

NEC Secondary Option X7 Delay Damages

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About Us




GVE Commercial Solutions Ltd are a commercial management consultancy providing quantity surveying and programming services. Our consultants specialise in the NEC forms of contract.

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Damages

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What are they?

Damages are a legal remedy in the form of a monetary payment, awarded to a party that has suffered a loss or injury.

Many damages provide relief based on a 'compensatory principle', which seeks to place the claimant in the position they would have been in 'but for' the act(s) which have caused them loss.

Breach of Contract

Where a breach of contract causes loss, that party is entitled to be placed in the position they would have been in had the contract been performed.

There are additional rights in respect of a contractual breach, depending upon whether the breach relates to a condition, an innominate term or a warranty.

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Liquidated damages



To claim damages for breach of contract, the party suffering the loss is required to prove the following;

- That there has been a breach of contract,
- That the breach has caused a loss,
- The amount of the loss.

Any such claims to demonstrate the above issues can be time consuming, expensive and damage commercial relationships.

A common way to overcome the 'burden of proof' is to decide in advance what the level of damages are for a specified breach.

This process 'liquidates' the damages into a precise sum of money known as 'liquidated damages' or 'liquidated and ascertained damages'.

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Liquidated damages - delay



A damages amount can be 'liquidated' for a particular breach of contract, either as a stated sum of money or an amount which can be calculated under the contract.

The use of a pre-determined amount provides for;

- A simple calculation of the sum,
- No requirement to prove 'loss',
- Commercial certainty,
- An incentive measure.

This application is common for a 'delay' whereby an amount is calculated which represents the sum of money associated with failure to deliver by a specified date.

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Penalty

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Principle

If a 'liquidated damages' sum represents a 'genuine pre-estimate' of loss then it is recoverable.

Where the specified sum is aimed at deterring a breach of contract, it becomes 'penal damages' or a 'penalty'.

If 'liquidated damages' are determined to be a penalty then the claimant would need to pursue damages for actual loss instead.

The Dunlop v New Garage Motor Co Ltd (1915) case established the principles of a penalty clause, as follows;

- the sum specified is 'extravagant and unconscionable' compared with the greatest possible loss,
- a larger sum is payable after non-payment of a smaller sum,
- a single sum is payable on occurrence of one or more events.

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Development



The courts have been increasingly cautious with overturning penalty clauses, culminating in the case of; Cavendish v Talal El Makdessi, which was paired with ParkingEye v Beavis (2015).

The court decided that the true test was whether the 'provision' (penalty clause) is a 'secondary obligation' which imposes a;

'detriment ... out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation'.

The test is whether the sum, or remedy, is 'extravagant, exorbitant or unconscionable' with consideration to;

- Whether there is a legitimate business interest in charging the sum,
- Whether there is wider commercial or socio-economic justification.



X7 – Delay damages

NEC Suite



Secondary option X7 can be found in the following NEC forms of contract;

- Engineering and Construction Contract (ECC),
- Engineering and Construction Subcontract (ECS),
- Professional Services Contract (PSC),
- Professional Services Subcontract (PSS),
- Supply Contract (SC).

A delay damages provision within the contract terms, at clause 50.6, is also found in the following NEC forms;

- Engineering and Construction Short Contract (ECSC),
- Engineering and Construction Short Subcontract (ECSS),
- Professional Services Short Contract (PSSC),
- Term Services Short Contract (TSSC),
- Supply Short Contract (SSC).

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Other NEC forms



Delay damages could also be included within the following;

- Term Service Contract (TSC) – Task Order,
- Facilities Management Contract (FMC) – Project Order,
- Facilities Management Subcontract (FMS) – Project Order.

The following NEC forms also include a Performance Table;

- Facilities Management Contract (FMC),
- Facilities Management Subcontract (FMS),
- Design Build and Operate (DBO),
- Alliance Contract (ALC).

Whilst there is no express provision for delay damages within the Performance Table, this could be included as a performance target.

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Option X7



All of the NEC forms with Option X7 require the 'supplier' to;

- Pay delay damages,
- At the rate stated in (Sub)Contract Data,
- From the (Subcontract) Completion (Delivery) Date,
- Until Completion (Delivery).

(Subcontract) Completion (Delivery) Date

This is stated in (Sub)Contract Data and is the date by which Completion is to be achieved.

Completion (Delivery)

This is essentially the 'condition' or 'state' of the work or service, as described at sub-clause 11.2.

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Take over



The requirement to pay delay damages also ends when;

- The (subcontract) works are 'taken over' (ECC and ECS),
- The Purchaser 'uses' the goods and services (SC).

The 'use' provision relates to the 'whole of' the goods and services.

For ECC and ECS forms 'works' may relate to a section under X5.

Under the ECC and ECS forms there is also the right to take over 'part' of the works before Completion has been certified.

Where take over in 'part' occurs, then the benefit is assessed and delay damages are proportionately reduced.

The benefit is assessed at the point of take over and applied to the amount stated in Contract Data.

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Payment of delay damages

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Payment

Once the (Subcontract) Completion (Delivery) Date has passed where Completion (Delivery) is not achieved, then delay damages become due.

Any assessed amount is included in a payment certificate as a deduction, determined under sub-clause 50.3 which states;

- Less amounts to be paid by or retained from

Any assessed amount for delay damages does not constitute Price for Work (Service, Goods and Services) Done (Provided) to Date, so would not be taken into consideration for the following;

- Retained amounts,
- Share calculation,
- Price adjustment for inflation.

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Payment - VAT



Value Added Tax (VAT) is a tax on the supply of goods and services.

Historically, Her Majesty's Revenue and Customs (HMRC) guidance confirmed that payments described as 'compensation' were typically outside the scope of VAT.

The HMRC guidance has recently been amended, however, to include the possibility of supply and consideration.

In the 2015 cases of Cavendish v Talal El Makdessi and ParkingEye v Beavis the courts considered 'wider commercial interests' which extended beyond the recovery of a 'genuine pre-estimate' loss.

Where delay damages consider 'wider commercial interests' could they fall inside the scope of VAT (at least in part)?



X7 – October 2020 amendments

Oct 2020 amendments



NEC published amendments to the standard form of contracts in October 2020, including an addition to option X7 whereby delay damages cease at the date upon which termination is certified.

The changes reflect the Court of Appeal (CoA) decision in the case of; Triple Point Technology Inc v PTT Public Co Ltd [2019] EWCA Civ 502

The CoA decided that delay damages were not applicable upon termination, which meant that any such damages that had already accrued 'fell away' at the point of termination.

The case was appealed to the Supreme Court who 'reversed' the CoA decision and determined that delay damages applied up to the point of termination.

Termination was determined to have a 'prospective' effect on the parties rights and obligations.

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Option X7 with X5

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Contract Data



If Option X7 is used without Option X5

Delay damages for (whole of works) are

If Option X7 is used with Option X5

Delay damages for each section of the works are

<i>section</i>	<i>description</i>	<i>amount per day</i>
(1)	<input style="width: 100%; height: 20px;" type="text"/>	<input style="width: 100%; height: 20px;" type="text"/>
(2)	<input style="width: 100%; height: 20px;" type="text"/>	<input style="width: 100%; height: 20px;" type="text"/>
(3)	<input style="width: 100%; height: 20px;" type="text"/>	<input style="width: 100%; height: 20px;" type="text"/>
(4)	<input style="width: 100%; height: 20px;" type="text"/>	<input style="width: 100%; height: 20px;" type="text"/>

The delay damages for the remainder of the works are

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Things to Consider

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Issues to consider



What if the Option X7 data entry in Contract Data is left blank?

What if Option X7 is selected but the entry in Contract Data states the amount per day as '£0', '£nil', 'none', 'N/A', etc ?

A delay damages 'holiday period'.

A delay damages 'cap'.

What if delay damages sum exceeds the interim payment amount?

Ensure that 'time' is managed properly under the contract.

Can you claim delay damages under X7 and also additional cost for failing to meet the condition stated for a Key Date?

Be aware of amendments to the definition of Completion.

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