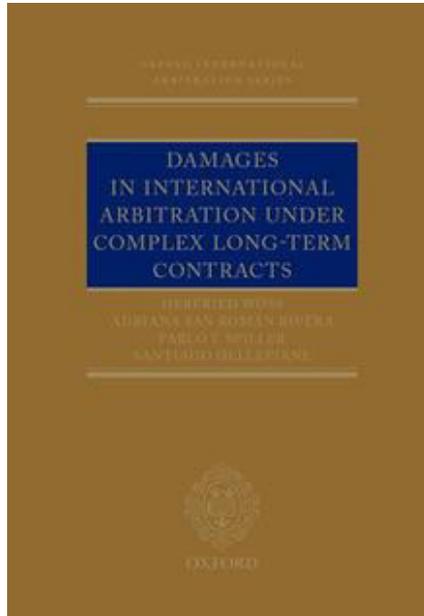


BOOK REVIEW: Damages in International Arbitration under Complex Long-Term Contracts

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Authors: Herfried Wöss, Adriana San Román Rivera, Pablo Spiller and Santiago Dellepiane.

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If presenting an arbitration case is like running a marathon, then arguing damages is like reaching mile 20 – the dark place where counsel’s energy can be depleted and one risks hitting the proverbial wall. Readers of *GAR*’s daily headlines will surely be familiar with the misery that can ensue, such as claimants who prove breach but not loss; claimants who, despite proving both, only establish a tiny fraction of the claimed amounts; respondents who brandish strong legal defences but fail to submit a meaningful damages counter-model and thus see claims awarded in their entirety; and more generally – but not more reassuringly – parties who fail to understand and clearly explain to the tribunal their damages model.

The forensic importance of damages makes the field particularly apposite for the development of a solid body of reference but an array of circumstances has conspired to delay this development. Most notably, practitioners and scholars wondered for a long time whether a general theory of damages could exist and, if so, whether it could be both identified and succinctly expressed. (For some – not this reviewer – those two questions should be answered in the negative, given the multiplicity of arbitration rules and practices, substantive laws, procedural laws and accounting techniques that exist in the world.)

Ultimately, practitioners looking for arbitration-specific guidance on damages had to survive for years on a very strict diet, mainly comprising a few articles from Professor John Gotanda and scattered commentary to the 1927

Chorzów Factory case – an example of jurisprudential longevity, if there ever was one. A change started to take place with the 2006 publication of Yves Derains' edited ICC dossier on *Evaluation of Damages in International Arbitration*. Then, in 2008, Mark Kantor published *Valuation for Arbitration: Compensation Standards, Valuation Methods and Expert Evidence*, the first contemporary attempt to cohesively explain damage calculation theories and approaches in investment and commercial arbitration. Since those pioneer publications, the output in the field has substantially increased – nowadays there is even a *Journal of Damages in International Arbitration* – and the voids in the bibliography are being filled.

One of the most conspicuous voids that remained involved long-term income-generating assets in general and complex contracts in particular. How does a tribunal award damages when a large company has been expropriated, a 15-year power purchase agreement unlawfully terminated, or a 99-year mining concession arbitrarily cancelled?

Damages in International Arbitration under Complex Long-Term Contracts ably fills that void. Its scope is highly specialised, but practitioners involved in any type of significant contractual or treaty arbitration will not be disappointed if they keep a copy handy.

One of the reasons the book is particularly useful is that it helps the reader understand not just the legal theories but also the accounting techniques and forensic issues underpinning damage calculation. Herfried Wöss and Adriana San Román of Wöss & Partners are responsible for most of the book's chapters, including those on the "function, role, and importance of damages law," the "nature and contents of the complex-long term contract," "damages claims for breach of contract under comparative and transnational law," "analysing, framing, and proving a damages claim," and "interest, currency, and exchange rate fluctuations, and cost in arbitration." Well-known economic experts Pablo Spiller and Santiago Dellepiane have contributed a chapter in which they discuss specific techniques for the valuation of damages for complex, long-term contracts.

As Loukas Mistelis and Stanimir Alexandrov note in their respective prefaces, the book is remarkable for its clarity and because it confirms that, despite their depth and the occasional intricacy, damages questions involving complex, long-term contracts can often be systematised and consistently explained in accordance with a few general principles.

For the authors, the most significant of all those general principles is that a party owes "full compensation" to the other party for breach or undue cancellation of a long-term, complex contract or for the undue impairment of any other long-term income generating asset. The authors then engage

in a detailed reasoning that essentially leads them to conclude that a but-for approach is typically appropriate to establish the amount of such “full compensation.” In essence, what the tribunal must do, according to the authors, is to reconstruct the hypothetical course of events – what would have happened if the “but for” event had not taken place – and compare it with the actual course of events. The amount to be awarded is usually the economic difference between both scenarios, also called the “expectation interest” – a term that, the authors convincingly explain, is preferable to the more traditional *damnum emergens and lucrum cessans*. The book then provides particulars on how the expectation interest may be quantified in both commercial and investment cases. The authors are thorough in their explanations, and the reader will find answers to most of the questions that come up when presenting or resolving a case on long-term income-generating assets, including complex contracts.

It is a testament to the quality of the book that the recent final award in *Yukos Universal Limited v Russian Federation* largely espouses the views expressed in it.