

Liquidated damages: Canadian adoption, divergence and the necessity for restatement

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Liquidated damages are a common element in Canadian construction contracts and serve as a useful risk allocation mechanism. However, despite their utility, these seemingly straightforward provisions can be problematic for legal practitioners, as a result of the Canadian common law having diverged from the traditional doctrine over the past several decades. The resultant state of flux can make it difficult to ascertain whether the liquidated damages in a particular contract will be found by a court to be enforceable or set aside as a penalty, which erodes contractual certainty.

In their article, *Liquidated Damages: Canadian Adoption, Divergence and the Necessity for Restatement*, Osler partner [Rocco Sebastiano](#) and associate [Jeff St. Aubin](#) explain the necessity for a restatement of the law of liquidated damages in Canada and set out recommendations for what such a restatement should include. Rocco and Jeff specifically consider:

- the origin of the penalty rule and the development of the law of liquidated damages;
- whether the penalty rule should remain operative in Canadian law;
- the role, if any, that unconscionability should play in the law of liquidated damages;
- the United Kingdom Supreme Court decision in *Cavendish Square Holding BV v Talal El Makdessi*; and
- the path Canadian courts may take going forward.

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