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BOOK REVIEW

Book Review of *Damages in International Arbitration under Complex Long-Term Contracts* / by Herfried Wöss, Adriana San Román Rivera, Pablo Spiller and Santiago Dellepiane ISBN 978-0-19-968067-2, £145.00

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In the world of international arbitration, 18 July 2014 marks a historical day. On this date, the largest arbitral award in history was rendered by an investment tribunal against the Russian Federation to the majority shareholders of Yukos, once the largest oil and gas company in Russia and one of the largest in the world. The award amount was US \$50,020,867,798. Yes, it was not a clean US \$50 billion, but US \$50 billion plus US \$20,867,798. How did the Tribunal come up with such an un-rounded number? For the answer, read the treatise *Damages in International Arbitration under Complex Long-Term Contracts* by the four eminent authors.²

The *Yukos* Award is embodied in 615 pages altogether.³ After describing the long and convoluted factual history of the case, analysing the multiple legal issues, and finding that the Russian Federation had expropriated the assets of Yukos in violation of Article 13 of the Energy Charter Treaty, the Tribunal devoted almost 100 pages to analyse and calculate the various components of damages.⁴ The Claimants proffered 15 separate calculations of damages (depending on different scenarios), the amounts ranging from the lowest of US \$33.317 billion to the highest of US \$114.174. How was the Tribunal to choose among these numbers?

Legal scholars and practitioners of international arbitration tend to focus on the legal issues involved in such disputes—in investment treaty cases—to such issues as ‘nationality’, the meaning of ‘fair and equitable treatment’, the definition of

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² Herfried Wöss and others, *Damages in International Arbitration under Complex Long-Term Contracts* (OUP 2014).

³ *Yukos Universal Limited (Isle of Man) v The Russian Federation*, UNCITRAL, PCA Case No AA 227, Final Award (18 July 2014).

⁴ Energy Charter Treaty (opened for signature 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95.

‘investment’ and so on. These are fascinating and critical issues indeed. However, for the claimants themselves, the most important thing is the amount of damages they will be awarded, once the legal issues are resolved.

Thus, this book is both timely and most useful for those involved with international arbitration—scholars, lawyers, forensic accountants, financial advisors, economists and arbitrators. The authors are well qualified to share their knowledge, experience and insights.

Assessment of damages may appear on the surface to be straightforward—the prevailing claimant would receive what it suffered as a result of the legal breach. If A contracts with B to buy a particular bicycle for \$100 on a designated date and B reneges so that A has to buy the same bike from another source for \$120, then A is awarded \$20 in damages. It is easy to calculate damages for such one-time, fixed-price transactions. However, international transactions are not this simple. More and more, international transactions involve many parties and extend over a long period of time, and payments can be volatile and in different currencies or even in kind. How can damages be calculated in these complex long-term contracts?

This book is a useful one-volume reference. In Chapter 2, it examines the role and function of the concept of damages. It takes the reader back to Aristotle’s theories of commutative and distributive justice and brings us forward to modern theories, such as Friedrich Mommsen’s *Doctrine of Interest* in 1855,⁵ and to cases, such as the seminal opinion of the Permanent Court of International Justice (PCIJ) in *Factory at Chorzów*, rendered in 1928.⁶

Chapter 3 describes the wide variety of current complex long-term contracts. Some are purely between private parties, and many are multi-party with public sector participation. A particularly informative portion analyses how risks are allocated among the many participants and how some risks might be mitigated.

Chapter 4 takes us through a comparative survey of damages laws of various jurisdictions—United Kingdom (UK), USA, France, Mexico and Germany—and international conventions—such as the UN Convention on Contracts for the International Sale of Goods and the International Institute for the Unification of Private Law’s Principles of International Commercial Contracts.⁷ We are reminded of the UK decision in *Hadley v Baxendale* regarding foreseeability.⁸ Interestingly, though each country’s laws and each international convention has ‘justice’ as its goal, varying concepts and procedures may result in differing calculus of damage.

Chapter 5 offers guidance in ‘analyzing, framing and proving a damage claim under a complex long-term contract’ in commercial and investment arbitration. In this discussion, it is illuminating that it distinguishes commercial arbitration from investment arbitration, including an analysis of the key differences between the ‘but-for’ premise in commercial arbitration and the particular measure of damages under the *Factory at Chorzów* formula in investment arbitration.

⁵ Friedrich Mommsen, *Beiträge zum Obligationenrecht: Abth Zur Lehre von dem Interesse* [Contributions to the Law of Obligations: Section ‘The Doctrine of Interest’] (E Schwetschke und Sohn 1855).

⁶ *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) PCIJ Rep Series A No 17.

⁷ UN Convention on Contracts for the International Sale of Goods (adopted 11 April 1980, entered into force 1 January 1988) 19 ILM 668; International Institute for the Unification of Private Law, *Principles of International Commercial Contracts* (3rd edn, Transnational 2010).

⁸ *Hadley v Baxendale* (1854) 9 Ex 341.

Chapter 6 delves deeply into the business economics of transactions and investments and provides concrete guidance on the various ways of calculating damages, using both hypothetical examples as well as real arbitration cases.

Despite the various theories, procedures and methods of calculating damages, it seems that they all boil down to the ‘but for’ analysis—how would the claimant have fared economically ‘but for’ the breach by the respondent? This ‘but for’ principle has been articulated in different forms as analysed in Chapters 5, 6 and 7. The PCIJ in *Factory at Chorzów* formulated it in the following way: ‘[R]eparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.’⁹ This seemingly straightforward formulation is in fact quite complicated as evidenced by the two qualifiers—‘as far as possible’ and ‘in all probability’. One must calculate the difference between facts (what actually happened after the breach) and the hypothetical scenarios (what would have happened but for). Hypotheticals are just that—hypothetical. Compounding this difficulty are other factors—the actual scenario must distinguish those consequences attributable to the respondent’s breach from external factors (such as global economic conditions, political upheaval, commodity fluctuations, currency spikes) and internal factors (such as the ability to access financing and defaults by other parties to a multiparty project). This is where forensic accountants and financial economists come in.

As the *Yukos* Award amply shows, tribunals must be well versed not only in law but also in economics, finance and business to make its award. Tribunals exercise wide and ample discretion in choosing among the differing possible ‘but for’ scenarios, the date of valuation, the applicable interest rates for pre-awards and post-awards, the discount rate and many other issues controverted by the parties.

After reading this book, I was awed by the complexity of assessing damages. Even when the comparative hypothetical can be credibly constructed, there remain baffling issues such as the date of calculation (date of breach, date of claim or date of award), discount rates to bring back or bring forward certain amounts, avoiding ‘double counting’ and ‘round tripping’ and interest being part of the overall damages analysis and so on.

This book is a must for practitioners and arbitrators as they tend to be lawyers steeped in legal concepts but often overwhelmed by numbers.

⁹ *Factory at Chorzów* (n 6) p. 47.