

The Impact of Contract Terms

BÄR
& KARRER

ASA Conference: Shaping Arbitral Proceedings to Best Examine Quantum

Panel 1: The Function of Monetary Relief – Economics and the Law

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Introduction

The Impact of Contract Terms

- Do contract terms have an impact on quantum?
 - Contract terms can be of paramount importance for recoverable monetary relief
 - Subject to mandatory law, the parties have great flexibility to agree on contract terms which impact the recoverable monetary relief
 - Many commercial contracts include such terms: Aim at efficiently distributing risks between the parties and controlling costs of later (arbitral) proceedings
- Do (or should) contract terms relating to quantum have an impact on arbitral proceedings?
 - Selected types of contract terms relevant for assessing monetary relief
 - Typical procedural challenges

Selected Types of Contract Terms

Overview

- Choice of law clauses
- Liquidated damages and penalty clauses
- Terms specifying recoverable monetary relief
 - Quantitative thresholds and limits on recoverable amount
 - Terms specifying the categories of available damages
- Terms modifying the burden of proof
- Terms modifying the statutory limitation period
- Terms specifying the method and procedure for determining recoverable monetary relief
- Terms specifying the parties' rights and obligations regarding disclosure of documents/ access to information (Panel 4)

Selected Types of Contract Terms

Liquidated Damages/Penalty Clauses

"Seller hereby undertakes to pay liquidated damages of CHF [amount] to Buyer for each breach of this non-competition/non-solicitation undertaking and, in case of continued breach, additional liquidated damages of CHF [amount] for every month of continued breach. Payment of liquidated damages does not release Seller from adhering to this non-competition/non-solicitation undertaking. The right of Buyer to claim further damage remains reserved."

(SPA clause)

Selected Types of Contract Terms

Liquidated Damages/Penalty Clauses (cont'd)

- Liquidated Damages Clause
 - A contractual provision that assesses in advance the amount of damages for a breach of contract
 - No punitive function
 - Enforceable?
 - Generally yes (both common law and civil law systems)
- Penalty Clause
 - A contractual provision that assesses in advance an (excessive) monetary charge for a breach of contract unrelated to actual harm
 - Includes punitive function to encourage performance
 - Enforceable?
 - Common Law: generally no
 - Civil Law: generally yes (but subject to reduction of excessive amounts)

Selected Types of Contract Terms

Liquidated Damages/Penalty Clauses (cont'd)

Art. 160-163 Swiss CO

- Under Swiss Law
 - Penalty clause ("*Konventionalstrafe*")
 - Can be promised for non-performance or defective performance of a contract
 - Parties are free to set the amount of the penalty
 - No need to prove existence or quantum of damages: payable even in the absence of any loss/damage
 - Court/tribunal may reduce excessive penalties at its discretion (application ex officio?)
 - Liquidated damages clause ("*Schadenspauschalierung*")
 - Requires that any damages were incurred (but no need to prove quantum)
 - Usually contain a limitation of liability/damages
 - Court/tribunal may reduce liquidated damages if excessive

Art. 163(3) Swiss CO

See e.g. decision of Swiss Supreme Court 4A_510/2015 of 8 March 2016

Art. 163(3) Swiss CO by analogy

Selected Types of Contract Terms

Liquidated Damages/Penalty Clauses (cont'd)

see Pencil Hill Limited v US Citta di
Palermo S.p.A (English High Court,
19 January 2016)

- Typical challenges
 - Construction of clause (penalty or liquidated damages?)
 - Validity of clause/reduction of excessive amounts
 - Enforceability of arbitral award including penalty in jurisdictions not enforcing penalty clauses?
 - Procedural implications

Selected Types of Contract Terms

Terms Specifying Recoverable Monetary Relief

"[...], by no circumstances the Seller [...] will be responsible for any indirect, casual, subsequent, punitive or edifying damages of whatever nature including but unlimited [sic] loss of profit, loss of profitable opportunity, loss of income, loss of production, loss of excessive investment of materials and energy, stoppage of the mill, costs of capital, costs of work force, damages of the property, costs for replacement of the capacities etc. The aggregate liability of Seller to Buyer arising out of this Agreement, whether based on warranty, contract, strict liability or otherwise, shall not exceed thirty (30 %) percent of the contract price."

(Decision of Swiss Supreme Court 4A_460/2013 of 4 February 2014)

Selected Types of Contract Terms

Terms Specifying Recoverable Monetary Relief (cont'd)

- Quantitative thresholds and limits on recoverable amount
- Terms excluding the recovery of certain types of damages
 - Indirect/consequential damages, lost profits, immaterial damages, punitive damages, immaterial damages, etc.
- Typical challenges
 - Construction of clause
 - Meaning of "indirect" or "consequential" damages (e.g. mere restatement of the principle of adequate causation under Swiss law, see DFT 126 III 388)?
 - Validity under applicable substantive law?
 - Limits to parties' contractual freedom posed by mandatory law
 - Switzerland: Agreement limiting liability/damages for unlawful intent or gross negligence is generally void
- Procedural implications

Also see presentation of Matthias
Wolf, Quantifying Claims in Post-M&A
Disputes, ASA Conference
16 September 2016

Art. 100 CO
(but also see Art. 101(II)(III), 199 CO)

Selected Types of Contract Terms

Further Terms

- Terms modifying the burden of proof
- Terms modifying the statutory limitation period
- Terms specifying the method and procedure for determining quantum
 - Relevant date/period for damages calculation
 - Method to calculate damages/value of an item (e.g. DCF)
 - Expert determination ("*Schiedsgutachten*") for a certain value (e.g. price adjustment clause in SPA)
- Typical challenges

Also see presentation of Balz Gross,
Post-M&A Disputes and Expert
Determination, ASA Conference
16 September 2016

The Impact of Contract Terms

Typical Procedural Challenges

- Shaping the arbitral proceedings
 - Role of the Arbitral Tribunal
 - How proactively may/should the arbitral tribunal address contractual terms on quantum to shape efficient proceedings?
 - At what stage of the proceedings?
 - Role of Counsel
- Instruction of Experts
 - How can it be ensured that the quantum experts are properly instructed on the legal parameters governing their assessment (e.g. exclusion of certain types of damages; valuation date and methods)?
- When are the relevant parameters determining quantum established?
 - Early in the proceedings (bifurcation, sub-bifurcation, reverse bifurcation)?
 - Alternative damage calculations by parties/experts?
- Arbitral tribunal's options if the parties fail to adequately consider the relevant contract terms when pleading on quantum?

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