Arbitration International, 2015, 0, 1–4
doi: 10.1093/arbint/aiv061
Book Review

OXFORD

BOOK REVIEW

***Damages in International Arbitration under Complex Long-term Contracts*, by Herfried Wöss, Adriana San Román Rivera, Pablo T. Spiller, Santiago Dellepiane, edited by Loukas Mistelis, Oxford International Arbitration Series, 2014.**

Lamenting the fact that too little attention is paid to damages, Lucy Reed once proposed that parties in arbitration disputes begin with dessert—by hearing damages right after opening arguments—rather than leave them for the end.[1] Notwithstanding that refreshing proposal, it remains true that damages are too often given short shrift, resulting in grumbling from all corners of the international arbitration community.

Scholars, experts, and practitioners are dissatisfied with the way in which tribunals approach damages or fail to explain how they have reached their conclusions on damages.[2] Arbitral tribunals are unhappy with certain party-appointed damages experts. One tribunal, after awarding the largest damages award in the history of international arbitration, observed that the claimants' expert's fees were 'plainly excessive' and that the claimants' expert had been of 'limited assistance to the Tribunal in its determination of Claimants' damages'.[3] Another tribunal, having noted with thanks the assistance of party-appointed damages experts, belied reliance on those experts in its damages analysis.[4] More recently, a tribunal turned the tables

* Ruth Teitelbaum is a deputy general editor of Arbitration International and a senior associate in the international arbitration group of Freshfields Bruckhaus Deringer US LLP. The views expressed are hers only and do not reflect those of her employer.

1 Lucy Reed, Luncheon Address at the 19th Annual Workshop of the Institute for Transnational Arbitration 'Damages in International Arbitration: Strategies, Techniques & Presentation', 'Luncheon Address: Less is More, More or Less' (2008) 2 WAMR 108–09.

2 See Laurence Shore, '2014 Year in Review: The Top Ten Developments in Energy Arbitration' (2015) 9 WAMR 117, 124; see also, Mark Kantor, 'Money Watch, "Winning Isn't Everything"' *Global Arbitration Review* (15 July 2015); see also, Gervase MacGregor and David Mitchell, 'Valuation: A Closer Look at Tidewater v Venezuela' *Global Arbitration Review* (22 July 2015); see also, Kevin Haywood Crouch, 'The Yukos Tribunal's Independent Approach to Damages' *Global Arbitration Review* (4 February 2015).

3 As observed by Shore (n 2). The Yukos awards rendered in July 2014 arose out of a dispute brought by three Cypriot entities that together held 70.5% of the former Yukos Oil Company: Hulley Enterprises, Yukos Universal, and Veteran Petroleum. By agreement of the parties, the cases were heard together before identical arbitral Tribunals. See, *Yukos Universal Limited (Isle of Man) v The Russian Federation*, Case No AA 224 Award dated 18 July 2014, paras 1883–84. For further analysis, see Crouch (n 2).

4 As observed by Shore n (2), citing *Venezuela Holdings, BV, Mobil Cerro Negro Holding, Ltd et al v Venezuela*, ICSIS Case No ARB/07/27, Award dated 9 October 2014, para 309.

on party-appointed experts by appointing its own damages expert, whose report the parties were required to address as the final round of a 12-year long investment arbitration dispute.[5]

The authors of *Damages in International Arbitration under Complex Long-term Contracts* address a number of causes for this current state of discontent. Their overarching mission is to instruct practitioners and arbitrators on how to deal with uncertainty.

According to the authors:

> This book underlines the fundamental necessity for arbitral tribunal to learn to deal with uncertainty and not to spare any effort to make a learned, fair and well-reasoned estimate of income profits lost, rather than taking a shortcut to reliance interest or 'splitting the baby'. (11)

The authors emphasize that the solution for uncertainty is not to resort to rigid rules, no matter how tempting that may seem. This is particularly true with respect to the date of valuation. They note that rigid rules, such as choosing the date of breach as the date of valuation, appeal to a need of greater certainty but risk producing injustice (218). Quoting Lord Wilberforce they emphasize that, 'it is for the courts or for arbitrators to work a solution in each case best adapted to giving the injured plaintiff that amount in damages, which will most fairly compensate him for the wrong which he has suffered' (218, citing *Miliangos v George Frank (Textiles) Ltd* [1976] AC 433 (HL) 468).

The authors have organized their guide to facing uncertainty through a structure that will appeal to lawyers who truly enjoy the practice of international arbitration, benefit from a case-study approach, and who have an interest in comparative law. It is a unique work that while written lucidly, takes some time to digest; it is not a 'Dummies' Guide to Damages' for anyone in a panic the night before a hearing.

First, the authors devote a significant amount of analysis to explain risk allocation in long-term contracts. In addition to providing an entire chapter dedicated to 'the complex long-term contract' the authors weave analysis concerning risk allocation throughout the book. They explain how the choices that a party makes in allocating risk impacts damages, both in the commercial arbitration context and the investment treaty context. The emphasis on risk allocation will prove to be a vital resource for practitioners advising clients about structuring their foreign investments and drafting contracts before a dispute arises.

Secondly, the authors provide a comparative law approach, analysing different aspects of damages under principles of civil and common law. This comparative law approach is extremely valuable given that there are no binding international legal rules on the calculation of damages in cross-border disputes. Little is said in

5 Suez, *Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic*, ICSID Case No ARB/03/19 (formerly *Aguas Argentinas, SA, Suez, Sociedad General de Aguas de Barcelona, SA and Vivendi Universal, SA v Argentine Republic*). The final damages award has not yet been released to the public. Details and the decision on liability are available at <http://www.italaw.com/cases/documents/1062#sthash.vWFphB16.dpuf>; See Kyriaki Karadelis , 'Twelve-year Claim Not a Waste as Argentina Ordered to Pay' *Global Arbitration Review* (10 April 2015) accessed 22 September 2015.

international contracts on the principles governing damages, and little is said in international investment treaties. Tribunals are left to apply general principles of international law and/or the law governing a contract. Having a guide with analysis of different principles of damages claims under different common law and civil law systems can give practitioners and arbitrators a useful framework for presenting damages claims. Chapter 4, for example, discusses certain unique features of French law, including the emphasis and protection of the performance interest in comparison with other legal systems. In light of the great number of civil codes modelled on or influenced by French law, from Algeria to Mexico, the references to damages under the French civil code will prove valuable to practitioners involved in foreign investment disputes, particularly those governed by contracts and foreign investment laws.

Thirdly, the authors, who bring a wealth of experience in presenting damages claims before international tribunals, distill some of the most challenging problems for practitioners in framing a damages claim in the face of uncertainty. One of the main sources of uncertainty for arbitral tribunals is the construction of a 'but-for' scenario, or the framework for estimating what the claimant's situation would be where the breach of the respondent's obligation had not occurred. The but-for scenario is essential for placing the claimant in the situation to provide full compensation or make a claimant whole for the injury suffered under a complex long-term contract where 'the time element plays an essential role'. (16)

The authors emphasize that tribunals should not simply rely on cash flows, because that is not what a buyer or seller would do when examining a business for the future.

> Tribunals, if properly informed by the evidence (factual, expert or both) will face the prospect of error about the future, in the same way that a board of directors risks being wrong about business decisions. A risk-adjusted discount rate for a given industry should reflect the prospects of the average project in that industry at a certain given maturity, thereby incorporating the whole range of success rates from very successful to unsuccessful ventures. (290)

Finally, for those who are unsatisfied with the reasoning of arbitral awards, but are not fluent enough in damages theory to articulate with confidence why a tribunal's damages analysis is wrong, this book provides critical analysis concerning the reasoning of damages awards of arbitral tribunals. For example, the authors address the challenging problem of double recovery, and in doing so use the *LG&E* award as an example of what not to do. The authors criticize the *LG&E* tribunal for its inability to forecast the value of the company out of a misplaced concern over double recovery, thus awarding only 'historical' damages. (291–92) The authors also spend a good deal of time on contingencies and risk allocation. Here they discuss shortcomings in the *Aucoven v Venezuela* award, which they cite as an illustration of a failure to conduct a proper analysis of contingencies in light of a risk allocation structure. (202)

The authors illustrate the need for tribunals to take a more active role regarding the production of evidence for ascertaining actual loss and establishing a but-for scenario. Citing an example of an arbitration concerning an automotive joint venture, the authors note that the arbitral tribunal did not allow the claimant to reconstruct the but-for scenario based on publicly available information presented in the arbitration. The tribunal also rejected the claimant's requests for document production concerning actual sales of the competing joint venture, documents that were under the control of the respondent. The authors emphasize this case study as an example of what tribunals ought not to do, less they wrongly 'interfere in the injured party's right to establish the reasonable certainty of loss as this violates the full compensation principle through procedural means'. (198)

In sum, *Damages in International Arbitration under Complex Long-term Contracts* is much more than a book about damages in international arbitration. It concerns the allocation of risk in international investment and commercial disputes and the legal theories involved in framing and assessing damages claims. The authors are to be commended for providing a much-needed resource for practitioners and arbitrators.

*Ruth Teitelbaum**