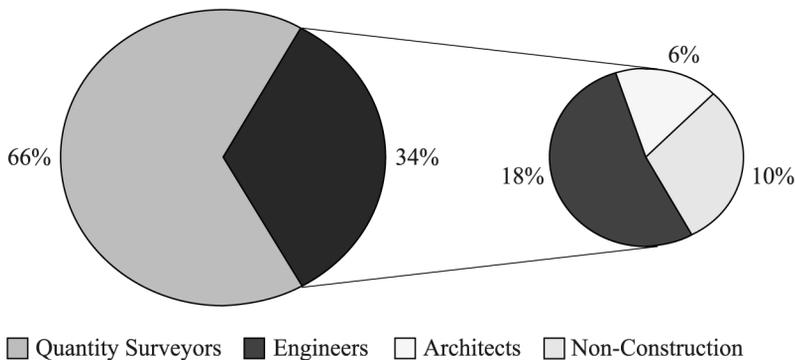


Figure 1.  
Summary of response



**Figure 2.**  
Professional affiliation of respondents

- (3) assessment practices;
- (4) enforcement practices; and
- (5) alternative suggestions.

The results are presented and discussed under these headings as follows.

*General issues*

This part of the questionnaire covered demographic information and also sought to determine respondents’ understanding of the basic principles governing the application of LADs in construction contracts. Level of understanding was assessed by asking respondents to select from four options the statement that best describes their opinion of LADs. These options were:

- (1) “penalty for non-performance”;
- (2) “payment to client for late completion”;
- (3) “payment to client for non-performance”; and
- (4) “agreed amount payable to client for inexcusable late completion”.

Adequate understanding was demonstrated if “agreed amount payable to client for inexcusable late completion” was selected.

Respondents from client organisations generally demonstrated adequate understanding of the principles of LADs and also indicated that the LAD clause is always part of contracts they commission. The high understanding of LADs in client organisations is not surprising as all the questionnaires were completed by Certified Quantity Surveyors.

About 26 percent of the responses from contractor organisations did not demonstrate adequate understanding of LADs, and about 44 percent of these responses were administered by officials who were from non-construction backgrounds. This lack of understanding of the basic principles of LADs may partly explain why most contractors consider the deductions of LADs unjustified. This adds to Eggleston’s (1992) assertion that contractors generally view the deduction of LADs as unjustified, either because of the circumstances in which the contract has been formed or some perceived legal flaws in the contractual provisions for LADs. Responses from

consultants revealed that only about 14 percent do not understand LADs adequately, but all the organisations have used LADs in their contracts.

#### *Relevance of LADs*

This part of the questionnaire sought respondents' perception of the relevance of LAD provisions in construction contracts in Ghana. Relevance was assessed by asking respondents directly whether they perceived LADs as relevant or not and whether LAD provisions have been successful in protecting the interest of clients. If LADs were perceived as irrelevant or not protecting clients, reasons were sought.

Respondents from private client organisations generally felt that LADs were still relevant and protected their interest. However, this was not the case with respondents from public-sector client organisations. They indicated that although LADs were relevant, prevailing circumstances such as delayed payments without compensation suffered by many contractors on public projects results in some reluctance in the enforcement of the clause when the same contractors are liable for the deduction of LADs. It therefore appears that sympathetic reasons account for the lack of enforcement of LADs by public clients in Ghana.

About 86 percent of respondents from consultant organisations felt LADs were relevant. And regarding protection of clients' interest, about 34 percent felt the client was being protected. There was a similar trend in the results from contractor organisations. About 77 percent agreed that LADs were relevant, and on protection of clients only about 11 percent thought clients were being protected.

From the above, therefore, although there seems to be consensus on the relevance of LADs, there appears to be disagreement on whether they are serving their intended purpose. This therefore raises a lot of issues and challenges to professionals and clients, especially public clients, to rethink and propose alternatives to address the situation. It also brings to light the fact that, for LAD clauses to serve clients better (especially public clients), practices regarding delayed payments need to be examined so that LAD clauses can be enforced without fear or favour.

#### *Assessment of LAD amounts*

This section of the questionnaire sought to determine responsibility for the assessment of LAD amounts, what factors are taken into account in the calculation, the assessment methods in use and whether respondents consider LAD amounts as genuine pre-estimates of loss or not.

The survey revealed that consultants are usually responsible for the assessment and determination of LAD amounts in consultation with clients. It also emerged that about 14 percent of respondents from contractor organisations surveyed have raised issues in the past, during the contract signing stage, that the LAD amounts in the contracts were too high. On these occasions the LAD amounts were re-assessed and agreed upon before the contracts were signed. This is a very useful intervention that can prevent future disputes regarding the enforcement of LADs.

Factors for calculating LAD amounts will differ for a number of reasons. The factors will depend on the client type, the project and the use to which the facility is being commissioned. In responding to what factors should be considered in calculating LAD amounts the opinions of respondents were therefore unsurprisingly varied. The results are summarised in Table I.

**Table I.**  
Opinions on LAD amount  
assessment factors

Factors	Contractors		Consultants		Clients	
	Number	Percent	Number	Percent	Number	Percent
Lost rent	22	63	20	69	17	100
Lost profit	9	26	16	55	13	76
Lost of use of facility	31	89	25	86	17	100
Professional fees	9	26	5	17	9	53
Transaction cost	9	26	4	14	13	76
Interest on cost of land	4	11	–	–	9	53
Administrative cost	9	26	2	7	9	53
Statutory fees	9	26	4	14	13	76
Interest on cost of works	4	11	2	7	9	53

Loss of use of the building/facility and loss of rent emerged as the most recurrent factors, often considered in LAD amount calculations across the three groups surveyed. It can also be inferred that clients tended to include every cost factor in their calculations. As shown in Table I, on average about 72 percent of clients indicated they include all the factors listed in their calculations of LAD amounts. Clients therefore appear to adopt a conservative attitude towards cost. It is also interesting that, although the loss of interest on cost of works was considered the only factor capable of being genuinely pre-estimated to a degree of certainty by the SCQSLG report, it emerged the least recurrent factor considered in calculating LAD amounts.

Four methods of assessing LAD amounts emerged which were often employed by the respondents from consultant organisations surveyed. These methods were:

- (1) use of LAD amounts from previous contracts (34 percent);
- (2) rule of thumb/guesses from experience (31 percent);
- (3) percentage of contract sum (24 percent); and
- (4) SCQSLQ method/first principle calculations (10 percent).

LAD amounts from previous contracts and rule of thumb methods are widely used (about 66 percent) in assessing LAD amounts. These two methods are very much similar, and considering that about 32 percent of the previous contract's LAD amounts are themselves guesses, they end up the same. Expressing LADs as a percentage of contract sum was also relatively popular (about 24 percent). This method is only partly acceptable if the amount was adequately assessed from first principles before expressing as a percentage of the contract sum. However, the variable nature of the contract sum in many projects renders this method unsuitable as variations can lead to an increase or decrease in the contract sum and hence the LAD amount, which could then be an unrealistic reflection of any conceivable loss.

The three most popular methods of assessing LADs as shown above are thus inappropriate and are a recipe for disputes in the enforcement of LADs. They also predispose clients to greater risks in the event that they suffer delays and the LAD amount proves inadequate. Examples exist, though isolated, where contractors are faced with the option of accelerating work to finish on time or finishing late and paying LADs. On such occasions contractors are known to carry out some assessments to ascertain if it is cheaper to finish late and pay LADs or to accelerate the works.

Contractors will then opt to finish late and pay LADs if the amount proves to have been highly underestimated. Just as the client is entitled to deduct LADs even when no loss has been suffered (as shown in *BFI Group of Companies Ltd v. DCB Integration Systems Ltd* (1987) CILL 348), so will he be obliged to deduct the same even when a greater actual loss has been suffered. Thus in *Temloc v. Errill Properties* (1987) 39 BLR 30, where the LADs were stated as nil, the court nevertheless held that the stated damages were exhaustive of the damages due the claimant. Indeed, no inquiry into the actual loss suffered is necessary, unless the contractor makes a claim that the agreed amount is unenforceable for being a penalty or for any such reasons that may be cited (Furst and Ramsey, 2001). If the contractor succeeds in establishing such a claim, the client's only remedy will be to resort to the courts to prove his entitlement to general damages or unliquidated damages for the period of culpable delay (Furst and Ramsey, 2001; Rumgay, 2003b).

Only about 10 percent of respondents were aware of the existence of the SCQSLG method (Society of Chief Quantity Surveyors in Local Government, 1993) for calculating LADs and actually use it or calculate LADs from first principles. The use of the SCQSLG or first-principles methods of assessing LADs must therefore be encouraged as it currently receives the least patronage. Consultants must be encouraged to calculate the LAD amounts on a case-by-case basis with reference to the expected damages that may be incurred in the event of a delay in completion. Indeed, in *J.F. Finnegan v. Community Housing* (1993) 65 BLR 103, a pre-estimate which was the product of a formula was held as a reasonable estimate of likely damages. The use of a formula is a particularly sensible approach where it is obvious that substantial loss will be incurred in the event of a delay, but where it is virtually impossible to calculate precisely in advance such loss (Chappell *et al.*, 2005).

It is therefore not surprising that respondents to this survey admitted that LAD amounts in contracts are not genuine pre-estimates of loss to be suffered if late completion occurs. Only about 7 percent of respondents from consultant organisations and 18 percent from client organisations thought they are genuine pre-estimates. No respondent from contractor organisations surveyed considered LAD amounts as genuine pre-estimates.

#### *Enforcement practices*

When delay in completion occurs and it is certified that the delay is due to non-excusable reasons on the part of the contractor, the payment of LADs becomes due. The Pink Form (Ministry of Works and Housing, 1988) empowers the client in such circumstances to deduct the LADs from any moneys payable to the contractor under the contract (Ministry of Works and Housing, 1988, Article 18). This method of recovery was confirmed in the case of *Token Construction Co. Ltd v. Charlton Estate Ltd* (1973) 1 BLR 48 CA and is applicable where the contract expressly gives that right, and this is the case under the Pink Form in Ghana. Clause 18 of the Pink Form (Ministry of Works and Housing, 1988) states (*inter alia*) that when LADs become due:

... the contractor shall pay or allow to the employer a sum calculated at the rate stated as Liquidated and Ascertained Damages [...] for the period during which the said work shall so remain or have remained incomplete, and the employer may deduct such damages from any moneys otherwise payable to the contractor under the contract.

Respondents from consultant and client organisations were asked if they have had to enforce LADs. If they did not enforce on any occasion they were due, reasons were sought. Respondents from contractor organisations were also asked if their organisations have been affected by LADs, and if they contested the enforcement on any occasion. The grounds for any contest were sought. All the respondents were also asked if they consider LADs as contentious in Ghana or not.

About 89 percent of respondents from consultant and client organisations combined, have had occasion to enforce LADs. They also indicated that generally the success rate of enforcement of LADs was 1 in 15 cases. This low success rate was attributed to the high rate of success by contractors in contesting the enforcement of the clause. Contractors contested LADs on the grounds of insufficient or no extension of time, mostly due to delayed payments or late possession of site. This brings to the fore the issue of *time at large* in the enforcement of LADs. According to Rungay (2003a, p. 67) this “occurs where there is no agreed time for completion or where a previously agreed time has been rendered inoperable usually by there being no express provision to extend time as a consequence of prevention by the employer”. Under the Pink Form (Ministry of Works and Housing, 1988), no express provision exists for extension of time for delays attributable to delayed payment or for late possession of site. Contractors can therefore usually contest the enforcement of LADs on the basis of time at large in the event that any of these occur. The validity of enforcing the LAD clause under conditions of time at large particularly arose in *Peak Construction (Liverpool) v. McKinney Foundations Ltd* (1970) 1 BLR 111, and Phillimore LJ in his judgment referred to the implicit link between an LAD provision and the extension of time provision:

... when the parties agree that if there is delay the contractor is to be liable, they envisage that the delay shall be the fault of the contractor [...] if part of the delay is due to the fault of the employer, then the clause becomes unworkable if only because there is no fixed date from which to calculate that for which the contractor is responsible [...] the problem can be cured if allowance can be made for that part of the delay caused by the actions of the employer [...] If there is a clause which provides for extension of the contractor's time in the circumstances which happen, and if the appropriate extension is certified by the architect, then the delay due to the fault of the contractor is disentangled from that due to the fault of the employer and a date is fixed from which the liquidated damages can be calculated.

Therefore to guarantee his right to LADs the client must allow the contractor extensions of time for all delays caused by him, otherwise the contractor can have the LAD clause declared invalid or unenforceable on the basis of time at large (Lynch, 2003). A related case law authority is *Rapid Building Group Ltd v. Ealing Family Housing Association Ltd* (1984) 29 BLR 5, where possession of site was delayed beyond the due date. The works were subsequently delayed and the client deducted LADs for the period of delay. Since the form of contract in use was JCT 1963, which had no provision for extension of time due to the employer's failure to give possession, the court held that the employer was not entitled to the deduction of LADs. A similar judgment on the basis of time at large was also made in the case of *Inserco v. Honeywell Control Systems Ltd* (1996) EWCA Civ 959.

Two other reasons came up for the non-enforcement of LADs when they are due. It was argued that culturally many Ghanaians are unable to separate business from personal relationships. The extended family system in Ghana makes it possible to trace

or prove some kind of relation between people, and this weakens the ability to be firm in the enforcement of laws. It must be emphasised, however, that for businesses to survive such “business culture” must stop. The second reason, which is close to the first, is that some “sympathetic clients” have often ignored or overlooked LADs when they are due.

When respondents were asked whether they considered LADs as contentious, about 94 percent of respondents from client organisations said that they were. About 96 percent from consultant organisations also agreed, as did 97 percent from contractor organisations. Although LADs are perceived as so contentious, no contractor surveyed has ever been compelled to go to court to contest their enforcement and no client sought the assistance of the courts in their enforcement. An interview with the Judicial Secretary of the High Court in Accra, Ghana, confirmed that there were no records, at least within the last 15 years, of any cases regarding enforcement of LADs that have come before the courts. The absence of court cases, especially from contractors, may be attributed to the fact that contractors are mindful of being blacklisted as litigants by clients and excluded from future contracts. Indeed, construction reviews on Ghana reveal the fear of losing tendering opportunities as being the primary reason claims are not pursued in court. The recent setting up of the Ghana Arbitration Centre to promote the use of alternative dispute resolution mechanisms may encourage the use of arbitration and mediation to resolve some of the contentious issues in the construction industry in an amicable manner.

#### *Alternatives*

Respondents were asked to suggest alternatives that can address the deficiencies and difficulties associated with the application of LADs in the Ghanaian construction industry or interventions to strengthen what is in place. The following were the suggested interventions most recurrent in the responses:

- commitment by clients to prompt payment to contractors (66 percent);
- establishment of a form of security, insurance or guarantee for the payment of LADs (52 percent); and
- an adequate performance bond to protect clients against deficient work (49 percent).

LADs are only due to clients if delays in completion are attributable to contractors and are non-excusable. As long as clients continue to fail woefully in their contractual duty of paying contractors on time they will not be due any LADs for delays under the Pink Form contract. In Ghana, it is commonplace to find projects funded by the central government in arrears of several years, and the possibility of the affected contractors receiving interest on those payments is unlikely (cf. Owusu, 1987; Seidu, 2001; Stiedl and Tajgman, 2003). It will be unjustifiable for such clients to deduct LADs from contractors who are victims of delayed payments from the same clients. In such instances, clients would also grapple with the issue of time at large discussed earlier on, in the absence of express provisions for extension of time for delayed payments or late possession of site in the contract forms they employ.

The suggestion of the provision of a security or insurance for LADs is justified for a number of reasons. LADs cannot be deducted in advance of their due date even if it is apparent that completion will not be achieved on time (Eggleston, 1992). The value of

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completed works together with retention and any other moneys payable to contractors are sometimes insufficient to cover LAD deductions at their due date. A security or insurance would therefore guarantee the payment of LADs if they are due and the contractor has no outstanding moneys with the client to cover them. A cue could be taken from the construction industry in Singapore where a somewhat similar security of payment scheme operates that guarantees contractors payment for work done through the Security of Payment Act that became law in 2005 (Building & Construction Authority, 2005).

On the matter of an adequate performance bond, it is argued that merely completing works late or the possibility of delay occurring may not be sufficient grounds to invoke the performance bond. This is because a performance bond is based on the broader picture of performance in terms of executing the contract according to plans and specifications, within the time allowed and at the agreed price (Russell, 2000). Many clients are also not comfortable with the process of invoking the performance bond, which may include determining the contract and re-awarding it to another contractor. The use of performance bond in place of the LAD clause is thus considered unsuitable.

### Conclusions

Clients have created situations that render LADs unenforceable. In particular the pervasiveness of delayed payments without monetary compensation or extension of time creates time at large situations that render LADs unenforceable. LADs have therefore become ineffective in their traditional role of protecting clients from inexcusable delays by contractors since clients, especially public clients, are reluctant to deduct LADs even when they are due on equity and sympathetic grounds. LADs can however be effectively enforced if clients become more diligent in their contractual, mostly financial, obligations. A specific clause for extension of time for delayed payments and late possession of site may also suffice as a remedy in contracts, by way of an amendment to the Pink Form.

Although most respondents generally demonstrated adequate understanding of the principles governing LADs, there is a lack of awareness and use of proven methods for calculating LADs such as the SCQSLG method or first principle calculations, especially among the respondents from consultant organisations surveyed. This is confirmed by responses that LADs are not genuine pre-estimates of possible losses.

Insurance or security bond for LADs is a viable alternative in guaranteeing clients that, if they are genuinely due, LADs payments will be met and this should be pursued by the industry. As long as the law does not permit deduction of LADs in advance a form of security bond for LADs appears to be a viable means of guaranteeing payment of LADs.

This research has highlighted some lapses in contract administration practices in Ghana and has thus set the pace for further research in this area. Since a purposive sampling procedure was adopted it will be interesting to conduct a nationwide survey to establish how widespread the lack of understanding of LADs is and also to establish the extent to which guesses rather than calculation of LAD amounts on a case-by-case basis is used. The suggestion for the use of some form of security bond for LADs is an area that could be explored in future research to test its practical viability in construction contracts in Ghana.

**Note**

1. Certified members of the Ghana Institution of Surveyors have a recognised degree or equivalent and a minimum of three years of relevant industry experience under the supervision of a senior surveyor of the status of "Fellow" of the Institution. They are also certified after the passing of a qualifying exam conducted by the Institution.

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#### Corresponding author

M.M. Tuuli can be contacted at: [tuulimm@yahoo.com](mailto:tuulimm@yahoo.com)