Alliance Journal of Corporate and Commercial Law (AJCCL)
Volume: 2, Issue: 1, December 2024 | E-ISSN: 2584-2463

COMPLEXITIES OF TAX AND CURRENCY ISSUES VIS-À-VIS AWARDING DAMAGES IN CROSS BORDER ARBITRATION

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ABSTRACT

International arbitration often grapples with the complex interplay of taxation and currency issues when awarding damages. The intricacies of these elements significantly influence the determination of fair and equitable compensation. Further, different jurisdictions have varying tax treatments for damages, which can substantially affect the net compensation received by the claimant. For instance, some countries treat arbitral awards as taxable income, while others may offer exemptions or impose varying rates of taxation depending on the nature of the damages. The inconsistency in tax treatment necessitates careful consideration by arbitrators to ensure that the claimant receives a fair after-tax amount. This requires a thorough understanding of the tax regimes of the relevant jurisdictions and possibly engaging tax experts to provide guidance. Further, currency issues present another layer of complexity. The volatility of exchange rates can significantly impact the value of the awarded damages, especially in cases involving long arbitration proceedings, as the arbitral tribunal have to decide on the appropriate currency for the award, considering factors such as the currency in which the contract was denominated, the currencies involved in the dispute, and the claimant's currency of loss. Additionally, arbitrators also need to address the timing of currency conversion, as exchange rates can fluctuate between the time of the breach and the final award, potentially affecting the compensation's adequacy. This article delves into the various challenges and consequences linked to taxation and currency conversion within international arbitration awards. It examines how an arbitral tribunal's approach to these issues can influence damage calculations, aiming to enhance the precision of damage assessments in international arbitration.

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Keywords: - Tax, Currency, Interest, International arbitration, Arbitral award

INTRODUCTION

In assessing compensatory damages, a tribunal seeks, as far as reasonable, to put the claimant in the position that it would have been in if the wrong had not occurred. In some cases, the quantum of damages may be adjusted to account for the claimant's tax position on the loss for which damages have been awarded. This can have a significant impact on a claimant's net recovery from the arbitration. For example, a claimant may be undercompensated if any tax payable on the award itself is not accounted for, or overcompensated if the award fails to consider tax that would have normally been paid by the claimant on the losses claimed for.

Despite the potential impact of taxation on the quantum of damages awarded, taxation is rarely canvassed in international arbitrations. This could be due to the inherent complexity and uncertainty in estimating the potential tax position of the claimant, which may be a costly and time-consuming endeavor requiring expert evidence on the taxation regime in the claimant's jurisdiction.

Similarly, the question of which currency should be used for damages in arbitration awards, like that of taxation, is rarely a live issue unless either party expressly raises it. However, when raised, it can be a particularly vexed question. The relevance of the currency in which damages are awarded arises in scenarios where parties use multiple foreign currencies in their commercial relationship. Large or frequent fluctuations in currency exchange rates may in turn lead to an unfair advantage for a claimant in arbitration proceedings who may opportunistically seek damages in the stronger currency. Thus, two questions arise when discussing the currency of damages in arbitration awards:

a. what currency should a tribunal award damages in, and

b. what date should be used for the conversion of foreign currency into the award-determined currency (if required).

This Article will explore how a tribunal's treatment of taxation and currency issues may impact the assessment of damages, with a view to ensuring more effective quantification of damages in international arbitration. To enhance clarity and readability, the article is divided into **five** (5) parts. The **second** part, following introduction, covers the Rule of Gourley, which stipulates that when calculating a claimant's damages for lost earnings, the tax that would have been paid on those earnings must be considered. The **third** part discusses the impact of taxation on the assessment of damages and addresses related practical issues. The **fourth** part examines currency issues in the context of assessing damages in international arbitration. The **final** part offers suggestions for managing or avoiding taxation and currency issues, concluding the entire research work.

THE RULE IN BRITISH TRANSPORT COMMISSION v. GOURLEY

General Principles

The key principles of taxation in damage assessment are outlined in the landmark English case of **British Transport Commission v. Gourley**[2] (**"Gourley"**) wherein, the House of Lords determined that when calculating a claimant's damages for lost earnings, the tax that would have been paid on those earnings must be considered.

In this case, the claimant sustained severe and permanent injuries in a railway accident caused by the respondent's negligence, resulting in a loss of actual and future earnings totaling £37,720. The issue was whether the claimant's damages should be reduced by the income tax and surtax (calculated at

2. [1956] A.C 185.

£31,025) that would have been paid if the earnings had been received. The House of Lords concluded that since damages aim to compensate for actual and prospective financial loss, the claimant should recover only the net earnings after tax deductions.[3] This rule applies if:

c. The lost earnings, if received, would have been taxed as income; and

d. The damages awarded are not taxable for the claimant.[4]

These conditions ensure the claimant isn't unfairly penalized by considering tax in damage calculations, avoiding double taxation where the damages themselves would be taxed.[5] Both conditions were met in Gourley, as it was undisputed that income tax and surtax were payable on the claimant's earnings and that the awarded damages were not taxable.[6] The House of Lords held that the amount of income tax that would have been paid on the awarded sum was not too remote to consider in damage assessment. This is because such taxes are almost universally applied and not specific to the claimant.[7]Allowing the claimant to recover gross earnings would lead to overcompensation, conflicting with the objective of compensatory damages.

The Treatment of Gourley in India.

The rule in Gourley has found favor in Indian and Singaporean jurisprudence. In **Renusagar Power Co. Ltd v. General Electric Co**[8], the Supreme Court of India considered the rule in Gourley in proceedings to enforce a foreign arbitral award. The appellant argued, among other things, that the respondent was unjustly enriched because the arbitral tribunal did not deduct the US tax payable by the respondent when awarding compensatory damages. The Supreme Court of India stated that:

> "Reliance, in this regard, has been placed on the decision of the House of Lords in British Transport Commission v. Gourley wherein it has been laid down that when assessing damages for loss of actual or prospective earnings allowance must be made for any income tax on the earnings. This rule in Gourley case will, however, apply only where two conditions are satisfied: (1) the money, for the loss of which damages are awarded, would have been subjected to tax as income; and (2) the damages awarded to the plaintiff are not subject to tax in his hands."[9]

In the case of **Hanover Shoe v. United Shoe Machinery Corp**[10]., the Court of Appeal sent the case back to the District Court to consider the extra taxes Hanover would have paid when calculating damages. They believed Hanover was harmed only by the amount of after tax profits it missed, as these could be reinvested or distributed to shareholders. However, the U.S. Supreme Court overturned this decision, ruling that the District Court's original method of calculation was correct. The Court observed:

> "As Hanover points out, since it will be taxed when it recovers damages from United for both the actual and the trebled damages, to diminish the actual damages by the amount of the taxes that it would have paid had it received greater

3. *Id*, at 213, per Lord Reid.
4. *Id*, at 213, per Lord Jowitt.
5. James Edelman, Jason Varuhas and Simon Colton (eds), McGregor on Damages, 21st edn (London: sweet & Maxwell, 2021), Vol I, Para 18-003.
6. Supra note 1 at 187-188
7. *Id*, at 200, per Earl Jowitt.
8. 1994 Supp (1) SCC 644.
9. *Ibid*.
10. 245 F. Supp. 258 (1965).

profits in the years it was damaged would be to apply a double deduction for taxation, leaving Hanover with less income than it would have had if United had not injured it."[11]

On the facts, the second factor in Gourley was not satisfied because the respondent would have been liable to pay US tax on the amount of compensatory damages awarded. Indian Courts have also applied the rule in Gourley in assessing damages for tortious claims.[12]

The rule in Gourley has also been applied in a variety of claims in Singapore, including but not limited to claims for pre- and post-trial loss of earnings arising from negligence,[13] and claims for rental income/mesne profits.[14]

Situations in which the Rule in Gourley May Apply Income Tax

The rule in Gourley applies in cases involving damages for losses which would otherwise attract income tax. The rule has been applied equally in tortious and contractual claims. The application of Gourley to tortious claims are evident from the cases cited in the sections above. The rule in Gourley has also been applied in claims for damages arising out of breach of contract in England, including claims for lost earnings due to wrongful dismissal of an employee[15] and claims for lost commission due to a breach of a contract for professional services.[16]

Generally, a claim for damages arising from a contract for the sale and purchase of goods will not adhere to the rule in Gourley. For example, in an action for breach of contract through non-delivery of goods, the claim for damages would generally be quantified with reference to the difference between the market value of the goods and the contract price. Alternatively, in a claim for late delivery of goods, the damages which will be claimed may be the difference between the market value of the goods at the contractual delivery date and the market value of the goods when delivered. In either case, the damages awarded may constitute a taxable revenue receipt such that the second factor in Gourley would not be satisfied.

A novel case in which a modified version of the rule in Gourley was applied was **Amstrad Plc v. Seagate Technology Inc**,[17] where the claimant was awarded damages for the loss of profit on the computers which the claimant would have sold between 1989 and 1990. It was accepted that both the lost profits and the award damages would attract corporation tax. However, between 1989 and 1997, the rate of corporation tax had decreased significantly from 35% to 33%. The respondent argued that the award must be correspondingly reduced to prevent the claimant from obtaining a windfall of about £1 million due to the lower tax rate applied to the damages representing the lost profits. The claimant disagreed on the basis that the second factor in Gourley was not satisfied, thereby

11. *Ibid.*
12. See A.S Sharma v. Union of India 1993 SCC OnLine Guj 34; 1995 ACJ 493 at 46 - 47 and Union of India and another v. Ashwathanarayan S. Sharma 1993 SCC OnLine Guj 35; (1993) 1 GLH 1044 at 48-49, where the Gujarat High Court found that a Motor Accidents Claims Tribunal should have considered the claimants liability for income tax (including sur-tax) when assessing damages for the claimant's future loss of income resulting from a road accident.
13. Teo Sing Keng and another v. Sim Ban Kiat [1994] 1 SLR(R) 340. See also Foo Chee Boon Edward v. Seto Wei Meng (suing as the administrator of the estate and on behalf of the dependants of Yeong Soek Mun, deceased), and another [2021] 2 SLK 1239 at 57 – 63, where the Singapore Court of Appeal applied Gourley in determining the deceased's projected income to calculate the multiplicand for a claim for loss of inheritance.
14. Raja's Commercial College v. Gian Singh & Co Ltd [1974-1976] SLR(R) 225 at 7-15; Klerk-Elias Liza v. K T Chan Clinic Pte Ltd [1993] 1 SLR(R) 609 at 71-73.
15. *Parsons v. B.N.M Laboratories* [1964] 1 QB 95.
16. *Lyndale Fashion Manufacturers v. Rich* [1973] 1 All ER 33.
17. (1998) 86 BLR 34 at 51-52.

excluding the application of the rule in Gourley altogether. The Queen's Bench Division accepted that the damages awarded to the claimant should be adjusted for the incidence of taxation. If this was not done, the Court stated that:

> "[a] claimant will in this way save tax that would otherwise have been paid at a higher rate than the tax that will be paid on the damages awarded for such expenditure. The issues raised by Seagate's case therefore are not confined to cases of loss of earnings or loss of profits but will extend to other classes of commercial transactions, eg the recovery of the cost of repairing goods, ships or buildings (if and insofar as such costs are taxable on an equivalent basis), and other claims for the recovery of loss, cost, or expense caused by breach of contract (where there is a tax saving resulting from the tax treatment of the amounts claimed as compared with the tax payable on the damages).
>
> …. It is therefore clear that unless account is taken in the assessment of damages of the incidence of taxation the award will be more than the loss which Amstrad is taken to have suffered. Am I compelled to ignore the incidence of taxation and to give judgment for more than Amstrad's supposed actual loss? I think not."[18]

The practical effect of Amstrad is that the rule in Gourley may be applied where the damages awarded to the claimant would be subject to a different level of tax in the claimant's hands. Any award for damages would therefore have to be adjusted upwards or downwards depending on the differential tax treatment between the claimant's loss and the award itself.

Under Indian law, the position appears to be that taxes are generally not payable on judgments or arbitral awards. Awarded damages lose the character of income and are not taxable once they have been decreed, as the sum is then converted to a judgment debt. In **All India Reporter Ltd. v. Ramchandra D. Datar**[19], the Supreme Court unequivocally held that even though compensation for wrongful termination was to be regarded in the nature of salary, the compensatory damages awarded as a judgment debt were not liable to income tax. This rule is equally applicable in the specific case of arbitral awards, as recently confirmed by the High Court of Delhi in **Glencore International AG v. Dalmia Cement (Bharat) Limited.**[20]

Capital Gains Tax

Capital gains tax are generally imposed upon gains accruing on the disposal of assets. There is generally no equivalent to the rule in Gourley in the context of capital gains tax in England,[21] as there are rarely circumstances where both factors necessary for the application of the rule in Gourley are present in the context of Capital gain tax. For example, where the dispute does not pertain to property and the damages compensate for income loss or non-pecuniary loss, these losses will not usually be subject to capital gains tax. This means that the first factor in Gourley will not be satisfied. Alternatively, if the loss arises from property (which could be subject to capital gains tax if disposed of), the second factor will not be satisfied as the award (which represents the proceeds of the disposal) would be subject to capital gains tax.

18. *Id* at 51-52.
19. AIR 1961 SC 943.
20. 2019 SCC OnLine Del 9634.
21. *Supra* Note 4

INCIDENCE OF TAXATION IN THE ASSESSMENT OF DAMAGES PRACTICAL ISSUES

Law Applicable to the Assessment of Damages

It is well established that international arbitrations can be and usually are governed by various laws and rules which may span several jurisdictions. These laws include: the law governing the contract between the parties; the lex arbitral or curial law; the law governing the arbitration agreement and the performance of the agreement; the arbitral rules of an arbitral institution (if applicable); and the law governing the recognition and enforcement of the arbitral award. Generally, issues relating to damage are classified as issues of substance. However, some aspects like the standard of proof to be applied can be analyzed as issues of procedure, such that different laws may apply.[22] That said, in most cases, a tribunal will normally look to the substantive law of the contract to determine how damages are calculated, unless the parties have agreed otherwise.[23] Accordingly, where the substantive law of the contract is Indian law, parties may rely on the principles in Gourley to argue that the applicable tax position should be considered when quantifying compensatory damages.

Burden of Proof

The effect of taxation on the assessment of damages is rarely canvassed in arbitral proceedings. In practice, there is a presumption that the assessment of damages will not involve any adjustments for tax. To avoid arguments on the incidence of taxation (if not raised by the parties themselves), a tribunal or court will simply award the gross loss claimed or, without any adjustments for taxation. This approach assumes by way of rough justice that the tax payable on the monetary sums that would have been received but for the breach would be the same as the tax that will have to be paid on the award.[24]

The burden therefore falls on the party seeking to displace the usual presumption to demonstrate that adjustments for tax should be made. The English Court of Appeal has taken the position in **Stoke-on-Trent City Council v. Wood Mitchell**[25] that the burden lies on the respondent to show that the second factor in Gourley (that the damages awarded would not be subject to tax in the claimant's hands) is satisfied. If the respondent is unable to do so, this would oust the rule in Gourley such that no adjustments for tax will be made. In that case, in deciding whether the damages payable to the claimants (whose property had been compulsorily acquired by an acquiring authority) should be adjusted for corporation tax, the Court of Appeal stated in strong terms that the rule in Gourley applies only where: -

"It is clear beyond peradventure that the sum in question would not be taxable in the hands of the claimants. If that is clear, then it would be wrong to require the acquiring authority to compensate the claimants beyond the amount of the loss which the claimants would in truth suffer. But if it is not, then it seems to us unjust that in a doubtful situation the acquiring authority can get the benefit of a reduced payment while leaving the claimants exposed to the risks we have mentioned."[26]

22. Claire Connellan et al, "Compensatory Damages Principles in Civil and Common Law Jurisdictions: Requirements, Underlying Principles and Limits," in John A. Trenor (ed.), The Guide to Damages in International Arbitration, 4thedn (London: Law Business Research, 2021), p. 9.
23. Jeffrey Maurice Waincymer, *Procedure and Evidence in International Arbitration* (New York: Kluwer Law International, 2012), p.1118.
24. Adam Kramer, *The Law of Contract, 2nd edn* (Oxford: Hart Publishing, 2017), p. 295
25. [1980] 1 WLR 254.
26. *Id*, at 260.

This position ensures there is no prejudice caused to the injured party through double deduction if, for example, its damages were first reduced by the court on the basis that the injured party would not be liable for tax on those damages and the relevant tax authority then disagreed and levied tax after the damages were awarded.

Similarly, the respondent should bear the onus of proving the first factor in Gourley (that the loss for which the damages are awarded would have been subject to tax). There is no principled reason why the burden of proof across the two factors should be split among the parties. As observed in **Finley v. Connell Associates and another**[27],it is only right for the respondent to establish that both factors are satisfied such that the rule in Gourley is brought into play, since it is the respondent that seeks an exception to the normal rule in relation to the incidence of taxation on damages,

The default position in practice therefore appears to be that damages should be assessed without any adjustments for tax. A deduction for tax should only be made if it is "clear beyond peradventure" that the injured party would be overcompensated if its tax position was not factored in the damages awarded.

Calculating Tax

In making the necessary deduction for tax, the court or tribunal need not engage in an elaborate assessment of the claimant's precise tax liability. Rather, the court may broadly estimate the tax liability, and it would suffice for the final figure to be a substantially fair one.[28]

The following issues are usually relevant in estimating the deduction for the claimant's tax liability:

a. **First**, the assessment of tax liability will be based upon the present rates of tax. In Gourley, it was explained that since it was impossible to foresee how the rates of tax would fluctuate in the future, it was advisable to avoid speculation on the matter but instead "deal with it as matters are at present"[29]. That said, any changes arising prior to the date of judgment are relevant insofar as they have a bearing on the assessment of the claimant's loss.[30]

b. **Second**, the court or tribunal must consider the future pattern of the claimant's income (including the claimant's personal circumstances, the claimant's existing or potential investment income, or the claimant's private income) insofar as it has an impact on the claimant's tax position.[31]

c. **Third**, where the damages are in respect of a part of the claimant's earnings in a particular year, the lost earnings are generally treated as the top part of the claimant's income such that the earnings would attract the higher rates of tax applicable in the assumed assessment.[32] This is correct as a matter of principle, given that if the lost earnings had been received as additional commission, the additional income would have been treated as the top part of the income which would then attract her rates of tax.

d. **Fourth**, where it has been determined that the rule in Gourley applies, the respondent

27. [2002] Lloyd's Rep PN 62 at 218.
28. *Supra note* 1 at 203-204, per Lord Goddard.
29. *Ibid*.
30. See *Daniels v. Jones* [1961] 1 WLR 1103 at 1116, where –*"the English Court of Appeal noted that the introduction of substantial surtax reliefs on earned income that were proposed in the Budget, though it was not certain that the proposals would become law in due course."*
31. *Supra note* 1 at 209, per Lord Goddard.
32. *Supra Note* 15.

is entitled to particulars that are relevant to determining the claimant's tax position.[33] Logically, the claimant would be best placed to adduce the necessary evidence regarding its income, tax allowances and personal circumstances.

It is clear that quantifying the incidence of taxation when assessing damages is a highly fact specific inquiry. The cross-border nature of international arbitrations adds an additional layer of complexity to this inquiry. For example, in a relatively simple claim for lost profits, the tribunal would need to consider, among other things:

a. the relevant periods where the lost profits were suffered; and

b. the tax rate that would have been applied to those profits in the claimant's jurisdiction, which would depend on the claimant's circumstances (including the claimant's performance, allowances, and depreciation of assets).

Separately, the tax treatment of any award compensating the claimant for the lost profits is also relevant, insofar as such this is assessed differently from the tax treatment of the lost profits themselves. If necessary, the tribunal may invite the parties to agree on the relevant figures, with the aid of accounting experts or otherwise.

CURRENCY ISSUES IN ASSESSING DAMAGES IN INTERNATIONAL ARBITRATION.

While the Indian courts have recently begun to consider the issues concerning the currency of damages,[34]this article seeks to focus on investment arbitration cases and English and Singapore jurisprudence since this subject has been more extensively discussed in these spheres.

Approaches Taken in International Arbitration Cases

Notably, there is no single consistent approach taken by investment arbitration cases. Rather, there appear to be three different approaches. These can be gleaned from the (a)Lighthouses Arbitration between France and Greece[35] (**"Lighthouses Arbitration"**), (b) **Sempra Energy International v. Argentine Republic**[36] (**"Sempra Energy"**), and (c) **Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic**,[37] (**"Vivendi"**).

In **Lighthouses Arbitration,**[38]the tribunal decided to award damages to the claimant by first converting the total net profits payable under the parties' concession agreement expressed in their original currencies (i.e., Turkish, Greek, French, American, English, and Swedish currencies) to US dollars, and then to French Francs as at the date when the definitive award assessing compensation

33. See *Phipps v. Orthodox Unit Trusts* [1958] 1 QB at 320-321, per Jenkins L.J

34. See for example, Vedanta Ltd v. Shenzhen Shandong Nuclear Power (Civil Appeal No. 10394 of 2018, Indian Supreme Court, decided on 11 October 2018) ("Vedanta Ltd"); Karam Chand Thapar & Bros (Coal Sales) Ltd. v. MMTC Ltd, OMP (ENF.) (COMM.) 258/2018 ("Karam Chand"); Triveni Kodkany v. Air India Ltd (Civil Appeal No. 2914 of 2019, Indian Supreme Court, decided on 3 March 2020) ("Triveni"). "However, one could argue that Vedanta Ltd more accurately concerns the rate of interest a claimant is entitled to under an arbitration award involving a multi-currency claim. Similarly, while Karam Chand and Triveni conclude that the conversion of a foreign currency award should be on the date the court decree/judgment attains finality and there is no further challenge, the question remains as to what currency a tribunal should award damages in to begin with."

35. (1956) 12 R.I.A.A. 155

36. ICSID Case No. Arb/02/16 (2007)

37. ICSID Case No. ARB/97/3

38. Supra note 34 at 13. *"The claimant French firm, Collas & Michel, sought compensation for (amongst others) unpaid debts and lost profit against the Greek government for breaching a prior concessionary contract the firm had entered with the Ottoman government to operate a series of lighthouses in a particular territory".*

was to be made.[39] While the tribunal's decision was partly due to the French government's request for damages to be calculated in US Dollars, the tribunal's overarching rationale was to prevent "the effect of the devaluation of those currencies to fall on the parties."[40]

In **Sempra Energy**,[41] the tribunal initially agreed with the Respondent that the claimant's damages were payable in Argentinian pesos-considering that it was predominantly used during the commercial relationship of the parties, and it was not intended for foreign investors to be paid in US dollars.[42] But given the pesos significant devaluation after the Argentinian economic crisis, the tribunal held that the claimant be compensated at the US dollar parity exchange value which the peso had at the time of the respondent's breach (i.e., December 2001). Otherwise, the claimant "would be put at great disadvantage."[43]

Finally, in **Vivendi**,[44] the tribunal awarded damages to the claimant in US Dollars on the date of the breach by the Argentinian government and not Argentinian pesos (as requested by the respondent).[45] This was because the claimants' investments were primarily made in US dollars and French Francs. But additionally, the tribunal noted the significant devaluation of the peso against the US dollar, and the frequent practice of international tribunals to provide for payment in a convertible currency (i.e., US dollars).[46]

While the three approaches may appear different at first blush, there is a common thread underpinning them - they all reflect the general principle of reparation in international law laid down in the Case **Concerning the Factory at Chorzów (Germany v. Poland**[47])("**Chorzow Factory**") that "reparation 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."[48]This general principle would therefore appear to be the guiding principle for tribunals considering both the currency in which to award damages as well as the appropriate conversion date.

Approach Taken in Singapore and English Jurisprudence

The English courts have extensively considered the questions surrounding the appropriate currency in which to award damages and have set out principles that complement the approaches taken by the investment arbitration tribunals referred to above. The Singapore courts have similarly endorsed the English position and taken together,

39. *Id* at 13-14
40. *Ibid. "The French government's request stemmed from the fact that the French Franc and Greek Drachma had devalued significantly during the course of the matter."*
41. *Supra note 35. "The Claimant US investor, Sempra, held an equity interest in two Argentinean gas distribution companies after the Argentinian government enacted legislation to attract foreign investors. Tariffs for gas distribution were guaranteed in US dollars (paid in pesos at the prevailing exchange rate). The claimant brought ICSID arbitral proceedings against the Argentinian government when it later rescinded on its guarantees during an economic crisis in the early 2000s".*
42. *Id*., at 184- 185.
43. *Id*., at 188
44. *Supra note 36. "The claimant French investor, Vivendi Universal, and principal shareholder of the Argentinian company, Compañiá de Aguas del Aconquija S.A. had entered into a concession agreement with the Argentinian government to provide water and sewage services. The claimants brought ICSID arbitral proceedings when the new Argentinian government unlawfully terminated the concession agreement."*
45. *Id*., at 8.4.4 – 8.4.5.
46. *Ibid*.
47. P.C.I.J., Ser. A, No. 17. Judgment delivered on 13 September 1928.
48. Id at 47. ["The court holds that that an injured party has the right to receive the equivalent at the date of the award of the loss suffered as the result of the illegal act."

the Singapore and English cases may provide guidance to practitioners on how this issue may be dealt with in Singapore-seated international arbitrations.

Initially, the former English position for most of the 20th century was that court damages were to be assessed in Pounds Sterling according to the rate of exchange at the date of breach of a contract regardless of the parties' use of any foreign currency in their commercial relationship.[49]

The turning point came in **Miliangos v. George Frank (Textiles) Ltd** ("**Miliangos**").[50] The House of Lords departed from the old English position and held that a judgment award could be calculated in foreign currency on the "breach date" by the offending party.[51] The date of conversion was fixed as the date of payment - i.e., the date on which the court authorized the claimant to enforce the judgment against the defendant.[52]The House of Lords' approach was a direct response to important global economic changes occurring at the time. Main world currencies that were earlier fairly stable in value began fluctuating substantially. There was a need for courts to ensure that claimants were fairly compensated in the period between the "date of breach" and the date of judgment or payment.[53]Thus, the House of Lords sought to ensure that a creditor would come closest to securing what he bargained for under his contract.[54]This overarching principle in Miliangos is similar to the compensation principle reflected in the international arbitration cases discussed above.

The Miliangos decision underwent some further refinement in subsequent years[55] and ultimately the English courts settled on the following principles stated by Lord Wilberforce in **Services Europe Atlantique Sud (SEAS) v. Stockholms Rederiaktiebolag**[56] ("**The Folias**") for determining the appropriate currency of damages for a claim:-

> "The **first** step must be to see whether expressly or by implication, the contract provides an answer to the currency question... If from the terms of the contract it appears that the parties have accepted a certain currency to be the currency of account and payment for all transactions arising under the contract, then it would be proper to give a judgment for damages in that currency. But there may be cases in which, although obligations under the contract are to be met in a specified currency, or currencies, the right conclusion may be that there is no intention shown that damages for breach of the contract should be given in that currency or currencies."[57]

49. Supra note 4.
50. [1976] AC 443. ["The facts concerned a Swiss claimant who sold goods to the defendants, an English company. The parties' contract was governed by Swiss law, and payment was to be made in Swiss Francs to a Swiss account. The claimant brought proceedings in the English courts when the defendant repeatedly failed to make payments on goods and invoices delivered and dishonoured two bills of exchange drawn by the claimant in Switzerland. The claimant sought to recover the price of the goods and invoices delivered on the breach date, and alternatively, the damages on the two bills of exchange in Swiss Francs.]
51. *Id.*, at 466.
52. *Id.*, at 468,469.
53. *Id.*, at 463.
54. *Id.*, at 466,469.
55. See for example Barclays Bank International v. Levin Brothers (Bradford) (1977) QB 270 at 861, wherein the EWHC clarified that judgment may be entered in a foreign currency even if the governing law of the parties' disputed contract was English law.
56. [1979] A.C. 685.
57. *Id* at 700-701

Second:

> "[i]f then the contract fails to provide a decisive interpretation, the damage should be calculated in the currency in which the loss was felt by the plaintiff, or which most truly expresses his loss. This is not limited to that in which it first and immediately arose. In ascertaining which this currency is, the court must ask what is the currency, payment in which will as nearly as possible compensate the plaintiff in accordance with the principle of restitution, and whether the parties must be taken reasonably to have had this in contemplation."[58]

The English principles stated above were generally endorsed in **Indo Commercial Society (Pte) Ltd v. Ebrahim and another**[59] (**"Indo Commercial Society"**) and represent the law in Singapore. In fact, the SGHC held that the rationale of the Miliangos doctrine did not provide an option nor allow the plaintiff to request for judgment to be entered for its claimed sum in Singapore dollars at the prevailing US dollar rate of exchange as at the date of the writ.[60] This was because the exchange rate at the time remained unpredictable and it still remained to be seen whether the plaintiff would suffer any loss from the judgment in US Dollars until payment was made voluntarily or it became necessary to enforce the judgment (which theoretically could be six years later).[61]

Other Singapore cases where the Miliangos doctrine was applied include:

a. a plaintiff that was awarded damages in pounds sterling from a breach of contract and/or negligence in the carriage of cargo;[62]

b. a plaintiff that was awarded interest by reference to rates applicable to a foreign currency i.e., pounds sterling) in which loss was incurred under an export credit insurance agreement between the parties, otherwise payable in Singapore dollars;[63]

c. a plaintiff that was awarded damages in Swiss Francs for a loan agreement which was for the equivalent in Eurocurrency of $ 1.160m;[64]

d. an Official Assignee that was permitted to pay a bankrupt's debts to a creditor bank in the Singapore dollar equivalent of the US dollar exchange rate prevailing on the date of the adjudication and after orders on proofs of debt,[65] and

e. a plaintiff whose damages in a personal injury claim was expressed in Singapore dollars - that best reflected his loss and the location where the tort occurred despite the assessment of damages being made in the Malaysian currency.[66]

CONCLUSION AND SUGGESTIONS

The fundamental objective that an award of damages seeks to achieve is the full compensation of a claimant for the losses it has suffered. Ultimately, the tribunal is the master of its own procedure and retains a degree of flexibility in determining the best

58. *Id*., at 701.
59. [1992] SGHC 230.
60. *Id*., at 35-36
61. *Ibid*.
62. Tatung Electronics (S) Pte Ltd v. Binatone International Ltd [1991] SGCA.
63. ECTCS Holdings Ltd (formerly Known as Export Credit Insurance Corp of Singapore Lid) v. TKM (Singapore) Pvt Ltd. [1994) SGCA 49.
64. Wardley Ltd v. Tunku Adnan and another (1991] SGHC 195.
65. Re Mohamed Yunus Valibhoy, ex parte Bank of Credit and Commerce Hong Rong Ltd (1994] SGHC 243
66. Ooi Han Sun and another v. Bee Hua Meng [1991] SGHC 73.

way to assess the implications of tax and currency on the assessment of damages. There is no single formula, and a tribunal must consider the facts of each case to see how best the underlying objective of damages is best achieved in that case. However, following are some general suggestions which the arbitral tribunal or disputing parties can take into account to avoid any issues related to tax and currencies in international arbitration-

1. **Currency Choosing:** It is preferable to state up front which currency will be utilized to cover damages. Generally speaking, choose a stable currency like the USD or EUR is advised. Such a consensus over the choice of currency will help to prevent any disputes.
2. **Tax gross up clauses**: - The disputing parties should include a tax gross up clause in the arbitration agreement. The tax gross up clause in an agreement suggest that payment would be made sans any deduction of tax.
3. **Tax treaties**- The tribunal should take advantage of the existing tax treaties between the countries or regions to which disputing parties belong. Such treaties can assist sans holding any tax burden or liabilities.
4. **Jurisdiction**: - Selection of appropriate jurisdiction having strong framework and tax laws would be advantageous for the tribunal to decide the tax issues. This would help in deciding any complex tax issues with ease.
5. **Payment in installment**: - Instead of awarding an amount in one go, staggered payments should be made. Payment in installment may help in dealing with tax impact over several time periods than bearing a big burden of tax at ones.
6. **Interest on award**- It should be decided at the outset, if the interest would be charged, and if it is charged then how much. Thereafter, they indicate the currency in which said interest has to made. Such arrangements can help in reducing any additional financial conflicts and obligations.
7. **Local advice: -** prior awarding damages, it would be advantageous to consult the local tax advisor, wherein the said award will be executed the disputing parties as well belong to. This will assist the tribunal and disputing parties, to navigate the prospects of tax reduction and also check the adhere of local tax laws.
8. **Clause of confidentiality: -** The disputing parties should add the confidentiality clause in the arbitration agreement. The confidentiality clause may, in one way, avoid possible tax investigation.