

Global Arbitration Review

The Guide to Damages in International Arbitration

Editor
John A Trenor

Second Edition

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John A Trenor

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This article was first published in December 2017
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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK
© 2017 Law Business Research Ltd
www.globalarbitrationreview.com

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Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – David.Samuels@lbresearch.com

ISBN 978-1-912377-32-9

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following firms for their learned assistance throughout the preparation of this book:

A&M GMBH WIRTSCHAFTSPRÜFUNGSGESELLSCHAFT

ALIXPARTNERS

BDO LLP

BERKELEY RESEARCH GROUP

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Introduction

John A Trenor¹

There are three types of arbitrators: those who understand numbers and those who don't.

This old joke, adapted to the international arbitration community and repeated at conferences, typically receives nervous laughter from parties, counsel and experts who may have experienced innumeracy first-hand on the part of a tribunal. Yet this innumeracy is by no means limited to those who serve as arbitrators; the joke could equally be applied to those who appear as counsel and to other participants in the international arbitration community.

This book is aimed at everyone who gets the joke, whether they profess to understand numbers or not. The objective of *The Guide to Damages in International Arbitration* is to help all participants in the international arbitration community – from the arbitrators to the parties to counsel and experts – understand damages issues more clearly and communicate those issues more effectively to tribunals to further the common objective of assisting arbitrators in rendering more accurate and well-reasoned awards on damages.

In the vast majority of international arbitrations, one or more parties seek damages. As such, damages are a critical component of most cases. A tribunal that misunderstands the relevant damages issues does not render justice to the parties. An award that effectively resolves the scope of liability but misunderstands, misapplies or miscalculates damages does not put the aggrieved party back in the position it would have been without the wrongful act. An award that seemingly takes a Solomonic approach by ‘splitting the baby’ or misunderstands the damages issues does not typically satisfy either party and does not contribute to a favourable reputation for the arbitrators that issued the award.

Parties, and their counsel and experts, express frustration with awards that offer little reasoning on damages or, worse yet, faulty reasoning or errors in principle or calculation.

¹ John A Trenor is a partner in the international arbitration group at Wilmer Cutler Pickering Hale and Dorr LLP.

Arbitrators express frustration with counsel and experts who struggle to communicate often complex damages issues clearly and effectively. Counsel and experts express frustration with each other on how best to present damages cases to tribunals that may lack quantitative backgrounds.

The idea behind this book arose from discussions among members of the Global Arbitration Review editorial board, who have heard these frustrations being voiced and identified a void in the market for such a guide to damages in international arbitration. This book draws upon the insights of leading lawyers, experts and academics in the field to produce a work that will hopefully be a valuable desk-top reference tool for arbitrators, parties, and their advisers and counsel, when approaching damages issues in international arbitration.

This book is not intended to provide a comprehensive answer to every question. Frequently, the answer depends on the context – on the contract or treaty language, the applicable law, the arbitration agreement or rules, the facts of the case, etc. Indeed, on some issues addressed in this book, the authors (and the editor) no doubt disagree. Participation in this book is not meant to convey endorsement of the views expressed by others. However, the objective of this book, and indeed the objective of resolving disputes between parties regarding damages, is to understand better why they disagree. Is the disagreement based on differing views on what the contract, treaty or applicable law requires? Is the disagreement based on differing assumptions of the parties and their experts? Is it based on differing views of the appropriate methodology to assess and quantify damages? Is it based on different quantitative models?

This book aims to make the subject of damages in international arbitration more understandable and less intimidating for arbitrators and other participants in the field and to help participants present these issues more effectively to tribunals. The chapters address key issues regarding various aspects of damages, identify areas of general agreement and disagreement, provide checklists and tips, and describe effective approaches to presenting and resolving damages issues. With a firm understanding of the underlying issues and the reason why the parties disagree, the arbitrators can make informed judgements on how to resolve those differences.

The book is divided into four parts.

Part I addresses various legal principles applicable to the award of damages. The chapters in this part include overviews of the civil- and common-law approaches to both compensatory and non-compensatory damages, damages principles under the Convention on Contracts for the International Sale of Goods (CISG), contractual limitations on damages, principles reducing damages such as mitigation, and damages principles in investment arbitration. The authors of these chapters are counsel from leading international arbitration firms and legal academics.

Part II addresses various procedural issues regarding damages and the use of damages experts, including bifurcation, evidentiary issues such as document disclosure, and techniques and approaches to maximise the effectiveness of expert assistance on damages. The authors of these chapters are also counsel from leading international arbitration firms.

Part III addresses various approaches and methods for the assessment and quantification of damages. The chapters in this part include an overview of damages and accounting basics, quantifying damages for breach of contract, an overview of methodologies for

assessing fair market value, the income approach (discounted cash flow methodology) and determining the weighted average cost of capital (WACC), the market approach (comparables), the asset-based approach, taxation and currency issues, interest, costs, and the use of econometric and statistical analysis. The authors of these chapters are experts from leading expert practices and economic and financial academics.

Part IV addresses industry-specific damages issues. The chapters in this part include overviews of damages issues in energy and natural resources arbitrations, construction arbitrations, financial services arbitrations, life sciences and pharmaceutical arbitrations, M&A and shareholder arbitrations, intellectual property arbitrations and competition/antitrust arbitrations. The authors of these chapters are again experts from leading expert practices and counsel from leading international arbitration firms.

In addition to the hard copy version of this book, the content of the guide will also feature on the Global Arbitration Review website, together with additional online materials identified by the authors. Online access is available to subscribers at the following address: www.globalarbitrationreview.com/insight/guides.

Many individuals have contributed to making this book a success and deserve thanks. First and foremost, the authors of the chapters have shared in the vision of helping participants in the international arbitration community understand damages issues better. Their valuable contributions help to achieve this goal.

The professional team at Global Arbitration Review and its publisher, Law Business Research, have worked tirelessly at all stages of the process, from conception of the idea, through the editorial process, to publication. Among the many individuals who contributed are David Samuels, editor-in-chief and publisher of Global Arbitration Review, who transformed an idea into reality; George Ingledew, senior business development manager at Law Business Research, who secured the participation of the contributing authors; and Iain Wilson, editorial coordinator at Law Business Research, who led the editorial team that polished the drafts into the chapters that appear in this book.

This book would also not have been possible without the ideas and support of numerous colleagues at Wilmer Cutler Pickering Hale and Dorr LLP. In particular, I would like to thank Michelle Bock, Helmut Ortner, Jonathan Lim and Sabrina Lee for their assistance in developing the contents of the book and identifying authors to contribute.

Global Arbitration Review's *The Guide to Damages in International Arbitration* will be updated in future editions. Contributing authors will be encouraged to update their chapters, and new authors are invited to contribute additional chapters. If readers wish to see additional topics addressed or existing topics addressed in more detail, please bring them to my attention or to the attention of Global Arbitration Review. We also welcome comments from readers on how the next edition might be improved.

I share the hope of Global Arbitration Review that this book and future editions will form a valuable contribution to the field of international arbitration and that, in the future, the joke that there are three types of arbitrators (or counsel, or others) – those who understand numbers and those who don't – no longer resonates.

Appendix 1

About the Authors

John A Trenor

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John A Trenor is a partner at Wilmer Cutler Pickering Hale and Dorr LLP in the firm's international arbitration practice group. Mr Trenor has represented companies, states, state-owned entities, international organisations and individuals in a wide variety of disputes in the aviation, defence, financial services, oil and gas, pharmaceuticals, technology, telecommunications and other industries. He has advised clients regarding commercial, investor-state and state-to-state arbitrations seated in common-law and civil-law jurisdictions worldwide under virtually all the major institutional, as well as *ad hoc* rules, including ICC, LCIA, AAA, SCC, VIAC, ICSID, UNCITRAL and others. He has extensive experience in matters regarding public and private international law, including such areas as investment protection, state responsibility, reparations, territorial sovereignty, sovereign immunity, the law of treaties, the law of the sea, conflict of laws and extraterritoriality.

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2012

ISBN 978-1-910813-96-6