Best Arbitrator Management Practices re:

Damage and Remedy Claims

Discussion Outline

Peter K. Rundle – October 25, 2016

This month we owe a special thanks to Edna Sussman, who was kind enough to facilitate the copying (below) of a portion of her article, *The Arbitrator Survey – Practices, Preferences and Changes on the Horizon,*" which appeared in THE AMERICAN REVIEW OF INTERNATIONAL ARBITRATION, 2015/Vol. 26, No. 4, pp. 517-38.*

Although the focus of the survey and article may have been international arbitration, there is much that translates easily into domestic arbitration practice. I found the survey result below, and the observations that follow, useful tools with which to frame our discussion.

Which do you find more difficult to decide, liability or quantum of damages?

Liability	*18.6%*
Damages	*43.7%*
Both the same	*37.7%*

Most arbitrations are about damages. How much will the claimant or counterclaimant be awarded? As the survey response confirms, this central issue, the determination of damages, can be an enormously complicated process and arbitrators often find it more difficult to determine the quantum of damages than to determine that damages should be awarded. Forty-four percent of the arbitrators surveyed said that quantifying damages was more difficult than assessing liability. Only 19% found liability more difficult.

* If you would like to review the full article, you may obtain a copy by visiting Edna's website at www.sussmanADR.com.

Copyright 2016

The decision on damages may require consideration of a host of issues.[1] What standard should be applied to the proof? Are there contractual limitations on the damages that may be awarded? Are damages limited by the applicable law? What law governs? Has the claimant demonstrated causation? Has the respondent mitigated sufficiently? If comparative negligence is applicable, how should damages be allocated? Has corruption defeated claimant's right to damages? If there are several respondents, who should be held responsible and for how much? Should there be an award of costs and if so how should it be allocated? What interest rate should be applied and on what basis? And all these and other questions may present themselves before one even considers the unique complexities presented by the damages question. The damages analysis often requires valuations and projections into the future with all of its uncertainties and the application of metrics that can be particularly difficult to assess. What is the most convincing vision of the "but–for" world? What discount rate should be applied? Which multiple is the right one to use? These and many other questions often lead to presentations of complex calculations and computer models with competing experts whose testimony and analysis must be assessed.

While having the experts confer in advance to narrow the issues and hot-tubbing (having them appear at the hearing at the same time) can be of great assistance to the tribunal, the fact remains that damages are often more difficult to assess than liability. Counsel should make every effort to make the presentation as straightforward as possible while still giving the tribunal all the building blocks it needs to understand the analysis. Counsel should invite the tribunal to ask questions and provide the tribunal with whatever tools are necessary to enable it to reach a sound result. The tribunal should make sure it understands all of the presentations and ask for whatever else it needs to make a well grounded decision. The tribunal may, *inter alia,* ask for additional explanations or analysis, request the parties to calculate damages based on specified factual findings or a variety of factual

[1] For discussions of damages in arbitration, *see, e.g.,* Hilary Heilbron, *Assessing Damages in International Arbitration: Practical Considerations,* in THE LEADING ARBITRATORS GUIDE TO INTERNATIONAL ARBITRATION 857 (Larry Newman & Richard Hill eds., 2014); Mark Kantor, VALUATION IN ARBITRATION (2008); HERFRIED WÖSS, ADRIANA SAN ROMAN RIVERA, PABLO T. SPILLER & SANTIAGO DELLEPIANE, DAMAGES IN INTERNATIONAL ARBITRATION UNDER COMPLEX LONG-TERM CONTRACTS (2014). The need for more discussion of the damages issue led to the launching at the end of 2014 of a new *Journal of Damages in International Arbitration* devoted to the subject.

Copyright 2016

findings, or, in appropriate cases, retain a tribunal expert or request a computer model that can be manipulated by the tribunal.

I have often found, both as advocate and arbitrator, that counsel pour most of their energy and presentation into the issue of liability, and leave the remedies (damages, interest, account equalization, equitable orders, *etc.*) as almost an afterthought. The above quoted survey results seem to confirm that I am not alone in this observation. After a few encounters with this dynamic, I have taken a more proactive approach to focusing counsel on these issues early so that at the conclusion of the evidentiary hearing I have the tools with which to craft an appropriate award.

Consider the following hypothetical:

1. General Partnership No. 1[2] is composed of three natural persons, Mr. A, Ms. B, and Ms. C.

2. General Partnership No. 2 is composed of three corporations, Corporations Alpha, Beta, and Gamma.

3. Mr. A is the sole shareholder of Alpha, Ms. B is the sole shareholder of Beta, and Ms. C is the sole shareholder of Gamma.

4. Both General Partnerships were created to operate a small electronics manufacturing business. Over the years, the partners contributed cash and assets to the partnerships in unequal amounts.

5. Mr. A, Ms. B and Ms. C had a falling out. Accusations of all sorts started to fly. Ms. C and Corporation Gamma elected to retire from both General Partnerships, forcing the remaining partners of both General Partnerships to elect whether to dissolve the General Partnerships, or continue their operation and buy-out Ms. C and Corporation Gamma.

6. Mr. A and Ms. B, as the remaining partners of General Partnership No. 1, elected to continue the partnership and buy-out Ms. C.

[2] At Appendix "A" you will find various provisions from the two hypothetical General Partnership Agreements.

Corporations Alpha and Beta also elect to continue General Partnership No. 2 and buy-out Corporation Gamma.

7. Ms. C and Corporation Gamma sue Mr. A and Ms. B, as well as Corporations Alpha and Beta because there is disagreement over the appropriate buy-out amounts, and also allege causes of action for:

   a. Breach of Contract;
   b. Fraud;
   c. Negligent Misrepresentation;
   d. Conversion;
   e. Breach of Fiduciary Duty; and
   f. Accounting.

8. Ms. C and Corporation Gamma pray for damages according to proof; punitive damages according to proof; injunctive relief; attorney's fees, interest, and such other relief as the arbitrator deems just.

9. The defendants assert 35 affirmative defenses, including:

   a. Contributory Negligence;
   b. Set-Off;
   c. Failure to Mitigate Damages;
   d. Contractual Limitation of Consequential Damages; and
   e. Contractual Limitation on the Power of the Arbitrator to Award to Award Punitive Damages.

As I not so fondly recall from law school days, "*Discuss.*"

In this type of scenario, if counsel are not focused on the many issues raised by this hypothetical, and the arbitrator does not take a proactive role, the evidentiary hearing may draw to a close with many, many hours or days of evidence that must be presented before a meaningful award can be issued.

I am sure we all utilize a variety of tools to avoid finding ourselves "in an evidentiary hole," on the issues of damage and remedy claims. I look forward to hearing and learning from everyone when we get together again on October 25th.

Copyright 2016

Appendix "A"

Below are some terms that may or may not be applicable in your "discussion" of the proposed hypothetical:

"**KEY PERSON EVENT:** Mr. A is the Key Person for Corporation Alpha; Ms. B is the Key Person for Corporation Beta; and, Ms. C is the Key Person for Corporation Gamma. A KEY PERSON EVENT occurs when any Key Person of a partner is unavailable, other than by death, to continue in the partnership. A Key Person becomes unavailable to continue in the partnership when that Key Person retires, withdraws or otherwise ceases to provide services to the partnership. Upon the occurrence of a KEY PERSON EVENT, the partnership shall continue unless the remaining partners elect to terminate the partnership. If the partnership is not terminated, the remaining partners shall purchase the interest of the unavailable partner in the partnership."

"The purchase price shall be equal to the unavailable partner's capital account as at the date of his or her unavailability plus the unavailable partner's income account as at the end of the prior calendar year, increased by his or her share of the partnership profits or decreased by his or her share of the partnership losses for the period from the beginning of the calendar year in which his or her unavailability occurred until the end of the calendar month in which his or her unavailability occurred, and decreased by withdrawals charged to his or her income account during such period. No allowance shall be made for goodwill, trade name, patents, or other intangible assets, except as those assets have been reflected on the partnership books immediately prior to the date of unavailability; but the remaining partners shall nevertheless be entitled to use the trade name of the partnership."

"Any amounts contributed to the partnership by an individual partner over and above the equal capital contributions of all partners shall be considered and treated as a loan to the partnership by that individual partner and shall not be considered a capital contribution. Loans to the partnership by an individual partner are to be repaid pursuant to the terms of the California Uniform Partnership Code."

"No interest shall be paid on the initial capital contributions to the capital of the partnership or any subsequent contributions of capital."

Copyright 2016