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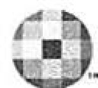
Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence

Mark Kantor



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> wholesaler is not liable for the wholesaler's loss of profit to the extent that it is extraordinary nor for his loss due to unusual terms in his resale contracts unless the seller had reason to know of these special circumstances.... Similarly, a seller who delays in delivering a machine to a manufacturer is not liable for the manufacturer's loss of profit to the extent that it results from an intended use that was abnormal unless the seller had reason to know of this special circumstance.

The Restatement's Comment (f) to section 351 also makes plain the role equitable considerations occasionally play in the application of foreseeability principles. Comment (f) cautions, though, that such considerations are less likely to be imposed in a commercial context.

> *Other limitations on damages*. It is not always in the interest of justice to require the party in breach to pay damages for all of the foreseeable loss that he has caused. There are unusual instances in which it appears from the circumstances either that the parties assumed that one of them would not bear the risk of a particular loss or that, although there was no such assumption, it would be unjust to put the risk on that party. One such circumstance is an extreme disproportion between the loss and the price charged by the party whose liability for that loss is in question. The fact that the price is relatively small suggests that it was not intended to cover the risk of such liability. Another such circumstance is an informality of dealing, including the absence of a detailed written contract, which indicates that there was no careful attempt to allocate all of the risks. The fact that the parties did not attempt to delineate with precision all of the risks justifies a court in attempting to allocate them fairly. The limitations dealt with in this Section are more likely to be imposed in connection with contracts that do not arise in a commercial setting. Typical examples of limitations imposed on damages under this discretionary power involve the denial of recovery for loss of profits and the restriction of damages to loss incurred in reliance on the contract. Sometimes these limits are covertly imposed, by means of an especially demanding requirement of foreseeability or of certainty. The rule in this Section recognizes that what is done in such cases is the imposition of a limitation in the interests of justice.[330]

4 Lack of Causation and Contributory Fault

Compensation is, of course, payable only for the consequences of injuries caused by the breaching party's conduct. The injured claimant, therefore, has the burden of demonstrating that the claimed quantum flowed from that conduct. Shelves of books and papers contain discussions of the fundamental role the principle of

330. *Id.*, at comment (f).

"causation" plays in determining both liability and compensation. While this volume is not the place to repeat those detailed analyses, we cannot overemphasize the crucial role causation performs in valuation issues. The claimant must satisfy the tribunal that the causal relationship is sufficiently close (i.e., not "too remote") to satisfy the applicable standard of causation. Also, injury to an enterprise may derive from several sources. "Causation" principles can cover a number of a number of issues, such as the issues of multiple, intervening and contributory causes and limits to legal responsibility such as "proximate cause vs. but-for causation" and "foreseeability."[331] Above, we addressed foreseeability issues. Here, we address issues of possible multiple or intervening causes. In addition, even though the breaching party did in part cause the damage, the injured party too may bear responsibility for the injury in part, and thus contributory fault may reduce or eliminate the claimed compensation.

The facts of the case will, of course, dictate what events must be considered for purposes of causation. Macro events, illustratively, may affect the market generally, whether a market-wide contraction or growth burst, a dramatic change in interest rates or oil prices worldwide, or a country-wide crisis such as occurred in Argentina. One experienced valuation professional relates the story of party expert valuations in an investment treaty arbitration for which he was serving as the tribunal-appointed valuation expert. The claimant asserted that the loss in question could be measured by a reduction in the value of majority investments in certain businesses during a particular period. However, the claimant's proposed stock market valuations failed to take account of overall market trends at the time.

> What was missing from the analysis was any recognition of the significant "corrections" that occurred in global stock markets in the same period. The reasons for these global stock market falls were in no way connected to the loss event in dispute.[332]

Issues of causation were, as discussed above,[333] crucial to the approach taken by the tribunal in *LG&E v. Argentina* towards damages. The tribunal rejected a fair market value approach towards damages, despite concurrence by both parties in that approach.[334] Instead, the tribunal concluded it must address the "actual loss" suffered by the investor "*as a result of*" Argentina's conduct. The question is one of "causation;" what did the investor lose by reason of the unlawful acts?[335] For the *LG&E* panel, the answer to that question was lost dividends for a specified duration, not a permanent diminution in market value.[336]

331. Walde & Sabahi, *Compensation, Damages and Valuation in International Investment Law* (International Law Association, 2007), at 35–36, available at <www.ila-hq.org>.
332. Senogles, *Business Interruption Claims*, *supra* n. 54, at 12.
333. *See* text associated with n. 144 et seq. *supra*.
334. *LG&E v. Argentina Final Award*, *supra* n. 7, at ¶ 33.
335. *Id.*, at ¶ 45.
336. *See* text associated with n. 144 et seq. *supra*.