

**INVESTIGATION ON CONTRACTUAL ASPECTS AND THE
CALCULATION OF LIQUIDATED AND ASCERTAINED
DAMAGES INCLUDED IN CONSTRUCTION CONTRACTS IN
SRI LANKA**

Kapugama Geeganage Malithi Chathurangani Samarajeewa

189569V

Thesis/Dissertation submitted in partial fulfilment of the requirements
for the
Degree of Master of Science in Construction Law and Dispute
Resolution

Department of Building Economics

University of Moratuwa

Sri Lanka

June 2024

DECLARATION

I declare that this is my own work, and this dissertation does not incorporate without acknowledgement any material previously submitted for a Degree or Diploma in any other University or institute of higher learning, and to the best of my knowledge and belief, it does not contain any material previously published or written by another person except where the acknowledgement is made in the text.

Further, I acknowledge the intellectual contribution of my research supervisor Dr. Menaha Thayaparan for the successful completion of this research dissertation. I affirm that I will not make any publication from this research without the name(s) of my research supervisor(s) as contributing author unless otherwise I have obtained written consent from my research supervisor.

Also, I hereby grant the University of Moratuwa the non-exclusive right to reproduce and distribute my dissertation, in whole or in part, in print, electronic, or other mediums. I retain the right to use this content in whole or part in future works such as articles or books.

.....

Samarajeewa K.G.M.C

.....

Date

I hereby acknowledge that Kapugama Geeganage Malithi Chathurangani Smarajeewa has followed the dissertation process for the Master's Dissertation set by the Department of Building Economics under my supervision.

.....

Dr. Menaha Thayaparan

Dissertation Supervisor

.....

Date

ABSTRACT

INVESTIGATION ON CONTRACTUAL ASPECTS AND THE CALCULATION OF LIQUIDATED AND ASCERTAINED DAMAGES INCLUDED IN CONSTRUCTION CONTRACTS IN SRI LANKA

Timely completion is crucial in construction projects, yet many encounter disputes regarding delays. The treatment of liquidated and ascertained damages (LAD) and penalty clauses serves as a significant risk mitigation strategy, contingent upon the governing laws of the contract. While numerous efforts have been considered to harmonize the contractual framework of liquidated and ascertained damages, inconsistencies are evident in the principles applied across various jurisdictions when assessing LAD. Although there have been many attempts to standardize the contractual structure of liquidated and ascertained damages, inconsistencies are apparent in the principles applied across different jurisdictions when evaluating LAD. Hence, this research investigates the contractual aspects concerning Liquidated and Ascertained Damages within the framework of construction contracts. The study incorporates a comprehensive literature review on the legal aspects of LAD across various jurisdictions, contractual implications, assessment methods, and associated disputes. Additionally, the study conducts semi-structured interviews with sixteen industry experts well-versed in contract administration and law. Manual content analysis has been used to meet its objectives. The findings illuminate practical applications and challenges concerning LAD provisions, considering factors like contractual interpretation, legal frameworks, and disputes. Ultimately, this study advances understanding of proper practices concerning LADs in construction contracts in Sri Lanka. The contribution of this research lies in enhancing the understanding of the considerations governing the imposing of Liquidated and Ascertained Damages from a legal and Contractual perspective.

Keywords: Construction industry, Liquidated and ascertained damages, Penalty, Contractual Aspect, Legal perspective

DEDICATION

**I dedicate this Dissertation affectionately to
my beloved Family for their love, endless
support, and encouragement!**

ACKNOWLEDGEMENT

I express my sincere gratitude to all who assisted me throughout my journey, inspiring and encouraging me up to this moment of my dissertation submission.

First and foremost, I express my heartfelt gratitude to my supervisor, Dr. Menaha. Thayaparan, for her invaluable guidance and assistance in making my research successful. I am indebted to my supervisor for guiding me in the right direction throughout the process

Further, I would also like to convey my sincere gratitude to the Head of the Department, Ch.QS. Prof. (Mrs.) Anuradha Waidyasekara, Programme Director, Ch.QS. Mr. Vijitha Disarathne, Former Programme Director Prof. (Mrs.) Yasangika Sandanayake, and all the lecturers of the Department of Building Economics, University of Moratuwa, for the immense assistance and guidance given to me during the course of this research. My sincere gratitude is extended to the program assistant, Mr. Waruna Vidya Adikari, and all members of the non-academic staff of the Department of Building Economics for their support. I would like to extend my appreciation to all the professionals who participated in this study, generously dedicating their time to gather data and share their valuable insights, despite their demanding schedules.

Last but not least, I thank my beloved parents, husband, son, daughter, siblings and friends for all the strength, care, and support they have given me in countless ways in this dissertation and throughout my life.

Samarajeewa K.G.M.C

June 2024

TABLE OF CONTENT

DECLARATION	I
ABSTRACT	II
DEDICATION	III
ACKNOWLEDGEMENT	IV
LIST OF TABLES	IX
LIST OF ABBREVIATION	X
CHAPTER 01	1
1.1 Background	1
1.2 Problem statement	3
1.3 Aim	4
1.4 Objectives	4
1.5 Scope and limitations	4
1.6 Methodology	4
1.7 Chapter breakdown	5
1.8 Chapter Summary	5
2 LITERATURE SYNTHESIS	6
2.1 Introduction	6
2.2 Construction Industry and Delay Damages	6
2.2.1 Brief Introduction to conflicts in the Construction Industry.....	6
2.2.2 Delay completions in construction projects and delay damages.....	7
2.3 Liquidated and Ascertained Damages.	8
2.3.1 Historical Background of Liquidated and Ascertained damages.....	8
2.3.2 What is denoted by LAD?.....	9
2.3.3 Difference between LD and LAD.....	9

2.4	Legal perspective of LAD under Different Jurisdictions	11
2.4.1	Common Law	11
2.4.2	Civil Law	12
2.4.3	Principles derived from Case Laws	13
2.5	Contractual Background of LAD	15
2.5.1	Contractual Implications	15
2.5.2	LAD Clauses in Construction Contracts	15
2.5.3	Advantages of LAD Clauses	16
2.6	Enforceability of LAD	17
2.6.1	Legal and Contractual Requirements	17
2.6.2	Penalty Doctrine	17
2.6.3	Penalty Vs LAD	18
2.7	Assessment of LAD	20
2.7.1	Basis of Assessment	20
2.7.2	Methods of LAD Assessment.	20
2.7.3	Key factors to considered in LAD assessment.	21
2.7.4	Practical Implications in LAD Assessments	22
2.8	Disputes Related to LAD	23
2.8.1	Challenges in Quantification of Damages	23
2.8.2	Disagreement over applicability and validity of LAD Clauses	24
2.8.3	Ambiguity in interpretation of contract terms	24
2.8.4	Force Majeure events	24
2.9	Chapter Summary	25
CHAPTER 03		26
3	RESEARCH METHODOLOGY	26
3.1	Introduction	26
3.2	Research Design	26
3.3	Research Approaches	27
3.3.1	Available research approaches	27
3.3.2	Selected Approach for this Study	29
3.4	Research Strategy	30
3.5	Research Method	30
3.5.1	Selected data collection method for this study	30

3.5.2	Selected data Analysis methods adopted in the study.....	31
3.6	Research Process	32
3.7	Chapter Summary	33
4	DATA COLLECTION AND ANALYSIS.....	34
4.1	Introduction.....	34
4.2	Administration of Semi-Structured Interviews.....	34
4.3	Objectives of Semi-Structured Interviews.....	34
4.4	Respondents' details for interviews.....	35
4.5	Research Findings.....	37
4.5.1	Current practice of LAD Assessment.....	37
4.5.2	Disputes in LAD Assessment.....	38
4.5.3	Reasons for Disputes in LAD.....	43
4.5.4	Investigation of existing Strategies for LAD Assessments.....	48
4.5.5	Suggestions to Proper Practice of LAD	51
4.5.6	Discussions of Interview findings.....	53
4.6	Chapter Summary	54
5	CONCLUSIONS AND RECOMMENDATIONS	55
5.1	Introduction.....	55
5.2	Overview of Objectives Achieved in the Study	55
5.3	Recommendations	57
5.4	Limitations.....	58
5.5	Further Research	58
5.6	Chapter Summary	58
	REFERENCES.....	59
	APPENDIX A: SEMI-STRUCTURED INTERVIEW GUIDELINE.....	65

LIST OF FIGURES

Figure 1.1 Chapter Breakdown	05
Figure 3.1: Research Process	32
Figure 4.1: Reasons for disputes in LAD Assessment.....	41
Figure 4.2: Strategies for LAD Assessment.....	46
Figure 4.3: Suggestions for proper practice of LAD.....	49

LIST OF TABLES

Table 2. 1: Comparison of LD and LAD	10
Table 2. 2: Comparison of penalty clauses vs LAD clauses	18
Table 2. 3: LAD Assement Factors.....	21
Table 4. 1: Details of Interviewed Respondents	34
Table 4. 2: LAD Assessment methods in Sri Lanka	36
Table 4. 3: Disputes in LAD Assessment	37
Table 4. 4: External Factors militting LAD	47

LIST OF ABBREVIATION

LD	Liquidated Damages
LAD	Liquidated and Ascertained Damages
EOT	Extension of Time
FIDIC	Fédération Internationale des Ingénieurs - Conseils'
SBD	Standard Bidding Document
IQSSL	Institute of Quantity Surveyors Sri Lanka
JCT	The Joint Contracts Tribunal
CIDA	Construction Industry Development Authority
QS	Quantity Surveyor