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CONTRACTS-VALIDITY OF "NO DAMAGE" CLAUSE

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CONTRACTS—VALIDITY OF "NO DAMAGE" CLAUSE—A "no damage" clause in a contract with a housing authority for the construction of a housing development provided that "no payment or compensation of any kind shall be made to the contractor for damages because of hindrance or delay from any cause in the progress of the work, whether such delays be avoidable or unavoidable." Contractor sought to recover from the housing authority for delay caused by arbitrary and unreasonable conduct of the authority. *Held,* the contractor could not recover unless the delay or hindrance was caused by fraud, bad faith, or malicious intent. *Psaty & Fuhrman, Inc. v. Housing Authority of City of Providence,* (R.I. 1949) 68 A. (2d) 32.

In the absence of any contract provisions to the contrary, a building contractor has the right to recover damages resulting from a delay caused by the fault of the contractee.[1] However, "no damage" clauses, precluding contractors from recovering damages in this situation, have been uniformly upheld, although they have been strictly construed.[2] Such clauses should be considered in connection with other types of provisions inserted by contracting parties in an attempt to regulate damages and liability.[3] Other provisions have not been so effective. Courts will give effect to clauses providing for liquidated damages when the actual damages will be uncertain in amount and the parties have made a good faith attempt to estimate their probable amount. On the other hand, courts will never give effect to penalty clauses because of their dislike of forfeitures. Whether a clause will be deemed to be one or the other is determined on the basis of the intention of the parties. If the clause is inserted merely to compel performance of the contract, and

[1] Wyckoff Pipe & Creosoting Co., 271 U.S. 263, 46 S.Ct. 503 (1926); 115 A.L.R. 65 at 66 (1938).

[2] Wells Bros. v. United States, 254 U.S. 83, 41 S.Ct. 34 (1920); Woods v. United States, 258 U.S. 120, 42 S.Ct. 209 (1922); 115 A.L.R. 65 at 80 (1938).

[3] For a discussion of these other provisions see, GRISMORE, CONTRACTS §201 (1947).

not as a reasonable estimate of probable damages, it will be held a penalty and disregarded. The more doubtful case is that in which the parties have put in a clause for the purpose of limiting liability. Apart from cases involving the right of public utilities to limit their liability, in which special theories have been developed,[4] courts have differed on the validity of these clauses. One English court allowed a damage provision in which the damages stipulated were such as to limit liability to an amount much below the actual loss.[5] However, the few American courts considering the question have usually construed these clauses as penalties and have refused to enforce them.[6] The problem arises when "no damage" clauses are compared to clauses limiting liability. The basic purpose of both types of provisions is the same, to limit or preclude the recovery by the party injured; and consistency requires that courts should deal with both clauses in the same manner. This is not done by American courts. In cases upholding the "no damage" clauses, the courts talk about the freedom of the parties to contract, and the desirability of giving full effect to the contract as made. For some reason the question as to the validity of the "no damage" clause is never raised in the cases; the only problem discussed is one of construction of the clause. In those cases which deny limitations on liability, the courts discuss their policy against penalties and the fact that the law favors indemnity and will not allow parties to deprive themselves of just compensation for their loss. The cases are difficult to reconcile on a purely theoretical basis, but a distinction may be found in the fact situations. "No damage" clauses are generally found in construction contracts relating to public improvements, and such clauses refer only to damages for delay. In the very few cases dealing with attempts to limit liability to a specified sum, the provisions are found in contracts between private parties and are usually directed against damages caused by a failure of performance. Thus, there is a difference in the character of the contracting parties and in the type of breach for which the parties seek to regulate damages.

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[4] 16 CORN. L.Q. 380 (1931).

[5] Cellulose Acetate Co. v. Widnes Foundry, [1933] A.C. 20. Discussed in 171 L.T. 493 (1931); 171 L.T. 305 (1931); 80 UNIV. PA. L. REV. 451 (1932). Following the Cellulose case: 1 CONTRACTS RESTATEMENT §339(1) comment g (1932); WILLISTON AND THOMPSON, SELECTIONS FROM WILLISTON'S TREATISE ON THE LAW OF CONTRACTS, rev. ed., §781A (1938).

[6] McCelvy v. Bell, (Tex. Civ. App.) 6 S.W. (2d) 390 (1928); Shreve v. Brereton, 51 Pa. 175 (1865); Bonhard v. Gindin, 104 N.J.L. 599, 142 A. 52 (1928); Pengra v. Wheeler, 24 Ore. 532, 34 P. 354 (1893); 25 C.J.S. 673 (1941); 15 AM. JUR., Damages, §251, p. 683 (1938).