Interpreting and Applying the Delay Damages Provisions of the FIDIC Red Book standard form contract in accordance with Vietnamese Law

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***Digest**: The amendment of FIDIC contracts governed by Vietnamese law using the approach taken by civil law systems is necessary, appropriate and correct because the current structure and provisions of Vietnamese law are already compatible with the approach taken by civil law systems to address the delay damages issues.*

***Note**: This article is an English translation of the article published in the 6 July 2023 edition of the People's Courts, the online journal of the Supreme People's Court of Vietnam.*

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Contents

I. Introduction

FIDIC (original name in French: "Fédération Internationale des Ingénieurs – Conseils") stands for International Federation of Consulting Engineers, a global professional association of consulting engineers founded in 1913. FIDIC is best known for its standard forms of construction contracts. Among the FIDIC form contracts, the three most popular and widely used in construction projects are the Red Book (Conditions of Contract for Construction), the Yellow Book (Plant and Design-Build Contract), and the Silver Book (EPC/Turnkey Contract), commonly referred to as the Rainbow Suite.

The standard Rainbow Suite was first published in 1999 based on updates and modifications of the previous FIDIC standard form contracts. In 2017, FIDIC published the second edition of the Rainbow Suite with numerous amendments and supplements to the first edition in 1999. In 2022, FIDIC reprinted the 2017 Rainbow Suite with some updates but retained the name of this edition as the second edition. In this article, the authors will mostly focus on the 1999 Red Book ("**RB/99**") and the 2017 Red Book ("**RB/17**").

In general, FIDIC standard form contracts are widely used in construction works and projects in Vietnam. They are mandatory for projects funded by Official Developing Assistance (ODA). For this reason, FIDIC standard form contracts play a very important role in Vietnamese construction projects, and therefore, properly interpreting and applying the provisions of FIDIC standard form contracts under Vietnamese law, often the governing law of such contracts, is a critical task.

In this article, the authors introduce and analyze the concept of delay damages ("**DD**") as used in the relevant clauses of RB/99 and RB/17 to conclude that the concept of DD, under the FIDIC standard form contracts, may not be compatible with the Vietnamese law damages regime. Therefore, the interpretation and application of these concepts in contracts governed by Vietnamese law will be difficult and complicated. Based on the experience of other civil law countries, the authors take the view that the amendment of FIDIC contracts governed by Vietnamese law using the approach taken by civil law systems is necessary, appropriate and correct because the structure and provisions of Vietnamese law are already compatible with the approach taken by civil law systems to address the DD issues. On that basis, if the parties to a contract wish to amend the DD provision to be more consistent with Vietnamese law, they should consider switching this provision into a delay penalty provision by replacing the term/concept "delay damages" by the term/concept "delay penalty."

This article consists of the following sections: (ii) the popularity of FIDIC standard form contracts in Vietnam, (iii) overview of the FIDIC Red Book standard form contracts, (iv) DD provisions in the 1999 Red Book (RB/99) and 2017 Red Book (RB/17), (v) interpreting and applying DD provisions in accordance with Vietnamese law, and (vi) a proposal to switch the DD provisions into delay penalty provisions.

II. The popularity of FIDIC standard form contracts in Vietnam

FIDIC standard form contracts are widely used in construction works and projects in Vietnam for two main reasons. First, infrastructure construction projects in Vietnam funded by Official Developing Assistance (ODA) must use FIDIC standard form contracts by agreement with the ODA sponsors (e.g., the World Bank, the Asia Development Bank (ADB), and the Japan International Cooperation Agency (JICA) etc.) and the Government of Vietnam. This is provided for in Article 1.3 of Decree 37/2015/ND-CP, as amended by Decree 50/2021/ND-CP, (collectively, "**Decree 37**") as follows:

> **Article 1. Scope and subject of regulation**
>
> […] 3. With respect to construction contracts for projects funded by the Official Developing Assistance sources (abbreviated as ODA), if an international treaty to which Vietnam is a signatory contains provisions that are different from those contained in this Decree, the provisions of the treaty shall be applied.

In addition, Article 54.3 of Decree 37 also states that:

> **Article 54. Implementation**
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> […] 3. Organizations and individuals are encouraged to use the standard form conditions of contract of the International Federation of Consulting Engineers ("**FIDIC**") and the standard form construction contracts in entering into and performing construction contracts. In using the form construction contracts, organizations and individuals shall consider amending the contracts to comply with Vietnamese law.
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> [Emphasis added]

In other words, the use of FIDIC standard form contracts is mandatory for ODA-funded projects and recommended for other projects subject to Decree 37. Projects that are subject to Decree 37 include: investment construction projects using public investment capital or state capital for non-public investment, and construction contracts between PPP project companies and construction contractors implementing bid packages in Public-Private Partnership projects (PPP projects).

In addition, Article 1.2 of Decree 37 also encourages organizations and individuals to take into consideration the provisions of this Decree in entering into and managing construction contracts even in projects using funds that are not subject to Decree 37. Of course, one of the provisions that should be taken into consideration in entering into a construction contract is the provision that encourages the parties to use the FIDIC standard form contracts.

In sum, FIDIC standard form contracts play a very important role in construction projects in Vietnam. Therefore, properly interpreting and applying the provisions of FIDIC standard form contracts under Vietnamese law, often the governing law of such contracts, is a critical task.

III. Overview of the FIDIC Red Book standard form contracts

In his new book "The FIDIC Red Book Contract: An International Clause-by-Clause Commentary" (April 2023), Christopher Seppala, a Partner Of Counsel of White & Case LLP and a legal advisor to FIDIC for the last 30 years, summarized the origin and development of the FIDIC Red Book as follows:[2]

> The RB [i.e., the Red Book] has its origins in England. The earliest editions of the RB were modelled closely on an English standard form of contract conditions. FIDIC considers the official and authentic texts of its forms of contract to be the versions in the English language. Anglophone engineers continue, very understandably for this reason, to be the principal drafters of the FIDIC forms, and the most informative and useful legal texts and commentaries on the forms have been written by English and Commonwealth lawyers and engineers.
>
> Nevertheless, FIDIC's forms are not intended for use principally in England or the

[2] C. Seppala, *The FIDIC Red Book Contract: An International Clause-by-Clause Commentary* (4/2023), pp. 3-4.

Commonwealth countries but universally. For this reason, FIDIC has sought with each new edition of its forms, to eliminate specifically English legal terminology in favour of language that is neutral and not particular to any legal system. Therefore, this book will, while taking due account of important English and Commonwealth legal material, cite civil law and international legal material as well.

This approach is necessary for the interpretation and explanation of the concept of DD in RB/99 and RB/17.

IV. The DD provisions under the 1999 Red Book (RB/99) and the 2017 Red Book (RB/17)

A. The DD provisions in RB/99

RB/99 does not define DD, but has a provision in Sub-Clause 8.7 on this concept, which could be translated into Vietnamese as follows:

[Vietnamese translation omitted]

8.7. Delay Damages

If the Contractor fails to comply with Sub-Clause 8.2 [Time for Completion], the Contractor shall subject to notice under Sub-Clause 2.5 [Employer's Claims] pay delay damages to the Employer for this default. These delay damages shall be the sum stated in the Appendix to Tender, which shall be paid for every day which shall elapse between the relevant Time for Completion and the date stated in the Taking-Over Certificate. However, the total amount due under this Sub-Clause shall not exceed the maximum amount of delay damages (if any) stated in the Appendix to Tender.

These delay damages shall be the only damages due from the Contractor for such default, other than in the event of termination under Sub-Clause 15.2 [Termination by Employer] prior to completion of the Works. These damages shall not relieve the Contractor from his obligation to complete the Works, or from any other duties, obligations or responsibilities which he may have under the Contract.

[Emphasis added]

In short, where the project has been completed (i.e., the Taking-over Certificate has been issued) but there was a delay, the Employer has the right to demand and the Contractor has the obligation to pay DD pursuant to Sub-Clause 8.7. DD are the amount of money that "shall be paid for every day which shall elapse between the relevant Time for Completion and the date stated in the Taking-Over Certificate." However, such amount shall be limited by a cap that the parties stipulate in the Contract Data (usually in Appendix to Tender or specific conditions).[3]

In addition, Sub-Clause 8.7 also provides that for delay breaches, the Contractor is only liable to pay DD but not any other types of damages arising from such delay breaches. In contrast, if the contract is terminated by the Employer before the Contractor completes the Works, Sub-Clause 8.7 is not applicable as a basis to calculate and pay DD. This is logical because in such case, the number of days that the Works are delayed cannot be calculated since there is no Taking-over Certificate.

[3] According to Mr. Seppala and in the authors' experience with FIDIC construction contracts in Vietnam, this ceiling usually ranges from 5% to 15% of the contract value.

In case the contract is terminated by the Employer before the Contractor completes the Works, the Contractor's obligation to pay damages is provided in Sub-Clause 15.4, which can be translated into Vietnamese as follows:

[Vietnamese translation omitted]

15.4. Payment after Termination

After a notice of termination under Sub-Clause 15.2 [Termination by Employer] has taken effect, the Employer may:

(a) proceed in accordance with Sub-Clause 2.5 [Employers Claims],

(b) withhold further payments to the Contractor until the costs of execution, completion and remedying of any defects, damages for delay in completion (if any), and all other costs incurred by the Employer, have been established, and/or

(c) recover from the Contractor any losses and damages incurred by the Employer and any extra costs of completing the Works, after allowing for any sum due to the Contractor under Sub-Clause 15.3 [Valuation at Date of Termination]. After recovering any such losses, damages and extra costs, the Employer shall pay any balance to the Contractor.

Under Sub-Clause 15.4, if the contract is terminated by the Employer before the Contractor completes the Works, then after the termination notice takes effect, the Employer may recover from the Contractor the losses and damages that the Employer has incurred, together with any additional costs in completing the Works. In other words, Sub-Clause 15.4 allows the Employer to recover all losses and damages that the Employer has incurred due to the Contractor's breach, together with other additional costs in completing the Works. However, the Employer will not be able to apply Sub-Clause 8.7 to demand that the Contractor pay DD calculated using the formula provided in Sub-Clause 8.7.

B. Delay damages in RB/17

A brand new provision of RB/17 is the concept of DD defined for the first time in Sub-Sub-Clause 1.1.28, which can be translated into Vietnamese as follows:

[Vietnamese translation omitted]

1.1.28 "Delay Damages" means the damages for which the Contractor shall be liable under Sub-Clause 8.8 [Delay Damages] for failure to comply with Sub-Clause 8.2 [Time for Completion].

RB/17 also amended and supplemented the DD provisions in Sub-Clause 8.8 of RB/17, which has been translated into Vietnamese as follows (with the amendments underlined): [4]

[Vietnamese translation omitted]

8.8. Delay damages

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

[4] Vietnam Engineering Consultant Association (VECAS), *Conditions of Contract for Construction for Building and Engineering Works Designed by the Employer*, English-Vietnamese edition, by Nguyen Do as the key editor, the Construction Publishing House (2020), p. 50.

Delay Damages by the Contractor for this default. Delay Damages shall be the amount stated in the Contract Data, which shall be paid for every day which shall elapse between the relevant Time for Completion and the relevant Date of Completion of the Works or Section. The total amount due under this Sub-Clause shall not exceed the maximum amount of Delay Damages (if any) stated in the Contract Data.

These Delay Damages shall be the only damages due from the Contractor for the Contractor's failure to comply with Sub-Clause 8.2 [Time for Completion], other than in the event of termination under Sub-Clause 15.2 [Termination for Contractor's Default] before completion of the Works. These Delay Damages shall not relieve the Contractor from the obligation to complete the Works, or from any other duties, obligations or responsibilities which the Contractor may have under or in connection with the Contract.

This Sub-Clause shall not limit the Contractor's liability for Delay Damages in any case of fraud, gross negligence, deliberate default or reckless misconduct by the Contractor.

[Emphasis added]

In addition, RB/17 also added a new provision in Sub-Clause 15.4, which has been translated into Vietnamese as follows (with the amendments underlined):

[Vietnamese translation omitted]

15.4. Payment after Termination for Contractor's Default

The Employer may withhold payment to the Contractor of the amounts agreed or determined under Sub-Clause 15.3 [Valuation after Termination for Contractor's Default] until all the costs, losses and damages (if any) described in the following provisions of this Sub-Clause have been established.

After termination of the Contract under Sub-Clause 15.2 [Termination for Contractor's Default], the Employer shall be entitled subject to Sub-Clause 20.2 [Claims For Payment and/or EOT] to payment by the Contractor of:

(a) the additional costs of execution of the Works, and all other costs reasonably incurred by the Employer (including costs incurred in clearing, cleaning and reinstating the Site as described under Sub-Clause 11.11 [Clearance of Site]), after allowing for any sum due to the Contractor under Sub-Clause 15.3 [Valuation after Termination for Contractor's Default];

(b) any losses and damages suffered by the Employer in completing the Works; and

(c) Delay Damages, if the Works or a Section have not been taken over under Sub-Clause 10.1 [Taking Over the Works and Sections] and if the date of termination under Sub-Clause 15.2 [Termination for Contractor's Default] occurs after the date corresponding to the Time for Completion of the Works or Section (as the case may be). Such Delay Damages shall be paid for every day that has elapsed between these two dates.

[Emphasis added]

According to Mr. Seppala's commentary:

Sub-paragraph (c), providing for the recovery of Delay Damages if the Works or a Section have not been taken over by the date of termination under Sub-Clause 15.2 and if that date occurs

after the date corresponding to the Time for Completion of the Works or Section, is new.[5]

Mr. Seppala has also explained to the authors that the only reason sub-paragraph (c) of Sub-Clause 15.4 was added to RB/17 was to provide for the above situation.[6]

C. Conclusions on the DD provisions in RB/99 and RB/17

Under RB/99:

- DD only apply in case the Works have been taken over and DD will be in a pre-determined amount based on the number of days elapsed from the date corresponding to the Time for Completion to the acceptance date. DD will be the only compensation for the delayed completion breach and are pre-determined based on the number of days of delay but must not exceed the cap provided in the contract, if any.

- In case the Employer terminated the contract due to the Contractor's fault, the Employer may demand compensation for damages but this compensation will not include DD.

Under RB/17:

- In case the Works have been taken over, DD will be a pre-determined amount based on the number of days elapsed from the date corresponding to the Time for Completion to the taking-over date. DD will be the only compensation for the breach of delayed completion and are pre-determined based on the number of days of delay but must not exceed the cap provided in the contract, if any.

- In case there is no taking-over and the contract has been terminated by the Employer (due to the Contractor's fault) after the date corresponding to the Time for Completion of the Works (or a Section), the Employer, in addition to other compensations, has the right to demand for payment of DD which is a pre-determined amount based on the number of days elapsed from the date corresponding to the Time for Completion of the Works (or a Section) to the termination date of the contract (or a Section). The amount of DD must not exceed a cap provided in the contract, if any.

Therefore, the DD regime under RB/99 and RB/17 are quite clear. The question is how the DD provisions should be interpreted and applied when the governing law is Vietnamese law.

V. Interpreting and applying DD provisions in accordance with Vietnamese law

The two legal pillars under Vietnamese law on this issue are the regulations relating to damages or those relating to penalties, where there are breaches of contract under the applicable laws, being the Construction Law and the Civil Code.[7]

A. Compensation for damages under the Construction Law and the Civil Code

The Construction Law is the law "applicable to domestic government agencies, organizations, individuals, and foreign organizations, individuals engaged in construction investment activities in the

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5 C. Seppala, *The FIDIC Red Book Contract: An International Clause-by-Clause Commentary* (4/2023), p. 1005.

6 The authors are grateful for the comments Mr. Seppala made in the email to the authors on 27 May 2023.

7 Construction Law No. 50/2014/QH13 dated 18 June 2014, as amended by Law No. 62/2020/QH14 dated 17 June 2020 (the "**Construction Law**"); Civil Code No. 91/2015/QH13 dated 24 November 2015 (the "**Civil Code**").

territory of Vietnam."[8] Pursuant to Article 3.20 of the Construction Law, "[c]onstruction investment activity means the process of carrying out construction activities including building, repairing, and renovating construction works." Thus, the Construction Law and its implementing regulations are the basic regulations applicable to FIDIC standard form contracts entered into to implement construction projects in the territory of Vietnam.

Pursuant to Article 138.1 of the Construction Law, "a construction Contract is a civil contract established in writing between an employer and a contractor to perform in whole or in part construction investment activities." Accordingly, FIDIC standard form contracts entered into to implement construction projects in the territory of Vietnam are considered civil contracts.

With respect to DD, Article 146.3 of the Construction Law provides for three cases where the Contractor is liable to the Employer for damages caused to the Employer, including damages relating to "completion delays due to the fault of the Contractor."[9] In addition, the general principle of Article 146.5 amplifies Article 146.3 by providing that "[i]n case a party fails to perform its contractual obligations, or fails to perform them in accordance with their terms, then, after performing the obligations or taking remedial measures, that party shall be liable for damages if the other party has incurred other damages still, and the amount of such liability must be commensurate with to the loss of the other party." This may be understood to require that the amount of liability for damages must not exceed the amount of actual damages of the other party.

However, the Construction Law does not specify the types of damages that are recoverable or the method to calculate them. Therefore, the Civil Code must be consulted on these issues.[10] The Civil Code has

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8 *See* Article 2 of the Construction Law.

9 Articles 146.3 and 146.7 of the Construction Law are the provisions relating to the liability for damages under a construction contract, as follows:

> **Article 146. Rewards and penalties under construction contracts, liability for damages caused by breaches of contracts and settlement of disputes under construction contracts**
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> […]
>
> 3. The contractor shall be liable for damages caused to the employer in the following cases:
>
> a) The work quality does not meet the requirements of the contract or completion is delayed due to the fault of the contractor;
>
> b) Damage to people or property during the warranty period dues to the fault of the contractor.
>
> 4. The employer shall compensate the contractor in the following cases:
>
> a) Due to the fault of the employer, work under the contracted is disrupted, delayed, or faces the risks of having to coordinate the storage of machinery, equipment, materials and building elements;
>
> b) The employer provides documents and conditions necessary for the work that are not in conformity with the contract thus causing the contractor to redo the work, suspend, or change the work;
>
> c) In case the employer is required in the contract to supply raw materials equipment and other requirements of the contract and fails to do so in a timely manner or in accordance with the provisions [of the contract].
>
> d) The employer fails to pay in a timely manner in accordance with the contractual agreement.

10 Article 4 of the Civil Code provides the principles of applicability of the Civil Code when compared to

four provisions relating to breaches of contract which are Articles 419, 361, 13, and 360.

Article 419 of the Civil Code is the fundamental provision on compensation for damages caused by contractual breaches as follows:

> **Article 419. Recoverable damages for breach of contract**
>
> 1. Damages in compensation for a breach of contractual obligation shall be determined in accordance with paragraph 2 of this Article, Article 12, and Article 360 of this Code.
>
> 2. An obligee may demand compensation for damages in respect of benefits which the obligee would have enjoyed from the contract. The obligee may also request the obligor to pay any expenses arising from its failure to fulfill contractual obligations without overlap with the amount of compensation for damages in respect of the benefits from the contract.
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> [Emphasis added]

The substance of the concept of damages used in Article 419 is specifically provided for in Article 361 of the Civil Code as follows:

> **Article 361. Damages caused by breach of obligation**
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> 1. Damage caused by breach of duty comprises physical damages and emotional damages.
>
> 2. Material damages are actual material losses, including loss of assets, reasonable expenses for the prevention, limitation and remediation of damage, actual loss or reduction of income.
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> 3. Emotional damages are mental sufferings caused by injury to life, health, honor, dignity,

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"other relevant laws that regulate civil relations in specific areas" as follows:

> **Article 4. Applicability of the Civil Code**
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> 1. This Law is the general law governing civil relations.
> 2. Other related laws governing civil relations in specific fields cannot be contrary to the fundamental principles of civil law provided in Article 3 of this Law.
> 3. If another relevant law has no regulation or has regulations that infringe Clause 2 of this Article, the regulations of this Law shall apply.
> 4. […]

Since the Construction Law does not contravene the fundamental principles of the Civil Code as laid out in Article 3 of the Civil Code, Article 4.3 will apply and therefore, if the Construction Law is silent, the provisions of the Civil Code shall apply. This is the position adopted by the Supreme People's Court (the "**SPC**") in Decision 12/2019/KDTM-GDT dated 24 September 2019 on a dispute over liability for damages under a contract for rock drilling ("**Decision 12/2019**"). In Decision 12/2019, the SPC commented in the "Findings" section as follows:

> Besides, since Contract No. 16/HDTC/12 dated 22 February 2012 between Quang Minh and Tay Nguyen **relates to construction activities** and was entered into based on Construction Contract No. 01/HP-XD/HD dated 18 August 2011 between Tam Long Electricity Joint Stock Company and Quang Minh, the First-Instance Court erred in applying the Commercial Law to resolve the case. **In this case, it is necessary to determine that the relationship in dispute is related to construction, and therefore, the applicable law should be construction law. If there are no applicable provisions in the construction law, then the Civil Code shall be applied to resolve [the case].**
>
> [Emphasis added]

reputation, or any other personal benefits to an entity.

[Emphasis added]

Therefore, it must be understood that when a reference is made to damages caused by a breach of contract, these damages usually mean "actual and ascertainable physical losses, including property losses, reasonable expenses to prevent, mitigate or remedy damages, loss or reduction in income" including (i) the benefits that the non-breaching party would have enjoyed from the contract [had there been no breach] and (ii) the expenses incurred by the non-performance of obligations under the contract apart from the lost benefits a party would have enjoyed. Moreover, pursuant to Articles 13 and 360 of the Civil Code, the breaching party is "obligated to compensate for all damages, unless there exists an agreement by the parties or a law to the contrary."[11]

In conclusion, the provisions of the Construction Law and the Civil Code relating to damages for breach of contract embody three main principles: (a) damages must be a type of physical damages listed in Articles 361 and 419 of the Civil Code; (b) damages must be proven; and (c) amount of damages must be equivalent to the actual losses, and the breaching party has to compensate for all damages, unless there is an agreement or a law to the contrary. These are the main principles that must provide the basis for the interpretation and application of the DD provision in RB/99 and RB/17.

B. Are the DD provisions in RB/99 and RB/17 compatible with the provisions on compensation for damages in the Construction Law and the Civil Code?

a. The first principle: Damages must be a type of physical damages listed under Articles 361 and 419 of the Civil Code

Under Article 419 of the Civil Code, damages caused by a breach of contract include (a) the benefits the non-breaching party would have otherwise enjoyed from the contract and (b) the expenses incurred due to the non-performance of the contractual obligations but without overlap with the amount of compensation for the loss of benefits from the contract. Under Article 361 of the Civil Code, physical damages include (a) damages to property, (b) reasonable expenses to prevent, mitigate, or remedy damages, and (c) the loss or reduction in actual income. Because DD are the amount of damages that the parties agreed would apply in case the Contractor does not complete the Project on time, it is not possible to determine whether DD fall into any type of damages recognized by Articles 419 and 361.

b. The second principle: Damages must be proven

According to Article 361 of the Civil Code, actual damages must be ascertainable, meaning proven. DD is a legal construct the basis of which is that the parties need not prove the actual damages when the Contractor fails to timely complete the Project. Therefore, DD cannot satisfy the second principle.

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[11] **Article 13. Compensation of damages**

Individuals and legal persons whose civil rights are infringed upon are entitled to compensation for the whole damage, unless otherwise agreed upon by the parties or prescribed by a law.

Article 360. Duty to compensate for damages caused by breach of obligation

In case of damage caused by breach of an obligation, the obligor shall compensate for the entire damage, unless otherwise agreed upon or otherwise prescribed by a law.

[Emphasis added]

A Supervisory Decision 10/2020/KDTM-GDT ("**Decision 10/2020**") of the Supreme People's Court of Vietnam, regarding a dispute over an exclusive distribution agreement and a demand of payment for the sale of goods between Yen Sao Sai Gon Co., Ltd. and Yen Viet JSC, has made clear the burden of proving damages even when the parties had agreed to a pre-determined level of compensation for damages in the context of a commercial contract. The authors are of the view that the SPC's approach in Decision 10/2020 is also completely applicable to construction and civil contracts. Decision 10/2020 concerns a dispute between two companies over an agreement for the exclusive distribution of edible bird's nests in Northern Vietnam for a term of 10 years. The plaintiff, the exclusive distributor, sued the defendant, the supplier, for opening a branch and multiple stores to distribute the same types of products in the Northern region. The plaintiff demanded that the defendant pay VND 10 billion as compensation for damages pursuant to Article 11 of the agreement. After some ten years of litigation, the SPC conducted a supervisory review, reversed the appellate decision to remand the case to the trial court for a new trial.

In paragraph 4 of Decision 10/2020, the Supreme Court stated:[12]

> [4] In Article 11 of Principal Contract No. 02, the parties agree that: "… if in the course of performing the Contract, a party breaches the terms agreed under the Contract, then the breaching party shall be liable to compensate the other party a sum of VND10 billion".
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> […] If [the Court] determines that there is an agreement with respect to compensation for damages, then the Court must ascertain the basis for liability consisting of all necessary elements: there must be a breaching act, there must be actual damages, the breaching act must be the direct cause of the damages and the party claiming compensation for damages must prove its damages, the level of damages caused by the breaching act and the direct profits that the party subject to breach would have had the benefit of in the absence of the breaching act.
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> […]
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> [Emphasis added]

In sum, if the SPC's approach in Decision 10/2020 is applied to construction contracts containing a DD provision, then the DD provision will not satisfy the second principle which is that damages must be proven.

c. The third principle: The amount of damages must be equivalent to the actual amount of losses, and the breaching party must compensate for all the damages, unless otherwise agreed by the parties or provided by law or regulations

DD is a legal construct the basis of which is that the parties need not prove the actual damages when the Contractor fails to timely complete the Project; the Contractor only has to pay an amount calculated using a formula agreed to the contract, as long as such amount is equal to or lower than the cap provided in the contract.

In addition, the DD provision also cannot be considered as an "agreement otherwise" except where the

[12] Authors' note: Supervisory review is a level of discretionary review of a decision of all the justices of the SPC triggered by a protest issued by the Chief Justice or the Chief Prosecutor. Supervisory review is confined to a review of errors of law below.

specific amount of damages has been proven, in accordance with the second principle mentioned above, and the DD amount is lower than the specific amount of damages that has been proven. If the general principle of the Construction Law and the Civil Code with respect to damages caused by breach of contract is that the breaching party has to compensate for all the damages, then there exists no basis in the Construction Law and the Civil Code for the parties to agree on an amount of damages that is higher than the total amount of damages.

As the authors have mentioned above, the DD provisions under RB/99 and RB/17 only differ to the extent that Sub-Clause 15.4(c) of RB/17 is a new provision creating the legal basis for the Employer to demand DD payment from the Contractor in case there is no taking over and the contract has been terminated by the Employer (through the fault of the Contractor) after the date corresponding to the Time for Completion of the Works (or a Section). However, this difference does not affect the conclusion of the authors that the DD provisions in both RB/17 and RB/99 are not consistent with the three general principles under the Construction Law and the Civil Code relating to damages caused by a breach of contract.

In the following sections, the authors present a proposal to change the DD provision into a delay penalty provision to create a clearer and more solid legal basis to give effect to the intent of the parties to a contract using the RB/99 or RB/17 standard form which is that certain agreed payments will be made by the Contractor to the Employer in the event there is construction delay due to the fault of the Contractor. We would like to recall the principle stated in Article 54.3 of Decree 37 as follows:

> […] 3. Organizations and individuals are encouraged to use the standard form conditions of contract of the International Federation of Consulting Engineers ("**FIDIC**") and the standard form construction contracts in entering into and performing construction contracts. In doing so, organizations and individuals shall consider amending the content of their contracts so as to comport with Vietnamese law.
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> [Emphasis added]

To faithfully implement the principle of Article 54.3 above, the experience of other countries in using RB/99 and RB/17 must be considered.

VI. A proposal to switch the DD provisions into delay penalty provisions

A. The approach to DD provisions in the civil law and in the common law system

In the Chapter comparing the approach to RB/17 adopted by common law countries to that adopted by civil law countries, Mr. Seppala made several comments that, in the opinion of the authors, should be taken into account to modify the DD provisions in a FIDIC contract governed by Vietnamese law. Under English law, the equivalent of, and also the legal basis for, the concept of "delay damages"is the concept of "liquidated damages."[13] In particular, Mr. Seppala's analysis is that:

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[13] In *Triple Point Technology, Inc (Respondent) v PTT Public Company Ltd (Appellant)* [2021] UKSC 29, a decision of the UK Supreme Court, Lord Leggatt, in an opinion concurring with the majority opinion written by Lady Arden, explained in a fairly clear manner the meaning of a "liquidated damages" (it is difficult to translate this type of damages into Vietnamese because there is no equivalent concept and therefore the authors have decided to keep the English term when used in this article) provision under English law, in paragraph 74, as follows:

The difference between liquidated damages in common law systems and a penalty in some civil law systems may be said to be that the former purports to define the damage suffered by a party, whereas the latter includes an in terrorem (Latin: 'in order to frighten') element intended to

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> 74. A liquidated damages clause is a clause in a contract which stipulates what amount of money will be payable as damages for loss caused by a breach of the contract irrespective of what loss may actually be suffered if a breach of the relevant kind (typically, delay in performance of the contract) occurs. Liquidated damages clauses are a standard feature of major construction and engineering contracts and commonly provide for damages to be payable at a specified rate for each week or day of delay in the completion of work by the contractor after the contractual completion date has passed. Such a clause serves two useful purposes. First, establishing what financial loss delay has caused the employer would often be an intractable task capable of giving rise to costly disputes. Fixing in advance the damages payable for such delay avoids such difficulty and cost. Second, such a clause limits the contractor's exposure to liability of an otherwise unknown and open-ended kind, while at the same time giving the employer certainty about the amount that it will be entitled to recover as compensation. Each party is therefore better able to manage the risk of delay in the completion of the project.

The issue in *Triple Point Technology* was the contractor's duty to pay "liquidated damages" in case the project was not completed and the employer terminated the contract after the time stated in the contract for completion had passed. The majority opinion, delivered by Lady Arden, brings more clarity to the discussion of delay damages. In paragraph 35, she states:

> 35. […] Parties agree a liquidated damages clause so as to provide a remedy that is predictable and certain for a particular event (here, as often, that event is a delay in completion). The employer does not then have to quantify its loss, which may be difficult and time-consuming for it to do. Parties must be taken to know the general law, namely that the accrual of liquidated damages comes to an end on termination of the contract (see *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 844 and 849). After that event, the parties' contract is at an end and the parties must seek damages for breach of contract under the general law. That is well-understood: see per Recorder Michael Harvey QC in *Gibbs v Tomlinson* (1992) 35 Con LR 86, p 116. […]

Based on this view, Lady Arden concluded that the contractor was obligated to pay "liquidated damages" to the employer until the termination of the contract if the contract is terminated after the date that the project should have been completed. Therefore, English law now follows the approach of paragraph (c) of Sub-Clause 15.4 of RB/17.

The authors note that certain conventional notions often invoked to explain "liquidated damages" in English law and in the other common-law jurisdictions were not raised by the UK Supreme Court in the *Triple Point Technology* opinion. These are:

> "Liquidated damages" are a reasonable estimate of damages by the parties because actual damages are hard to determine. Lord Leggatt mentioned this in his opinion, but added that the difficulty of assessing actual damages was one of the motivations for parties to a contract to opt for "liquidated damages." He did not, however, state that this difficulty was a basis or condition precedent for the parties to agree on liquidated damages.
>
> "Liquidated damages" is an amount of reasonably estimated damages, and therefore is not a penalty void as against UK public policy. The UK Supreme Court has limited the scope of this principle and held that this principle did not apply to the primary obligations in a contract, such as the obligation of timely completion (see *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67).

In sum, since the *Triple Point Technology* decision by the UK Supreme Court, the fundamental issue relating to the effectiveness of a liquidated damages provision, from an English law perspective, is the agreement of the parties on a primary contractual obligation regardless whether the agreed amount of the liquidated damages is a reasonable estimate of the damages that could arise in case of a breach.

induce performance. Sometimes, in civil law systems, a clause will serve both purposes.[14]

In his specific comment on Sub-Clause 8.8 of RB/17, Mr. Seppala added:

> *(1) Common law and civil law compared*
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> As indicated above, Delay Damages are referred to in common law systems as liquidated damages for delay, whereas in some civil law systems they are referred to as penalties (in French: pénalités). Under both systems, they are subject to regulation and, to be enforceable, the amount of these predefined damages must, as a practical matter, be a reasonable estimate of the anticipated or actual loss caused to the Employer by the delay. However, as explained more fully in an earlier Chapter (comparing the common law system with French and other laws), the common law and civil law systems differ notably in the following respects:
>
> (1) under the common law, a court has no power to adjust the amount of the pre-agreed sum, whereas it may often have such power under the civil law;
>
> (2) under the common law, if the pre-agreed sum is found to constitute a penalty, then the corresponding clause is unenforceable and of no effect, whereas under the civil law, if such sum is found to be objectionable, the amount may be adjusted to correspond to actual damages and the clause will be saved;
>
> (3) under the common law, the assessment of whether the pre-agreed sum is a penalty, and therefore objectionable, is made as of the date of contract, whereas, under the civil law, the assessment of whether it is objectionable is made at the date of judgment or award, in light of the actual damages which have been suffered; and
>
> (4) under the civil law, there may be a requirement of having to give notice requiring performance before being entitled to payment.
>
> *(2) UNIDROIT Principles*
>
> The UNIDROIT Principles also require the pre-agreed sum to satisfy a reasonableness criterion:
>
> > notwithstanding any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances.[15]
>
> Furthermore, they provide that a clause which limits or excludes a party's liability for non-performance 'may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract'. Just as Sub-Clause 8.8 provides that it may not be invoked in the case of fraud, among other things, so do Articles 3.1.4 (Mandatory character of the provisions) and 3.2.5 (Fraud) of the UNIDROIT Principles.

Based on Mr. Seppala's analysis, the authors are of the view that amending the FIDIC form contracts governed by Vietnamese law following the approach adopted by civil law systems is appropriate and

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[14] C. Seppala, *The FIDIC Red Book Contract: An International Clause-by-Clause Commentary* (4/2023), p. 90.

[15] C. Seppala, *The FIDIC Red Book Contract: An International Clause-by-Clause Commentary* (4/2023), pp. 702-704.

correct because the current structure and provisions of Vietnamese law are already consistent with the approach taken by civil law systems to address the delay damages issues, an issue that comes up in all construction projects and construction contracts around the world whether the governing law belongs to the common law or the civil law system. The author also take the view that a regime already exists under Vietnamese law that could be used to give effect to the DD provisions in RB/99 or RB/17 in the form of penalty provisions.[16]

B. The penalty regime under the Construction Law and the Civil Code

Article 146 of the Construction Law states:

1. Rewards and penalties must be agreed by the parties and recorded in the contract.

2. With respect to construction projects using public investment capital or non-public state capital, the penalty for breach of contract shall not exceed 12% the total contract value that is the subject of the breach. Apart from the agreed penalty, the breaching party shall

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[16] French law provides a good illustration of this point. The authors are grateful to Maude Lebois, a partner of Gaillard Banifatemi Shelbaya Disputes (Paris), for her comments and analyses on the issue of delay damages under French law, which are summarized below:

> A "liquidated damages clause" in a contract is technically a "penalty clause (clause penale)." Article 1231-5 of the French Civil Code confirms the validity of "liquidated damages" clauses.
>
> A decision rendered by the Paris Court of Appeal in 2019 expressly describes the characteristics of a penalty clause: the occurrence of the breach of contract triggers the application of the penalty clause, and there is no requirement to establish the existence of a harm or actual damages (Paris Court of Appeal, 23rd October 2019, N° 18/00049). In this case, the franchisee unilaterally terminated the franchise agreement but continued to pay the franchising fees until the agreement expired. The franchisee argued that the penalty clause should not apply because the franchisor, who had received the franchising fees due, had suffered no actual damages.
>
> In its decision, the Court of Cassation reiterated the principle that the aggrieved party could demand payment of the penalty for breach of contract without proof of actual damages. However, the Court compared the sum of franchising fees that the franchisee had paid (euros 63,288) to the sum stated in the penalty clause (euros 80,000), and concluded that the penalty amount in the contract was excessive. The Court lowered the penalty amount to euros 20,000.
>
> Clauses 2 and 3 of Articles 1231-5 of the French Civil Code add that a court, in its discretion, can raise or lower the penalty amount if the court finds the contracted amount to be clearly excessive or too low. A court has to compare the contractual penalty against the actual damages that the non-breaching party suffered to decide whether the penalty amount is manifestly excessive or too low. To that end, French courts may appoint experts to evaluate the actual damages. In addition, French courts have wide latitude to raise or lower the penalty specified in the contract. For example, the Cour de Cassation once held that a court need not fully justify its refusal to adjust the contractual penalty (Decision No. 12-20.263, Commercial Chamber, Cour de Cassation, 5 November 2013).

Based on this analysis, the authors are of the view that a "liquidated damages" provision under French law is actually a penalty provision (clause penale) pursuant to which the non-breaching party need not prove actual damages to receive payment of the penalty amount. This approach is fully consistent with Vietnamese law. In addition, French law provides courts with a broad discretion to adjust the contractual penalty amount if the court finds that such amount is manifestly excessive or too low. In this respect, French law has gone beyond the common law understanding of "liquidated damages" because the basis for such damages is an agreement between the parties on some amount of money that the breaching party would be obligated to pay the non-breaching party in case of breach. The common law system does not permit courts to adjust liquidated damages. Vietnamese law does not allow courts to adjust the amount of penalty payable and thus, the concept of penalty for breach under Vietnamese law is closer to common law "liquidated damages" than a "clause penale" under French law.

also compensate the other party (or a third party, if any) for any damages suffered in accordance with this Law and other pertinent laws.

[Emphasis added]

Article 418 of the Civil Code provides the following on agreements to pay penalties for breach of contract as follows:

1. Penalties for breach of contract are agreements of the parties in a contract, whereby the breaching party shall pay money to the other party.

2. The amount of the penalty shall be agreed by the parties, unless a relevant law provides otherwise.

3. The parties may agree that the obligation of the breaching party shall be limited to the payment of the penalty amount and the breaching party will not be liable for damages or that the breaching party will be liable for both penalty and damages.

   In the event the parties only agreed on penalty but did not agree on liability for both penalty and damages, then the breaching party shall only be liable for penalty.

[Emphasis added]

Therefore, the obligation to pay an amount of money to the party not in breach under Article 418 of the Civil Code does not carry with it the duty to prove actual damages. This was confirmed by the SPC in Decision 10/2020.[17]

C. A proposal to switch delay damages provisions into penalty provisions

In the event the parties to a contract wish to amend the DD provision to be more consistent with Vietnamese law, the authors would propose that the parties amend the DD provision, through agreement in the Specific Conditions, into a delay penalty provision by replacing the term "delay damages" with the term "delay penalty." Therefore, the contract would have separate provisions for delay penalties and for damages.

In particular, Sub-Clause 8.7 of RB/99 or Sub-Clause 8.8 of RB/17 will be the penalty provision and in case the Employer takes over the Works (despite being delayed), the Contractor will only be liable for a penalty but not for damages caused by the delay. In case the Employer does not take over and terminates the contract due to the Contractor's fault, Sub-Clause 15.4 of RB/99 mandates the obligation to compensate for damages but not to pay the penalty. In contrast, in the same situation, RB/17 provides

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17 In paragraph 4 of Decision 10/2020, the SPC took the view that:

> Under Articles 300, 301, 302, 303, 304 of the Commercial Law 2005, penalty for breach is an agreement between the parties that the breaching party shall pay a pre-determined penalty amount but must not exceed 8% of the value of the contractual obligation which is breached; while compensation for damages is an agreement between the parties that the breaching party compensate for damages caused by the contractual breach, but those damages were not determined at the time of the agreement.

The authors concluded above that the approach taken by the SPC in Decision 10/2020 can certainly be applied to construction and civil contracts. Thus, the principle clarified in the quoted paragraph of Decision 10/2020 is that payment of a pre-determined penalty for breach of contract does not depend on proving actual damages. This is consistent with the approach adopted by French law (see Footnote 16).

that the Employer will have the right to demand that the Contractor (i) compensate for damages, and (ii) pay the penalty. In both cases, the relevant DD provisions can be based on Article 418.3 of the Civil Code, which allows "the parties to agree that the breaching party […] [will be] liable for both penalty and damages."

The next issue under Vietnamese law is the cap on the penalty amount. Sub-Clause 8.7 of RB/99 and Sub-Clause 8.8 of RB/17 both provide for a cap on the amount of penalty. This is consistent with existing international practices relating to the basic concept of "liquidated damages" under English law, which is defined as the amount of damages reasonably estimated by the parties. The Civil Code does not provide for a cap on the penalty amount. But Article 146 of the Construction Law requires that the cap on the penalty must not exceed 12% of the value of the breached portion of the contract in constructions that are funded by public investment capital or state capital for non-public investment. With respect to construction projects other than the above categories, neither the Construction Law nor the Civil Code provides for a cap on penalty for breach of contract. Therefore, it is arguable that agreement on a cap on penalty with respect to constructions not funded by public investment capital or state captal for non-public investment is a commercial agreement not subject to a ceiling prescribed by law. However, it should be noted that the Construction Law does provide a ceiling on penalty amount for construction projects funded by public investment capital or state capital for non-public investment, which are projects of national importance. Moreover, both RB/99 and RB/17 provide for caps, consistent with international practices. On those grounds, the authors are of the view that if the parties to a contract in a construction that is not either funded by public investment capital or state capital for non-public investment, still agree on a penalty cap that does not exceed 12% of the value in breach of such agreement, such agreement would be valid and would reduce the risk of future disputes on the penalty amount.

The authors hope that the above proposal would serve as an initial attempt at providing a clearer, more consistent and simpler interpretation and application of the DD provisions in construction contracts governed by Vietnamese law to avoid complications and unpredictable outcomes in the dispute resolution process.

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