On International Public Works Agreements in the Anglo-American Jurisdictions:

A Comparative Perspective

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مقدمه بالعربية

يتناول الباحث في البحث الماثل الطبيعة القانونية لغرامات التأخير في القانون والقضاء الانجلوامريكي بالتطبيق على أحكام القضاء الانجليزي (Case Law) والمحكمة الفيدرالية الأمريكية والمحاكم الأمريكية، مقارناً ذلك القضاء باتجاهات القضاء والافتاء العربي.
وتثور مشكلة غرامات التأخير حينما تشترط بعض التشريعات العربية كقانون المناقصات والمزايدات المصري الصادر بالقانون رقم 89 لسنة 1998 أن تستحق الغرامة بمجرد التأخير ، و التي تصل نسبتها إلى 10٪ من إجمال قيمة العقد في عقود مقاولات الأعمال، إذا ما زادت مدة التأخير من المقاول عن أربعة أسابيع. فالأساس القانوني للغرامة في هذه الحالة تشريعي واطردت تطبيقات القضاء العربي وافتائه لاسيما مجلس الدولة المصري ممثلاً في المحكمة الإدارية العليا أن افتراض الضرر بسير المرفق العام حاصل دونما حاجه إلى إثباته وبمجرد حدوث التأخير. فالغرامة توقع بمجرد حدوث التأخير ودون اشتراط لوقوع الضرر فضلاً انه وعلى فرض وقوع الضرر، فالغرامه لا تقدر بمقدار هذا الضرر وإنما توقع كشريحه ثابتة منصوص عليها في التشريع حتى ولو حاق بالمرفق العام ضرراً أقل من مقدار الغرامة المنصوص عليها في التشريع والعقد الذي يعتبر عادة قانون المناقصات والمزايدات جزءاً لا يتجزأ منه.

وعلى العكس تماماً فإن القضاء الانجليزي في القضية الشهيرة (Dunlop Case 1914 HL)، والتي حكم فيها مجلس اللوردات The House Lords، قرر انه لا يمكن أن ينفذ شرطاً عقابياً، واشترط في قضايا أخرى عديدة سردها الباحث تفصيلاً وجوب تناسب مقدار التعويض مع الضرر الذي حاق بالمرفق.

ولقد ساير القضاء الأمريكي القضاء الانجليزي في ذات النظر حتي جاءت قضية (Phillips Hong Kong, 1993) التي أرسى بها القضاء الانجليزى (Privy Council) مبدأ جديداً في صدد غرامات التأخير. وقد كانت هذه

القضية تتعلق بإنشاء نظام مراقبة بالكمبيوتر Computerization لطريق سريع في Hong Kong . يعالج البحث هذا الاتجاه الجديد ، والاساس القانونى له فى القضاء الانجلوأمريكى ، من خلال دراسه للعديد من القضايا في المملكة المتحدة والولايات المتحدة بمزيد من التحليل والعمق ليوضح اوجه التباين بين منهج القانون والقضاء الانجلوامريكي من ناحيه ، والنظم القانونية العربية من ناحية اخرى بما اطردت عليه قضاءً وإفتاءً .

Globalization and Liquidated Damages On International Public Works Agreements in the Anglo-American Jurisdictions:

A Comparative Perspective with Civil Law Legal Systems

Abstract:

The purpose of this paper is to examine the legal nature of liquidated damages (penalty for delay) in the international public works agreements (infrastructure projects) in the Anglo-American jurisdictions, with special reference to the Egyptian "Conseil d'Etat" State Council decisions, in the light of the influence of the legal globalization to these contracts.

This paper is divided into three parts. The first describes the legal globalization as a transnational and socio-economic phenomenon .The second is scrutinizing Anglo-American case law perspective .The third is an analytical and comparative perspective on the Egyptian State Council decisions in comparison with the Egyptian cassation court decisions as the Egyptian Cassation Court is applying directly civil law provisions.

The Egyptian State Council plays a significant role in establishing and codifying rules of (les contrats administratifs) administrative contracts since the administrative law is not codified in Egypt. The State Council in Egypt is the founder of the Administrative Contracts Theory established in 1946. Since then, courts, and the General Assembly for Legal Opinion (Fatwa) and Legislation, have set out the legal framework of the administrative contract criteria.

It was settled in the State Council decisions for many decades that the contract is considered administrative if a party to the contract is a public juristic entity, if it concerns any of the public utilities (its management or organization) and if it includes among its provisions specific clauses that differ from civil and

commercial contracts. These provisions are called “Les Clauses Exorbitantes” [1]

It is also settled that an international public works agreement having the abovementioned criteria is an administrative contract by nature and is under the jurisdiction of the State Council courts or subject to international arbitration and is not under the jurisdiction of civil or commercial courts.

The system employed by the State Council is to some extent similar to the system employed by courts exercising the common law, since the administrative law is not codified by the Egyptian legislator. It is worth considering that decisions of the Supreme Administrative Court are not obligatory to lower administrative courts to follow (appeal or first instance administrative courts). Meanwhile, lower courts are always influenced by the decisions of the Supreme Court and, in case of different views; lower courts can deal with new perspectives and have their own reasoning towards the use of this approach after deliberations and voting by the majority of Judges. [2]

Globalization plays a fundamental role in enhancing and modifying the administrative contract traditional theory as a result of the new stipulations imposed by foreign contractors entering into infrastructure agreements with public juristic entities. A new era for a new legal structure has begun since it is acceptable by the Egyptian legal system to stipulate that arbitration is the only mechanism for dispute settlement in infrastructure projects [3] if it is agreed upon by the contracting parties [4] . Moreover, the Egyptian legal system began to accept foreign laws as the substantive laws applicable to the dispute rather than Egyptian laws applicable in similar cases, especially in arbitration rather than litigation.

1 Supreme Administrative court decision in 19th of May ,1962,Year 7, page 890,Dr Soliman El Tamawy, General Principles of Administrative Contracts, fifth edition, 1991,pp.86 and Case 851 ,Year 20 in 21st of June 1980.See also decision No. 3128-24/1/1995,Legal Principles in Administrative contracts by the Egyptian State council in 40 years pp98-99. In France See the leading authority in Administrative Contracts: Andre de Laubadrere, Franck Moderne and Pierre Delvolve, Traite de Contrats Administratifs , Tome I , 2nd Edition, LGDJ, 1983,pp.211-29,Laurent Richer Droit Des Contrats Administratifs, LGDJ,1995 .

2 Deliberations are obligatory and confidential pursuant to article (166) of the Egyptian Civil and Commercial Procedural Law No. 13 of 1968 which applies to State Council courts.

3 Article (13) of the Egyptian Arbitration Act, No. 27 of 1994, in civil and commercial disputes stipulates that if there is an arbitration clause in the contract or arbitration agreement courts shall be prohibited to hear the case.

4 A crucial question remains unanswered, can the parties go to the national courts if the time bar in the agreement to start arbitration passed, (i.e. FIDIC form of contracts stipulates time limit to start arbitration), for more details in civil law countries perspective, In Arabic, Mohamed A.M. Ismail, Arbitration in international public works agreements(2003), pp497-504,Beirut, El Halabi Publishing.

The Egyptian legal system began to recognize new clauses, such as the stabilization clause, in favor of foreign contractors to maintain stability in contract prices as public works agreements are considered complex and long-term agreements. In some agreements with multinational entities, the state cannot amend, modify or terminate the contract without the consent of the foreign contractor; meanwhile, in the traditional theory of the administrative contract the state can exercise unlimited power in the contract.

There was a strong debate until early 1997 about the possibility to start arbitration procedures in administrative contracts. A leading opinion of The General Assembly for Legal Opinion (fatwa) and Legislation in 18/12/1996 rejected arbitration in administrative contracts (international public works agreements) as it is always related to public utilities which are owned and managed by the nation representatives (ministries and governorates) and all its disputes shall be settled by the national courts, as the traditional theory of the administrative contract stipulates.

The general assembly went beyond to confirm that article (1) from The Egyptian Arbitration Act in commercial and civil matters (no.27of 1994), is lacking clarity and certainty [1]. As a result to this approach, the Egyptian Parliament promulgated new legislation (no. 9 of 1997) to amend article (1) of the Arbitration Act (no 27 of 1994) and to confirm that administrative contracts disputes can be settled through arbitration if the parties agreed upon.

These are some enhancements at the administrative contracts theory which considered to be results from globalization and the integration of the Egyptian legal system (to a great extent) in the global legal and economical concepts that influenced legislator and court decisions in Egypt.

It is appropriate, at this stage, to refer to globalization as a transnational and socio-economic phenomenon.

(I) Globalization is a transnational socio-economic phenomenon

Law is a social science that performs a significant role as an essential mechanism needed to fulfill the needs and requirements of all human societies. Law reflects and represents the minor image of a society, determines its common interests and reflects its cultural traditions. On the other hand, globalization has had its influence on various human societies, breaching cultural barriers through the flow of commodities, capital, people, and intangibles such as

1 The General Assembly for Legal Opinion (fatwa) and Legislation, Legal opinion NO. (160) dated 22/2 /1997, session 18/12/1996, file No (54/1 /339).

culture and values[1] from one country to another.

Information technology developments during the last two decades have facilitated the globalization process and intensified cultural interaction, especially legal cultural interaction between legal institutions in the entire world. Rigid and traditional legal patterns and traditions began to accept modifications and enhancements. Some of these patterns began to deteriorate while others created a new legal system with new characteristics, as a result of the merging between the legal cultures. Despite globalization movements and the flow of a new legal culture to the legal systems of developing countries, as well as to their socioeconomic structure and social traditions, the author of this article strongly believes that some areas will still preserve their national oriental identity. For instance, in Egypt, family laws and traditions relate to social oriental traditions as well as to Coptic and Muslim religious beliefs and social habits; these, largely, will not be greatly influenced by the cultural globalization in the socio-legal domain. Regardless of the minor religious controversy between Copts and Muslims in minor areas of family laws, the conservative social culture, for both Copts and Muslims, imposes the same traditions and customs in the domain of human familial relations[2].

On the other hand, legal matters that are considerably influenced by legal cultural globalization, such as the Administrative Contracts Theory, (Le Contrat Administratif), will maintain some of their basic features. It is true that penalties and sanctions stated in the Administrative Contracts Theory have not changed to date, even with the existence of new trends aimed at the liberalization, modernization and internationalization of the traditional theory of administrative contracts.

Accordingly, it can be said that the rigid patterns of administrative contracts, their substance and exorbitant features have significantly changed in the last decade in the Egyptian legal culture, especially concerning infrastructure agreements with foreign private entities. These new legal patterns, such as the introduction of international public works agreements, BOT / BOOT/ BOO agreements and PPP contracts, posed the start of new era in the Egyptian legal

1 Joseph E. Stiglitz, Globalization and its Discontents, W.W. Norton & Company Inc., 2004. See also, by the same author, Making Globalization Work, W. W. Norton & Company, 2007. Nobel laureate (2001) , Prof. at Columbia University, USA; Brain Snowdon , Globalization, Development and Transition. Edward Elgar, 2007 and Mohamed S. Abdel Wahab, Cultural Globalization and Public Policy: Exclusion of Foreign Law in the Global Village, Oxford University Press, 2005, Vol. 8, P. 306; Mohamed A M Ismail, Globalization and New International Public Works Agreements in Developing Countries, An Analytical Perspective, Ashgate Publishing,UK,2011.

2 Mohamed A. M. Ismail, Public Economic Law and the New International Administrative Contracts, El Halabi Publishing Co, Beirut, 2010, P.14, this book was awarded the State Prize in legal research by the government of the A.R.E, 2011.

culture; one with unique and liberal mechanisms and stipulations.

Legal cultural globalization has had its influence on legislation, litigation, the contractual regime of the administrative contracts (new types) and, currently, arbitration. The Arbitration Act of 1994, as a direct result of legal cultural globalization, created the latter mechanism.

Despite the abovementioned facts, the state still maintains its role as the employer, regulator and supervisor of these new types of contracts, although, nowadays, this role is very limited.

The latter trend is expected to open doors to the private sector to positively participate in the economic life and to increase its role in building financing systems and operating infrastructure projects related to public utilities.

The increase in the private sector's role is codified in the new constitutional amendments of 2007, which reject socialism and Marxism. These ideologies were adopted by the 1971 constitution. The new constitutional modifications, nevertheless, adopt no specific ideology; they left the door open to presidential and parliamentary elections to determine the necessary ideological political and economic policy to be followed during each presidential or parliamentary term.

This flexible trend is a direct result of cultural globalization and the influence of the free market economy policy on the national socio-economic structure. The role of the state shall be limited to its basic and fundamental functions, as pointed out by the eminent economist Adam Smith.

The first element influenced by globalization was culture. Cultural interaction is the main outcome of the flow of ideas and values into Middle Eastern communities. Culture represents a set of practices, values, beliefs and customs acquired by individuals as members of a distinctive society and resulting from interaction between people[1].

Cultural Globalization and Public Economic Law:

Cultural globalization has considerably affected legal cultures of the civil law countries. State international business transactions and the traditional Theory of Administrative Contracts were subject to the flow of liberal and global perspectives. The state in its transactions is not in equal bargaining power with the other private entity. Hence, the administrative contracts include exorbitant clauses, such as the right of the administrative authority to unilaterally amend or terminate a contract.Furthermore, the state may also unilaterally impose certain penalties on the other contracting party. These may include: a penalty for delay (liquidated damages in common law jurisdictions) and rescission of

1 Mohamed S. Abdel Wahab, Supra , PP. 363.

the contract (La résiliation administrative) as well as the forfeiture of deposits (performance bonds). The impact of legal cultural globalization is significant in the domain of international administrative contracts, especially international public works agreements. New clauses have appeared in these contracts, including the stabilization and arbitration clauses. The contractual regime has undergone various changes, especially with respect to the new types of international public works agreements concerning infrastructure projects, such as Build, Own, Operate and Transfer contracts (BOOT), BOO or public-private partnership agreements (PPPs). The main target of these new contractual mechanisms is to finance and build infrastructure projects (public utilities) in developing countries.

Legislation has significantly developed in the area of granting concessions for infrastructure projects and public utilities. Laws No. 100 of 1996, 229 of 1996, 3 of 1997 and 22 of 1998 amended old existing legislations such as law No. 129 of 1947 concerning granting concessions for public utilities and law No. 61 of 1958 on granting concessions related to exploitation of natural resources and public utilities.

The new four legislations fall under the domains of the electricity sector; Roads sector; specialized ports, and civil aviations and airports.

This is a real revolution in administrative contracts and state international administrative transactions.

On the legislative level, the revolution was in the current enhancements and modifications to the state procurement law concerning contract price as well as granting the administration the authority to review contract prices every three months. The administration can exercise this power in cooperation with the contractor pursuant to certain stipulations and parameters stated under laws No. 5 of 2005 and No. 191 of 2008. [1]

It is also true that the Arbitration Act of 1994 and its amendment by Law No. 9 of 1997 gave effect to some considerable changes to the Administrative Contract Theory, especially contracts concluded by and between the state and foreign private entities.

Liquidated damages have new trends under Law No. 89 of 1998 as well as in litigations by State Council (Le Conseil d'Etat) courts, despite the fact that they still exercise a punitive nature under the penalty for delay clause.

In conclusion, cultural and legal globalization have influenced the civil law legal culture in Egypt, especially concerning international administrative transactions and contracts entered into by, and between the State and foreign private entities, with special emphasis on public utility projects and

1 Mohamed A. M. Ismail, Globalization and Contract Price in the Egyptian State Procurement Law, The International Construction Law Review, London, Informa, Vol. 27, part I, Jan 2010.

international public works agreements (infrastructure projects). The entire legal regime was influenced by these transnational phenomena: legislation, litigation (State Council court decisions) and contractual regime. With respect to state international transactions, a set of new rules and international customs have flown from common law countries to our legal culture and created a new branch of public law in Egypt.

This branch is currently well known in France, but has only practically begun to appear in Egypt in the last few years. Lately, a few academic studies[1] in the Egyptian doctrine began to focus on this new branch which is considered of a fundamental importance to the administration.

(II) The Anglo-American Case Law:

English and American case laws share a unique perspective regarding the liquidated damages clause stipulated under contracts. Taking cognizance of the changes in judicial precedents witnessed during the last decade of the 20th century, it is now necessary to analyze the current judicial policy. This may be done through scrutinizing some of the most important cases, for case law is deemed the leading authority in this domain as regards the common law legal culture.

(i)English Case Law

Kemble vs. Farren (1829) was one of the leading cases that had come before the court during the 19th century. A contract [2] was entered into by and between the defendant and the contractor, stipulating the appearance of the former as a principal comedian at the Covent Garden Theatre against a remuneration of £3.6 per night for four seasons. The contract also contained a provision specifying that if either party failed to fulfill the terms of the contract, or any part thereof, such party shall be subject to the payment of a sum of £1000 in liquidated damages.

During the second season, the defendant refused to act because of failure of the contractor to meet a single payment of £3.6. The court held that the sum of £1000 shall be made to the defendant (actor) as recompense for the failure of the plaintiff (contractor) to make payment. Since the sum of £3.6 is very trivial in comparison to that of £1000, the clause has thus been rendered into a penalty clause, rather than a liquidated damages .

1 See: Dr Mohamed A. M. Ismail, Public Economic Law and The New International Administrative Contract, El Halabi Publishing Co., Beirut, 2010,see also Ragab Mohmoud, Participation Agreements, (PPP), Dar El Nahda El Arabia, 2007, p. 3

2 Kemble vs. Farren (1829) 6 Bing 141.

In the 1906 Public Works Commissioner [1] vs. Hills case – the fourth of its kind to be held under a railway construction contract – the indefinite sum ruled by the court could not be a genuine pre-estimate of loss, and was therefore regarded as a penalty clause.

In the Ford Motor Company vs. Armstrong [2] case (1915), Armstrong, a retailer, agreed not to sell any Ford car, or any part thereof, below the set price list; he also agreed to pay £250 in liquidated damages for every act of breach. The court held that the sum of £250 was a penalty since it is not equal to the damages encountered.

In the leading case of Dunlop Pneumatic Tyre vs. New Garage [3] (1914) The House of Lords Stated: "The essence of liquidated damages is a genuine covenanted pre-estimate of loss" Lord Dunedin pointed out. He elaborated: "Though the parties to a contract who use the words "Penalty" or " Liquidated damages" may **primafacia** be supposed to mean what they say, yet the expression is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages"

As Eggleston [4] pointed out, the terminology itself is not decisive, and if, as a matter of construction, the courts find that liquidated damages are penalties or vice verse, they will award accordingly.

Lord Dunedin's judgment in the Dunlop case remains the objective test on which following judgments have relied.

In addition to the abovementioned phrases, Lord Dunedin stated:

"- The essence of a penalty is the payment of money stipulated as a threat to the offending party; meanwhile, the essence of liquidated damages is a genuine covenanted pre-estimate of damage.

- Whether a stipulated sum is regarded as a penalty or a liquidated damage is a question of construction to be decided upon the terms and inherent circumstances of each particular contract and should be determined as at the time of making the contract, not the time of breach.

- To assist this task of construction, various tests have been suggested which, if applicable to the case under consideration, may prove helpful or even conducive. Such are :

1 Public Works Commissioner vs. Hills, (1906) AC 368.

2 Ford Motor Company Ltd (En gland) vs. Brain Eggleston, Liquidated Damages and Extension of Time in Construction Contracts, Second Edition, Blackwell Science, 1997. P.59, 60.

3 Dunlop Pneumatic Tyre Company Ltd vs New Garage & Motor Company Ltd (1915) AC 79.

4 Brian Eggleston, Supra, P.56.

a) The stipulated sum will be held to be a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.

b) The stipulated sum will be held as a penalty if the breach is represented only in the failure to pay a sum of money that is less than the stipulated sum.

This, though one of the most ancient instances, is truly a corollary to the last test.

c) There is presumption (but no more) that the stipulated sum is a penalty when "a single sum is made payable by way of compensation as a consequence of the occurrence of one or more events, some of which may occasion serious and other trifling damage".

d) The stipulated sum, being a genuine pre-estimate of the expected damage as a consequence of the breach, should not render price pre-estimation an obstacle or an impossibility. On the contrary, that is just the situation where it is probable that the pre-estimated damage is the true bargain between the parties".

It is clear that during that period, and up till the last decade of the 20th century, English courts did not validate penalty clauses.

The sum stipulated by the parties must reflect the "genuine pre-estimated loss" and must be reasonably adequate to the actual loss. This should be determined by the contracting parties.

The burden of proving that the stipulated sum (clause) is actually a penalty lies on the party challenging the clause. It is the duty of the said party to prove the punitive nature.

In a recent case famous for applying new principles, English courts had different perspectives. This is evident as follows:

Philips Hong Kong Ltd vs. Attorney General of Hong Kong (1993)[1]

In the leading case of Phillips Hong Kong, Phillips entered into a contract with the Hong Kong government to design, supply, install and commission a computerized supervisory system for a new route to the approach roads and twin tunnels. The contract was one of seven contracts; six of which contained a flow chart setting out a program for the progress of work. In addition, there were other flow charts setting out the work of five different contracts. The flow charts identified key dates on which the work performed by Phillips interfaced with the programs of other contracts. Clause 27 of the Phillips contract imposed an obligation on Phillips to meet its key dates; simultaneously, clause

1 Philips Hong Kong Ltd vs. Attorney General of Hong Kong (1993), 61 BLR 41.

29 provided that failure to meet key dates shall entail the payment of liquidated damages.

The Privy Council held that the provision stipulating liquidated damages under the contract entered into between the parties was a genuine pre-estimate and was thus enforceable since the parties were able to estimate with a reasonable degree of certainty the extent of their liability and the potential risk. The court applied the party autonomy and freedom of contract principles. It adopted an objective assessment that will not normally identify situations where the application of the provision could result in a larger sum being recovered by the injured party as compared to the actual loss sustained. The court concluded that if the liquidated damages clause is a genuine pre-estimate of what the loss is likely to be, thus, it is not a penalty clause.

The fact remains that the issue has to be determined objectively and that judgment must be made on the date the contract was entered into.

The court held that in the case of a governmental body, the nature of the loss is especially difficult to evaluate because the government reasonably adopted a formula that reflected the loss of returns on the capital involved on a daily basis [1] .

The following two cases are a selection of recent English cases that illustrate the application of these rules as influenced by the Philips case:

1- M & J Polymers Ltd vs. Imerys Minerals Ltd [2]

In 1991, Imerys (the defendant) had received supplies of chemical products from Polymers (the appellant). In July 2003, both parties entered into a new contract effective until December 2004.

Pursuant to the latter agreement, Polymers was to supply Imerys with chemicals to be used in producing high quality printings; nevertheless, there was a shortage in acrylic acid, one of the ingredients to be supplied, that would last till the end of 2004. Pursuant to the terms of agreement, the defendant terminated the contract. Claimant alleged that the contract termination was illegal.

The court held that the take or pay clause stipulated under the contract held by and between the parties is not a penalty; it is a liquidated damage clause for damages that are a genuine pre-estimate of loss.

The court confirmed that English courts had never before held a take or pay clause to be a penalty clause. Furthermore, the court rejected the counterclaim

1 See: Brian Eggleston, Supra, P. 61-2.

2 M & J Polymers Ltd vs. Imerys Minerals Ltd, (2008) I All ER (COMM 893).

made by Imerys (defendant).

2-Liberty Mercian Limited vs. Dean & Dyball Construction Limited[1] (2008):

In the latest case of liquidated damages, the English court held that the liquidated damages clause is a genuine pre-estimate of the specific loss of the incomplete part.

The dispute concerned a construction contract. The question before court was whether or not there was a sectional completion of works and whether the liquidated damages clause was applicable at this stage or was it considered an unenforceable penalty clause.

The court applied the choice made by the parties and enforced the liquidated damages clause.

(ii)American case law

The doctrine in the United States defines liquidated damages as a stipulated sum of money estimated by the contracting parties upon contract execution to which extent any breach of contract causes damage (loss)[2] .

Liquidated damages mean the sum agreed upon by the parties to be paid in case of breach of contract. These damages are usually payable without the need to start litigation or arbitral proceedings[3] .

American courts adopted a judicial policy similar, but not identical, to that of the English Courts.

In April 1891, in the case of W.P.Tinkham Resondent vs. Ferdivand Satori[4], the Court of Appeal of Missouri held that the seller was not confined in the amount of his damages to the penalty but could recover a greater sum. The seller and the buyer entered into a real estate contract which stipulated that the $100 down payment made by the buyer would not be refunded if he was in breach of the contract. The buyer in fact breached the contract after the seller was awarded an amount greater than the $100. The buyer sought a review of the stance claiming that the damages incurred by the seller were limited to the sum

1 Liberty Mercian limited vs. Dean & Dyball Construction Limited, (2009) BLR 29. See also (http://www.balill.org/ew/cases/EWHC/TCC/2008/2617.html)

2 Oklahoma City University Law Review, The Use and Abuse of Liquidated Damages in Federal Defense Contracts: An analysis .Vol.8,Summer 1983,N-3,P.251.

3 Scott M.Tyler , in public Construction Contracts, Duke Law Journal,Vol.44,p.357.

4 44 Mo.APP.659;1891 Mo-APP. LEXIS 206 .

of liquidated damages specified under the contract entered into by the parties. The court held that a contract presenting the question of whether a deposit would be taken as a penalty or as liquidated damages was to be interpreted by the test of party intention. The court held that the seller was not confined, in the amount of his damages, to the penalty but could rather obtain a greater sum.

In the case of Mercer vs. Stupp Bros. Bridge Iron Company [1] (Aug. 1904), the Court of Appeal of Illinois observed that the sum mentioned in the contract was converted by the parties themselves into a penalty.

The reason why the law did not favor refunds is that the court found that if the clause fixing the amount of damages appeared to have been inserted to secure prompt performance of the agreement, it had to be treated as a penalty clause; accordingly, no more than the actual damages proved could be recovered.

The facts of this case show that under the terms of the construction contract, the company shall pay $5 per day as a penalty for delay in completing the bridge.

The issue before the court was whether the $5 represented liquidated damages, as alleged by Mercer county, or an illegal penalty, as alleged by the Company.

The court held the above mentioned conclusion.

In May 1913, in the case of Pacific Hardware and Steel Company vs. the United States government, the United States Court of Claims found that a contract of the United States Navy Department to deliver materials to a commission in Panama contained a penalty clause. The contract provided for deductions to be made in the contract price to be paid to the plaintiff for any delays in delivery. The contract also provided that any delays caused by factors other than the own doing of the plaintiff, and for which the government suffered no damages or inconvenience, may be grounds for a waiver of deductions at the discretion of the commission's Chairman. Deductions were later made to the contract price for failure of the plaintiff to make prompt delivery. The court considered whether the contract provision was for liquidated damages or was only a penalty. It found that the parties had no pre-intention to cause any damages, nor did the intention exist upon execution of the contract. The parties were familiar with the fact that if the damages clause was to be waived because the delay was due to the reasons stated under the contract, the provision then entailed a penalty not liquidated damages.

1 115 III. APP. 298; 1904 III,. APP, LEXIS 312.

In the April 1914 case of James Golden vs. H. A. Mckim, the Supreme Court of Nevada [1] reversed the judgment of the trial court finding that the actual award was based on a penalty provision in the contract rather than on the actual damages. The court further ordered a new trail as it found that the excavator should have been relieved from the imposition of the liquidated damages provision of the contract.

In the leading case of R. A. El Zey vs. the City of Winterest, Iowa [2] (Nov. 1915), the claimant entered into contract with the city to provide it with paving works. Although the claimant performed his part under the contract, the city refused to pay for his rendered work for failure to complete on due time. The Trail and Appeal Courts ruled in favor of the claimant.

The Supreme Court of Iowa ruled that the damage clause relied on by the city was a penalty clause rather than a liquidated damages one.

The city failed to prove actual damages.

The court added that failure of the claimant to deliver as contracted was due to failure of the city to grade the streets before paving so work may continue as agreed. The court concluded that, even if the damage clause was construed as liquidated damages, no damages would have been equitably allowed under the circumstances. The court affirmed the judgment against the city.

In September 1920, the Supreme Court of Nebraska, in the case of Sunderland and Brothers Company vs. Chicago, Burlington & Quincy Rail Road Company [3], held that the liquidated damages clause was a penalty clause.

The court found that the penalty specified under the contract was unconstitutional because it provided for both actual damages as well as a fixed sum; the assessment was an amount in excess of the actual damages sustained. The shipper in this case sought and received damages for the carrier's delay in the shipment and delivery of goods under the Reciprocal Demurrage Act, Neb Rev. Stat. 6159, 6160, 616 (1913). The Act allowed the shipper to recover $1 per day for each car in addition to the actual damages sustained for each day's delay in shipment and delivery. The court added that this penalty was in excess of the compensation to the shipper and, as such, was properly considered as a penalty.

The court confirmed that damages resulting from delay in the shipment of various commodities were variable depending on the type of commodity and its current market value. The amount of $1 did not bear any reasonable relation to

1 37 Nev, 205; 141 P. 676; 1914 Nev. LEXIS 25.

2 172 IOWA 643; 154 N.W. 901; 1915 IOWA sup. LEXIS 342.

3 104 Neb. 322; 179 N.W. 546; 1920 Neb. LEXIS 264.

the damage sustained by the shipment of each type of commodity.

This perspective of the American courts has not changed, even in the new millennium.

In the case of IPC Retail Properties vs. Oriental Gardens INC, Chung M. wand and Tomy W. Ho [1] (March 2004), the appellant argued that the accelerated rent provision was an unenforceable penalty. The Court of Appeal of Kansas held that the provision was not a reasonable estimate of damages and could only be applied to breaches where damages could be easily ascertained. The provision was an unenforceable penalty. The court directed that because the landlord had re-rent the premises, the proper measure of damages was the difference, reduced to the current value, between the fixed rent in the lease contract and the sum for which the premises were rented to other parties for the remainder of the term.

The findings of the court can be summarized as follows:

1- The distinction between a penalty and a provision of liquidated damages is that a penalty is a security for the performance of work while a provision of liquidated damages is a sum to be paid in case of failure to deliver on performance.

2- The burden of proving that a liquidated damages clause constitutes an unenforceable penalty rests with the party challenging the provision.

3- When determining whether a stipulated damages amount constitutes a liquidated damages clause or an unenforceable penalty, the instrument must be considered as a whole; furthermore, the situation of the parties, the nature of the subject matter and the circumstances surrounding its execution must be taken into account.

4- Two fundamental considerations support the holding that a contractual provision concerned with setting liquidated damages rather than being a penalty. The first is that the amount stipulated is conscionable, that is reasonable in view of the value of the subject matter of the contract and of the probable or presumptive loss in case of breach. The second is that the nature of the transaction is such that the amount of actual sum of resulting damages would not be easily and readily determinable.

5- A contract provision will be considered a penalty where there is no attempt to calculate the amount of actual damages that might be sustained in case of breach. When the amount of damages is equivalent to the sum of breach of a major or minor contract provision, or of a total or partial breach, it becomes evident that the parties undertook no attempt to calculate the actual damages.

1 32 Kan. App. 2d 554; 86 543; 2004 Kan. App. LEXIS 236.

6- Where a lease allows the landlord to collect future rent, as well as actual damages, the accelerated rent provision is, in its nature, equivalent to an unenforceable penalty. Such a provision does not constitute a settlement, and allows the landlord to have his cake and eat it too.

7- A clause that specifies a minimum amount to be paid, and then leaves the door wide open to prove actual damages, is not considered a valid liquidated damages clause.

8- To be able to make recovery under a liquidated damages clause, the amount of liquidated damages must bear some reasonable relationship to the actual injury caused by the breach. If the amount bears no such relationship, it is thus considered a penalty and is treated as void.

Despite the different conclusion adopted by the court in the case of Hutton Contracting Company Inc. vs. The City of Coffeyville [1] (April 2007), the court adopted some of its principles in the IPC Retail Properties case in 2004. In the Hutton Contracting case, the plaintiff (contractor) used the defendant (the city) in the United States District Court of Kansas to obtain the unpaid amount of a contract to construct a power line and a fiber-optic line. After a jury trail, the District Court ordered the city to pay the contractor a sum of $24,659.47 in addition to a retainage of $110,159.47 minus $85.500 in liquidated damages to which the city was entitled.

The contractor appealed but the United States Court Of Appeal of the Tenth Circuit affirmed the judgment. The court ruled that the contractor was responsible for the delay with no reason of force majeure to excuse them. The concern of the court was the damages caused by the delay since the time factor was of essence to this particular contract [2].

The court referred to the judgment sentenced in the IPC Retail case in many occasions including those when the burden of proving that a liquidated damages clause constitutes an unenforceable penalty rests with the party challenging the provision.

In the case of Ameritech Construction Corp. vs. William F. Cummings, the Court of Virginia (Circuit Court of the City of Winchester), a construction company sought to recover from the homeowner liquidated damages at the

1 487 F. 3 d 772; 2007 U.S. App. LEXIS 9914.

2 66 VA. CIR 328: 2005 VA. CIR. LEXIS 38.

of $5,225 plus its reasonable attorney's fees. The court held that the sum of liquidated damages was 30 percent of the total contract price and that it still remained to be proven whether this amount was grossly in excess of, and out of all proportion to, the actual damages. There were many unanswered factual questions and considerations in assessing the actual damages as well as the question of their lawful validity.

The court affirmed the validity of the liquidated damages clause and denied its punitive nature.

In a very recent case of El Centra Mall vs. Payless Shoe Source [1] (April 2009), the defendant appealed a judgment ruled by the Superior Court of Orange County (California). The court ruled that the liquidated damages clause stated under the commercial lease agreement signed between the parties was not an unlawful penalty and awarded contract damages to the plaintiff (landlord) pursuant to that clause.

The court found that substantial evidence supported the conclusion that the defendant had not, under the Civil Code, met its responsibility of showing the estimate of damages. The court of Appeal of California affirmed the judgment ruled by the trial court. The defendant (Payless Shoes) also failed to present evidence, usually through expert testimony, that a charge of 10 cents per foot did not represent a reasonable estimate of the actual damages. The burden of proof lied on the defendant to demonstrate that the liquidated damages provision was actually a penalty one. The court concluded that the provision is a valid liquidated damages clause.

Substantial Completion of the Contract :

In the case of Carrathers Construction Company L.L.C vs. the City of South Hutchinson, Kansas [2] (May, 2008), The Court of Appeal of Kansas found that the evidence established that the construction company failed to achieve a substantial completion of the contract until 12 January 2004, and that it was not finally completed until 13 January 2004.

The amount of the liquidated damages under the contract was reasonable when viewed prospectively as well as in relation to the actual damages caused by the breach. The summary judgment awarded liquidated damages in favor of the city. The Court of Appeal found that the nature of the transaction was

1 174 Cal. App. 4th 58; 2009 cal. App. LEXIS 806.

2 39 kan. App. 2d 703; 184 P. 3d 943; 2008 Kan. App. LEXIS 85.

such that the amount of actual damages resulting from delay was not easily and readily determinable and affirmed the summary judgment.

It is also relevant to refer to the old case of Thermodyn Contractors Inc. vs. the General Services Administration [1]. The contractor "Thermodyn" refused to make payment of the liquidated damages specified by the government at a sum of $22,630 as a result of failure to complete the work in the Texas station on due time. The contractor affirmed substantial completion of works before 31 March 1993.

The Court of Appeal rejected the contractor's defense and held that the liquidated damages clause is valid and enforceable as the administration has not started utilizing the public utility.

In light of the previous judgments, the concept of substantial completion can be defined as the time at which the work (or a specified part thereof) has progressed to the point where, in the opinion of the Engineer and in accordance with the contract documents, it is sufficiently complete for utilization for the purposes it was intended.

This concept is a factor necessary for the maintenance of fairness in the contractual relationship as well as for avoiding any future unforeseen matters between the contracting parties.

(III)- Penalty Clauses or Liquidated Damages in Accordance with the Egyptian Legislation and Courts Decisions :

Liquidated Damages at the Egyptian Legislation:

Liquidated damages pursuant to the Egyptian legislation are penalty clauses applicable for the delay of the execution of works. The penalty is dual in nature; it acts as a punitive clause and exercises pressure upon the contractor. Article (23) of the State Procurement Law promulgated by law No. 89 of 1998 stipulates that:

"If the contracting party delayed the work after the set completion date, the authority concerned, can, for public interest, grant the contractor an extension of time for total completion and it can impose a penalty (fine) pursuant to percentages and rules stipulated by executive regulations. The total (fine) shall not exceed (3%) of the total contract value in purchasing immovables, receiving services, consultation studies and technical works, and shall not exceed (10%) in public works and transportation".

The administration (state) shall collect the penalty for delay (fine) "ipso

1 Tylor, Op. cit., P. 383. See also Mohamed Abdel Mageed Ismail, International Public Works Agreements Arbitration , El Halabi Publishing, Beirut, 2003. P.220.

facto" without warning or any preliminary (or Judicial) procedures. The contracting party can be exempt from the penalty, after a legal opinion from the State Council, if the delay was out of the control thereof. The authority concerned accepts in this case, after consulting with the State Council, to exempt the contracting party from the fine, if the delay did not cause any damage.

The penalty imposed and collected from the contracting party will not violate the right of the authority concerned to reclaim compensation from the contractor for delay in executing works.

Article (83) of the executive regulations stipulates that:

"The contractor is obliged to complete works to be able to do preliminary completion at stipulated time."

If the contractor delays the completion of the work, the contracting authority, can, for public interest, grant him an extension of time for total completion. The penalty (fine) shall be imposed, from the beginning of this extension of time until the preliminary completion at a rate of (1%) for every week or part of a week.

The total value of the penalty (fine) shall not exceed (10%) of the total value of the contract price.

The penalty (fine) shall be calculated and deducted from the value of total works (take over certificate shall be considered), if the authority concerned decided that the delayed part of works of the project will directly or indirectly prevent the state from the utilization thereof at the stipulated time. If the authority concerned decided that the delayed part of the works will not cause such prevention, the fine calculation will be pursuant to previous percentages and conditions from the value of the delayed part of works only.

"The fine shall be immediately imposed upon occurrence of the delay without taking any other procedures (i.e. notification, or any judicial procedures)".

It is appropriate to refer to the previous State Procurement Law promulgated by law No. 9 of 1983 and the executive regulations thereof and abrogated by the current legislation (No. 89 of 1998). It was prohibited, until the new legislation was promulgated, to exempt the contractor from the penalty even if no damages occurred to the state.

The situation at the previous legislation was that the penalty was compulsory and obligatory even if there were no damages to the contracting public juristic entity.

The new trend with the 1998 legislation and the executive regulations thereof is that a contractor can be exempt from the penalty if the legal opinion

department at the State Council approved the exemption. Otherwise the contractor is obliged to pay the fine up to the cap (ceiling) stipulated under article (23) of the 1998 legislation, and article (83) of the executive regulations (10% of the total value of the contract price) even if there is no loss or damage to the state!!. If there is a delay, the penalty should be paid "Ipso facto" regardless of the fact that no damage or loss was suffered by the state.

Despite the fact that there are some enhancements in the new trend adopted by the current legislation, the fine still has its punitive and exorbitant nature. The penalty is due, at any circumstances, when there is a delay even in light of the current legislation stipulations. The penalty is an extravagant and exorbitant clause in the agreement in light of the state procurement law.

Public juristic entities (i.e. ministries, governorates, the cabinet, etc .....) in Egypt still accept this nature and apply these stipulations by state procurement laws (No. 9 of 1983 and No. 89 of 1998) without considering the harmful effect on the contractor by calculating this punitive penalty (10% of the total value of the contract price) and setting off this amount from his payments, especially the final certificate. The contractor has to reclaim this amount through either State Council courts or arbitration. This paper will examine the decisions of the Supreme Administrative Court of the Egyptian State Council and the legal opinion department (fatwa) from a comparative perspective with the Egyptian civil law perspective and cassation court in Egypt (civil and commercial circuits).

A) The Penalty under the State Procurement Law of (1998) and the Pre-estimated Compensation under the Egyptian Civil Code [Legislation] :

1- Article (224) of the Egyptian civil code stipulates that: "the agreed compensation is not due if the debtor proved that the creditor did not suffer any damages (loss).

2- A judge (or arbitrator) can reduce the amount of compensation if the debtor proved that there is an exaggeration in that amount to a great extent or that the original obligation was partially executed.

3- Any agreement contrary to the abovementioned provisions 224/1 and 224/2 is null and void".

Pursuant to article 225, if "he damages exceeded the agreed compensation value, the creditor cannot claim more than the stipulated amount unless the debtor is accused of committing fraud or a fundamental mistake".

The Egyptian doctrine[1] explains this agreed compensation as a pre-estimated compensation agreed upon and stipulated between the contracting

1 Dr PAbdel Wadood Yehia, Obligation stipulations at Egyptian Civil Law, Cairo(1987) pp 52-55 and Egyptian Cassation Court ,decision No 227, Civil circuit ,year 19,session 25/12/1968.

parties under the agreement or any of its appendices. This compensation is not due in the absence of loss or damages to the creditor. The court or arbitral tribunal can reduce the compensation if it is not adequate to the damages or "the contractor executed the contract partially, partial execution" to create a contractual balance between the due compensation amount and the damages. This dimension in the Egyptian civil code (which is based on Napoleonic codes) is to maintain fairness and balance of the contractual relationship.

These rules are mandatory pursuant to the Egyptian civil code.

The question is to compare the nature of the pre-estimated and agreed compensation, on one hand and penalties stipulated under the Egyptian State Procurement Law of (1998) on the other.

According to the nature of the penalties (fines) under article (23) of law No. 89 of 1998, these penalties resemble a fine on the contractor in public works agreements (domestic and international) up to (10%) of the total value of the contract price even if no damages occurred to the state contracting entity.[1]

This is a mandatory rule in the Egyptian legal system under an administrative contract. Consequently, the state must take this action of punitive nature pursuant to the law and exorbitant clauses in the administrative contract in light of this legislation without a need to any judicial action.

Conversely, the agreed compensation (Liquidated damages) in the Egyptian civil code applies to civil and commercial contracts which fall in the private law scope. First, the compensation aims to compensate the creditor in case of damages only. Second, this compensation should be fair and adequate to the actual loss. Third, the national court or arbitral tribunal can exercise its power to review the amount of compensation to assure that it is fair and adequate. These rules are mandatory in the domain of civil and commercial agreements.

International construction contracts fall under the scope of this article. Meanwhile, public works administrative contracts, whether domestic or international, fall under the scope of article (23) of the state procurement law and executive regulations thereof fall under article (83), unless there are different stipulations by faring contractor.

The Egyptian law recognizes rules the application of which can be avoided by the agreement of the contracting parties; they cannot avoid the application of any mandatory rules by their mutual consent as it is a matter of public policy. Thus, parties to any agreement cannot violate any valid mandatory rule under any circumstances at the Egyptian legal system.

1 It is worth mentioning that parties to the contract can stipulate different percentage or cap and this can supersede cap or percentages stipulated by law (This very rarely happens) an opinion from The General Assembly For Legal Opinion(fatwa) And Legislation, No. (800) dated 13/12/1999 session 20/ 10/ 1999 file No 54 /1/ 358.

B) Decisions of Egyptian Courts:

(i) Egyptian State Council :

Courts' decisions:

As the State Council has been codifying principles of administrative contracts since 1946, the Supreme Administrative Court distinguished between penalties in administrative contracts and liquidated damages which were pre-estimated and agreed upon in civil and commercial transactions (private law contracts).

The court confirmed that: "Penalties in administrative contracts differ in nature from pre-estimated compensation in civil and commercial contracts. The latter is a pr-estimated compensation agreed upon between the parties and payable upon breach of contract by any of the contracting parties. This compensation is conditioned to be paid in all stipulations of the Egyptian law for compensation in general, such as the necessity of damages to the other contractor, notification to the party who caused the breach and a court judgment which can reduce compensation if one of the parties proved that compensation exceeds damages or loss.

Meanwhile, the justification of penalties in administrative contracts is to guarantee the execution of these contracts at the stipulated time. The fundamental principle in administrative law of "running the public utilities in discipline and regularity" is the main justification and reason behind codifying these penalties in administrative contracts. These penalties (fines) are imposed by the administration (state) as an administrative procedure without court judgment or arbitral award, once a breach by the contractor occurs, the state can calculate the fine and settle the account of the contractor by setting-off the amount of fine from the payments made thereby pursuant to the contract without any necessity or need to prove damages.

It is not acceptable from the contractor to prove that no damages occurred, as the administration (state) has stipulated, under the contract, a certain time for completion of works, taking into consideration the essential need to public utility to execute works at the stipulated time without delay 1 . Damages are always presumed".

The Supreme Court elaborated in this leading case that "the penalty (fine) is applicable in case of delay without a need to notify the contractor or to prove that damages occurred. If the appeal administrative court stipulated that there must be damages to the state to apply the penalty, this judgment by the appeal

1 Supreme administrative court - Egyptian State Council, principles of Supreme Administrative Court and the General Assembly for Legal Opinion (fatwa) and Legislation in administrative contracts in forty years, decision 1772-29,5/2/1985 and decision 741-27,28/5/1985. In the same meaning, decision 612-2,21/9/1960.

court should be annulated".

The court stated, in addition to the abovementioned principles, that the administration (state) can reconsider the surrounding circumstances of the contract and exempt the contractor from the penalty (fine) if it assumed that there is no harm to the public interest caused by the delay, or that the final completion of works at the stipulated time is not necessary in this particular case. This is an implied exemption to the contractor from the penalty (fine). [1]

The Supreme Administrative Court exempt the contractor in some occasions from the penalty (fine) despite the fact that it has confirmed the punitive nature of the penalty as a penalty clause in the public works agreement imposed by the state upon the contractors without a need to proof that damages occurred to the state. In this case, there is a presumption that damages exist promptly when there is a delay.

In the past, the administration could not exempt the contractor from the penalty as it needed a court decision or a legal opinion from the department concerned (fatwa department) at the State Council pursuant to the current legislation No. 89 of 1998. This is the only difference between the old and new legislation as the new legislation facilitated the process for the state to exempt the contractor from the penalty by only a legal opinion from the opinion department (fatwa) rather than a court judgment which may take many years. If the contractor failed to obtain a legal opinion in his favor, he has to start either arbitration or litigation for some years. During these years, the value of the currency may possibly depreciate causing the inflation rate to increase in third world countries, in particular, and the contractor can only reclaim the fine deducted from his payments plus an interest rate of 5% from the date of reclaiming the amount until the actual payment by the state through either an enforceable court judgment (appeal court Judgment at least) or an arbitral award pursuant to the Egyptian Arbitration Act No. 27 of 1994 and the amendments thereof (law No. 9 of 1997) confirming the application of this act to administrative contracts whether national or international.

Moreover, It is very difficult to deny the loss to a contractor and in addition the consequential loss that he could not recover even by a court judgment in most cases. At that stage, the significance of arbitration appears as it is in most cases prompt and adequate to the loss because of the vast authority entrusted to arbitrators and the flexibility to apply different rules of law in various cases. The parties can achieve a rapid resolution through a final and binding award.

The Supreme Administrative Court in recent decisions [2] confirmed an

1 Ibid.

2 Supreme Administrative Court decision in case 10834 year (47) 30/5/2006 Third circuit and case 11986 year (48) 16/1/2007 Third circuit.(unpublished decisions).

extravagant and exorbitant clause of the fines as a penalty for delay despite the fact that in certain cases the contractor may be exempt.

It is fundamental to refer, at this stage, that the supreme administrative court in one of the most recent decisions held that "at the scope of application of the previous law No 9 of 1983, the administration can impose a fine 1% of the contract value in the first week of delay or part of it , 1.5 % of the contract value in the second week of delay or part of it , 2 % of the contract value of the third week of delay or part of it, 2.5% of the contract value of the fourth week of delay or part of it and 4% of the contact value of every month of delay or part of it .The total amount shall not exceed 15% of the total contract price according to the final certificate."

A new approach was adopted by the court confirming a new perspective in interpreting law No 9 of 1983.The court confirmed that the above mentioned rates shall not be calculated together which means that in the fourth week of delay the court shall apply a fine of only 2.5 % rather than the old practice by courts which used to add the fine of the four weeks together to be 7 % of the total value of the contract price:

1%+1.5%+2%+2.5% = 7%.

The court confirmed that there is no addition to these percentages by calculating them together. Moreover, the court added another new approach that, in certain contracts, the administration can get benefit from part of the completed works by the contractor, the stipulated percentage 2.5 % at the fourth week, pursuant to the new interpretation, shall be calculated of the price of the other part of the contract that has not been completed.

The price of the delayed part =107355.5 Egyptian pounds X 2.5 % = 2684 Egyptian pounds.

This amount shall be deducted from the final certificate by set off. [1]

This new approach reflects to what extent how globalization affects the application and interpretation of the legislative clauses even if it is punitive and extravagant. It is clear to what extent judges are trying to achieve fairness at the contractual relationship between state and contractor. They are obliged to apply the legislation as stipulated by the legislator. It is clear how there is an essential need to adopt new concepts by the Egyptian legislator which are not

1 The Supreme Administrative Court ,case 11874,year 49, session, 10/3/2009(unpublished)

exist even in the new legislation No 89 of 1989.[1]

The General Assembly for Legal Opinion (Fatwa) and Legislation:

In 1965 the General Assembly for Legal Opinion (Fatwa) and Legislation pointed out that "the nature of administrative contracts is different from the nature of civil contracts as administrative contracts are made by and between a public juristic entity and a private entity in order to achieve public interest. The contracting parties in administrative contracts, entered into by the state, are not in equal bargaining power. The target of these contracts is to value public interest over the interest of the contractor. This target must appear in the provisions of the contract, the contractual relationship and, in particular, the application and interpretation of the contract.

The administration (state) shall consider the punitive clauses stipulated under the contract and which are suitable to the nature, value and time considerations thereof in order to achieve final completion in a certain method so as to maintain regularity of public utilities..... In case of delay in execution by the contractor, there is a fundamental presumption that damages exist regardless of the practical reality. Any delay by the contractor is considered an act of violation and unorganization employed by the administration in managing the institutions thereof. There is no doubt that this delay interferes with public interest which is the main concern in administrative contracts". [2]

In another decision, the General Assembly confirmed the views of the decisions of the Supreme Court that "the penalty for delay must be calculated and deducted from the payments made by the contractor by set-off. The contractor cannot be exempt from this penalty if the administration was ready to accept works upon final completion. The contractor can only be exempt if the state delayed accepting works past the stipulated time . The existing case was that the administration was ready for inspecting, commissioning and accepting works meanwhile the contractor delayed. The General Assembly applied the penalty for delay clauses" . [3]

A leading principle confirmed that a pre-exemption from the penalty for delay in a contract is illegal. The power to exempt a contractor shall be exercised

1 Dr Mohamed A M Ismail ,Globalization and Liquidated Damages in the International Public Works Agreements ,An Analytical Perspective for the Penalty of Delay Clause in Infrastructure Agreements ,The International Construction Law Review ,London , Informa , Vol. 26,Part 4,Oct.2009.

2 Legal Opinion No. 845 issued on 6/9/1965 session 4/8/1965 file No (78/1/37).

3 Legal opinion (116), issued on 25/1/1988, session 23/12/1987, file No. (32/2/1641) and in the same meaning see: Legal opinion No. (1196) dated 28/12/1991, session 1/12/1991 ,file (54/1/283).

only if it is necessary and in light of legislative and contractual stipulations (set out by the Egyptian legislator and Egyptian State Council)[1]

In one of the recent decisions, which fall in the scope of application of the State Procurement Law of (1998), the General Assembly decided that "penalty for delay in public works agreement is obligatory. There is an obligation upon the contractor to achieve final completion at stipulated time in the contract. If the contractor delayed in the execution of works as a result to default by the administration to execute its obligations, this obligation by the administration is fundamental to the contractor to carry out his obligations. The mutual consent of the contracting parties to modify the contract and add a clause for the extension of time, impliedly means an exemption from the penalty for delay at the stipulated extension of time period added to the contract by the parties" [2]

The General Assembly affirmed in many occasions that civil and administrative contracts must be executed according to the principle of good faith (bona fide). The penalty for delay is stipulated for the specific purpose of regularly maintaining the attainment of public utility at the stipulated time. Damages are presumed. The contractor cannot be exempt unless there is a force majeure or default by the administration[3]. The administration has to exercise its power in imposing a penalty on the contractor or exempting him therefrom. If the administration, prima facia, exempts the contractor for particular reasons, it is legal that the administration can re-impose a penalty for delay if there is a considerable consideration [4]

(ii)Decisions of the Egyptian Cassation Court (civil and commercial circuits) :

The cassation court directly applied stipulations of article 224 of the civil law. The court held in some of the leading cases that "in the light of article (224) of the Egyptian civil law if there is penalty clause in the contract , damages are presumed unless the debtor proved the opposite or that stipulated compensation at the contract exceeded the actual loss". [5] [6]

The court held in recent cases that "the contracting parties can fix a pre-

1 Legal opinion (106), issued 22/1/1992, session 19/1/1992 file No. (54/1/291).

2 Legal opinion (364), issued 25/5/2003, session 16/4/2003 file No. (54/1/403).

3 Legal opinion No. (528) dated 3/6/1991, session 5/6/1991,file(37/2/419).

4 Legal opinion (668) issued 25/8/2004, Session 21/4/2004, file No. (47/2/449),In the same meaning see: Dr Mohamed A M Ismail ,Supra, I.C.L.R ,Vol. 26,Part 4 ,Oct. 2009.

5 Egyptian Cassation Court, case 415, year 46, 13/2/1980

6 Egyptian Cassation Court, case 26, year 38, 18/12/1973.

estimated compensation for damages as a result for non performance of any of the stipulated obligations ..... .If the debtor proved that the pre-estimated compensation exceeded the actual loss or that he performed some of his obligations court shall reduce compensation to be adequate to actual loss". [1]

The same principles still adopted by the court until present.

Conclusions:

The judicial review of the State Council courts and General Assembly for Legal Opinion *(Fatwa)* and Legislation, at its most optimistic scenario, can exempt the contractor in certain cases stipulated at the Egyptian State Council practices. The contractor can be exempted from the penalty for delay in case of *force majeure* or fundamental default, by the state, which exempts the contractor from his obligations and, consequently, from the penalty for delay. This is not contrary to the punitive nature of the penalty for delay clause as this clause is always a penalty clause. Egyptian administrative courts recognize penalty clauses in administrative contracts, whether national or international, and consider them legal.

If there are no damages, consequently, there is no loss to the state; the contractor can be exempt from the pre-estimated sum stipulated by the Procurement Law of (1998) or the contract, only in case of a legal opinion from the state council.

These current changes in the last decade are direct result of globalization.

Transfer of the legal culture From common law countries is of great importance as the administrative contract theory needs more modifications and enhancements.

Globalization plays a significant role in changing some of the main features of this theory to be adopted through drafting international public works agreements with Private foreign entities .It is a new trend in the civil law legal culture.

It is strongly recommended that there is an essential need for a legislative reform of article (23) of the State Procurement Law of (1998) to reduce the cap of the fine to be less than 10% of the total value of the contract price. It is fundamental to propose that the penalty shall be calculated according to the actual loss and no pre-estimated and fixed sum by legislations and regulations shall be applied as it exceeds the actual loss.

The penalty can even reflect the substantial loss to the state public utility

1 Egyptian Cassation Court, cases 1859, 2444, 2447, year (70), 12/6/2001.

and be calculated pursuant to this loss which may be less than the actual loss in many cases. In Common law jurisdictions as stated above the Anglo- American case law considers liquidated damages genuine pre-estimated compensation that should be estimated according to the actual loss (Damages). In some cases the contractor can be exempted from the penalty if the substantial completion was achieved in a reasonable time and the state can start utilization of the completed part on the stipulated purpose. Despite the fact that some recent cases applied liquidated damages clause and considered it valid, the latter view considered the stipulated sum adequate to the actual loss. The clause was not applied as a penalty clause at any circumstances.

Among other difficulties which need to be considered is that in accordance with the principles of the administrative courts of the State Council [1] a contractor, in certain cases, cannot suspend or terminate works if the administration terminates his payments. He cannot claim to stop execution until he gets his payments from the state. In that case, the administration applies article (23) on the penalty for delay if he does not achieve final completion at the stipulated date despite the fact that he is not paid his payments by the administration.

This critical situation needs a legislative reform of the state procurement law No. 89 of 1998 as termination of payments is an example of a fundamental default (breach of contract), by the state, pursuant to the Egyptian civil code . Few exceptions to this principal by Egyptian state council courts considered direct result of globalization.

Contrary to this concept, in civil and commercial transactions, pursuant to article (161) of the Egyptian civil legislation, if one party to a contract failed to fulfill his obligations, the other party can suspend or terminate performance.

Moreover, the proposed legislative reform must consider the dynamic relationship in the international public works agreements which differ from static relationships in other transactions. This dynamic relationship is related to many factors such as contract price, total sum stipulated as penalty, the extent to which it is adequate to the loss, currency depreciation, inflation rate, contractual relations with lending banks, insurance institutions and the change in raw material prices in developing countries, which may change contract price under different circumstances.

1 Contractor cannot stop or suspend performance of works at any circumstances even if the state fails to make payments, in that case the penalty for delay is applicable [Supreme Administrative Court- case 5959, year (44), 26/1/2001] .In very rare occasions the court allowed contractor to stop performance if the state delayed his payments [i.e case 4483, year (41), session 6/5/1997]. In some other (rare) cases the contractor stipulates at the contract that the period of late payments shall be added to the completion date. This clause is valid as it is not contrary to mandatory rules of the state procurement law. An old Legal opinion confirming that in some cases the contract provisions can supersede procurement law .Legal opinion for the General Assembly (fatwa)No (100),session 20/3/1985 ,file(47/2/350).

In conclusion, the penal nature of the penalty for delay clauses in the state procurement law under Egyptian law No. 89 of 1998 and the executive regulations thereof need a legislative reform of the fine stipulated by the state as well as a reconsideration of many other aspects.

Modifications and enhancements to the legal regime governing international public works agreements will increase foreign direct investments (FDI) in the construction sector and infrastructure projects. New types of infrastructure agreements began to appear such as (Public-Private Partnership agreements) PPPs in France since 2004 (by decree No 559 of 2004,in June the 17th , which was affirmed by the French Conseil d'Etat in 29 /10/2004famous decision)[1] and currently in Egypt since 2005 under the Egyptian Ministry of Finance supervision (PPP Central Unit). Both systems recognized the latter mechanism following the English legal system which started this legal concept in financing, building operating public utilities since 1989. Moreover, PPPs can assist in developed countries in climate change mitigation as legal systems in these countries stipulate that newly established projects must adopt certain technologies friendly to environment.[2]It is worth mentioning that the legislation of the PPP transactions in Egypt is not considering these transactions administrative contracts and consequently are not subject to the state procurement law, concessions law No 129 of 1947 or natural resources concessions law No 61 of 1958.

Civil law concepts and mechanisms in the administrative contract need complete revision and the judicial review by the State Council courts will advance as a result of the legislative reform.

Globalization is playing a significant role as a tool to implement the abovementioned legal views and facts to encourage private foreign entities entering into infrastructure agreements with states as well as financial institutions.

Finally, this legislative reform shall assist arbitral processes in international construction contracts arbitration between developing countries and foreign contractors. The arbitral tribunal in applying substantive law to facts has to determine first if the contract is an administrative contract and the fixed sum is

1 WWW.consiel-etat-fr/jurispd/index-ac.10442.html

2 See: Dr Mohamed AM Ismail, Legal Globalization and PPPs in Egypt "an analytical and comparative perspective on the current legislative and judicial modifications to and enhancements of the administrative contractual regime on PPP transactions" European PPP Law Review, Germany, March 2010(in English) and also by the same author: Public Economic Law and New International Administrative Contract, El Halabi Publishing Co., Beirut, 2010, PP 175-185.Geoffray Hamilton, FDI, the Global Crises and sustainable recovery ,working paper for public private partnership and FDI as means of securing a sustainable recovery, paper submitted to the fourth Columbia International Investment Conference ,Columbia University, Nov.5-6 ,2009. Dr Ragab Mahmoud, PPP agreements, Dar ElNahda el Arabia,2007.

a penalty and is applicable regardless to any existing loss or it is a commercial contract and consequently the pre-estimated compensation is subject to the arbitral tribunal review to be adequate to the actual loss. This is the current situation at the Egyptian Legal System where a legislative reform shall establish new concepts to be applied in both arbitration and litigation.