Quantification of damages in international arbitration – selection of issues from a civil law perspective

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Introduction

- Focus of presentation:
  - Commercial arbitration
  - Contractual liability

- Importance of applicable law

- Importance of arbitrators’ legal background

- Range of legal systems in civil law world

- Civil law vs. common law:
  1. Differences with limited impact on damages
  2. Differences with potentially more impact on damages
1. Differences of limited impact

1.1 Specific performance v damages

- Different starting point in case of breach: civil law (specific performance) vs. common law (damages)

However,

- Damages available and same underlying principles applicable:
  - Common law: position the injured party would have been in if it had not sustained the wrong
  - Civil law (France): réparation intégrale, full compensation, actual loss and lost profits
  - Civil law (Switzerland): full compensation, intérêts positifs or intérêts négatifs
1. Differences of limited impact

1.2 Foreseeability (certainty/remoteness) vs. causation

- Common law (England): foreseeable loss, *Hadley v Baxendale*
- France: foreseen or foreseeable loss, Art. 1232-2 CC
- Switzerland: natural causation and adequate causation

However,

- Different terminology and reasoning, result likely to be the same
- The issue of loss of chance (Swiss restrictive approach)
1. Differences of limited impact

1.3 Duty to mitigate

- Common law (England): clear duty to mitigate

- France: no stand alone duty
  - However, duty of good faith, discretion of adjudicator, *lex mercatoria*

- Switzerland: power of adjudicator to reduce damages if the injured party is responsible for the increase or aggravation of the loss (Art. 44.1 CO)
  - Practically, similar to a positive duty to mitigate
2. Differences with potentially more impact

What impact?

➢ Availability of certain categories of damages
  ▪ Ultimately dictated by applicable law

➢ Quantification: interpretation of limitation of liability clauses, assessment of evidence on quantum
  ▪ Room for interpretation and impact of arbitrators’ legal background

➢ Challenge of award for breach of public policy?
2. Differences with potentially more impact

2.1 Notice requirements

- Law requires notice to perform within a period of time prior to exercising right to claim damages (with exceptions, e.g. non-performance is final)

- France: Art.1231 CC

- Switzerland: Art.102, 107-109 CO: notice and obligation to elect early between *positive* (expectation) or *negative* (reliance) loss

- Failure to notify/elect remedy can be fatal
2. Differences with potentially more impact

2.2 Possible award of damages for moral damage in contractual claims

- England: generally damages for non-pecuniary loss in tort only

- France: damages for non-pecuniary loss, including moral damage, available in purely contractual claims, provided it is compensatory, discretion of the judge

- Switzerland: more restrictive, applies to contractual cases but only awarded to natural persons
2. Differences with potentially more impact

2.3 Enforceability of penalty clauses

- England:
  Liquidated damages clause (enforceable) vs. penalty clause (not enforceable)

- Civil law (France and Switzerland):
  - Standard *clause pénale* may also serve a punitive function
  - Enforceable provided it is not manifestly excessive

- Room for interpretation by arbitrators

- Enforceability of award applying “penalty clauses”
2. Differences with potentially more impact

2.4 Restrictions by law on exclusion / limitation of liability clauses

- Parties can decide on the allocation of risk
- But limitations imposed by law: no exclusion or limitation of liability in case of gross negligence or wrongful intent
- France: Art. 1231-3 CC / Switzerland: Art. 100.1 CO
- Lower threshold than fraud
- Room for interpretation by arbitrators
2. Differences with potentially more impact

2.5 Judge’s discretion in quantifying damages?

- Common general approach: discretion of the judge, but:
  - English judgements more detailed and use of precedents
  - France: no requirement to explain elements, lack of reasoning
  - Swiss approach: in between?

- Impossibility to evaluate the loss
  - France: clear duty to do so even if difficult based on evidence available
  - Switzerland: more restrictive approach in case of impossibility to prove loss (Art. 42.2 CO)

- Room for interpretation by the arbitrator
THANK YOU

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