BOOK REVIEWS

Damages in International Arbitration under Complex Long-Term Contracts, by Herfried Wöss, Adriana San Román Rivera, Pablo T. Spiller, and Santiago Dellepiane, OUP, 2014. The author reviews this new book designed to address by way of detailed analysis the difficult damages issues which can arise in a variety of different complex long-term contracts.

The underlying raison d'etre of almost all international arbitrations is to obtain financial compensation for loss suffered by the injured party. Although, of course, premised on the finding of liability, a favourable award on liability without adequate recompense is normally not a satisfactory outcome for such a party. Monetary compensation is therefore at the heart of international arbitration and yet disproportionately more legal learning and writing is devoted to liability than to damages.

This book, which is written by four respected international arbitration practitioners and scholars, and is arranged over eight chapters, seeks to remedy this lacuna and is designed to give an in-depth analysis of damages directed specifically at complex long-term contracts, such as infrastructure and technology projects in the public and private sectors. It is an ambition which it succeeds in achieving.

The authors' ultimate conclusion is that there are certain special considerations in assessing damages in these complex long-term cases which may call for adjustments to the normal principles applicable to more straightforward contractual breaches, such as in a claim for loss of profits; they argue that foreseeability and mitigation do not seem to play a major role and they advocate the important role of economic experts in comparing the position both historically and in the future with and without the breach.

The book starts with a short introductory chapter addressing the function, role and importance of damages law, and in particular the standard to be applied. It briefly deals with such matters as the full compensation and 'but for' principles, the *Chorzhou* case, the difference between *damnum ermegens* and *lucrum cessans*, and the different levels of protection of the underlying interest available under various rules of law. Thereafter, the chapters are more detailed.

A thorough understanding of how the relevant contract works is key to calculating any damages claim. There is thus a very useful chapter detailing the

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various fundamental structures and mechanisms of such contracts. Public private partnerships (PPP), turnkey construction contracts, operation and maintenance agreements, joint ventures and other specific contracts are addressed, together with various forms of project finance and model contracts. The chapter highlights the distinction between the complexities involved in such contracts and typical synallagmatic contracts, pointing to the source of the income stream from third parties, the interactions of various contracts in such projects, and the identification, allocation and mitigation of risks inherent in such contracts.

There is then a chapter which summarizes in considerable detail the comparative principles of law in five jurisdictions, namely, Germany, the United Kingdom, the United States, France, and Mexico, and as set out in the UNIDROIT Principles of International Commercial Contract (PICC) and in the United Nations Convention on Contracts for the International Sale of Goods (CISG).

Continuing the premise of the book that principles relating to the measure and other aspects of the calculation of damages applicable to more straightforward breach of contract cases may need adjustment in the context of such complex long-term contracts, there follows a chapter of practical value as to how to frame and prove with reasonable certainty a damages claim in both commercial and investment arbitrations in such cases.

The chapter begins with a reference to the 'but-for' principle, i.e., putting the injured party in the position it would have been in but for the breach, being the guiding principle for any damages claim and extracts various principles and concepts from the different jurisdictions. The authors then analyse a host of factors, such as the nature of the breach; loss; causation; the mitigation of damages; the evidence necessary for a claim; and the role of experts, informing the reader of the ingredients and pitfalls of making claims in complex long-term contracts citing many actual examples from the cases. From a practitioner's perspective, this chapter provides a thorough and comprehensive review of what needs to be considered in framing a damages claim, including the various contingencies which can occur when looking into the future. It is an invaluable aide-mémoire to those contemplating advising, pleading, or preparing the evidence to establish loss in such complex cases.

The next chapter provides an insight into the economics of public and private contracts and gives guidance on the difficult question of the calculation of damages, focussing on the loss of income arising from the breach of complex long-term contracts based on income stream or the violation of an international legal standard affecting such contracts. Referencing many authorities, it deals with concepts such as fair market value, market discount rates, various valuation formulas, for example, discounted cash flow and adjusted present value, as well as

more fact specific issues such as sunk investments in the context of water and sewerage assets, utility contracts with public agencies, and knotty problems such as the valuation date.

The penultimate chapter wraps up with issues such as interest and the currency of the award, all matters which in themselves can involve substantial sums of money. The book ends with a short concluding chapter bringing the strands together.

The book is fully referenced with footnotes and summaries of awards and cases. Where relevant, the topic is analysed against the historical, economic and academic background. The detail provided in the book makes it difficult in a short review to do justice to the extensive analysis and material provided. However, for those advising in relation to difficult damages issues which can arise in complex long-term contracts, this book provides a most useful and comprehensive reference for the many issues which are likely to occur.

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Choice of Venue in International Arbitration, edited by Michael Ostrove, Claudia T. Salomon and Bette Shifman, OUP, 2014. The author reviews this new book considering the twenty most popular seats for arbitration worldwide giving an in-depth analysis of each jurisdiction.

The deal is done. Euphoria abounds. Everyone is exhausted. Then the lawyer asks: what about provision for dispute resolution? Sighs all round – a dispute seems a distant and unlikely prospect. Arbitration is suggested – all agree. Can we go home, the participants ask?! No say the lawyers – where should the seat be? What do you mean and why does it matter, ask the participants? Reach for this book.

A stellar group of thirty-five contributors and editors, all of whom are experienced arbitral practitioners from around the world, have considered the twenty most popular jurisdictions for arbitration worldwide. Each jurisdiction is analysed at length under five broad headings: background; commencing the arbitration; during the arbitration; the award; after the award. There is then a short conclusion. The book only touches briefly on enforcement issues. Each section has several subsections to make for easy analysis and reading and the sub-categories are largely, though not exclusively, dealt with in the same way in each chapter, but this is the inevitable consequence of the variants in the jurisdictions.

Helpfully, there is a detailed index at the back of the book under each jurisdiction to assist the reader in tracing a particular point and an introduction