Kluwer Arbitration Blog

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We are happy to inform you that the latest issue of the journal is now available and includes the following contributions:

Markus Burgstaller & Dmytro Galagan, *Contributory Fault in International Investment Arbitration*

As a general rule, if a state commits a wrongful act, it is under an obligation to make full reparation for the injury caused. Yet, arbitral tribunals have used the doctrine of contributory fault to reduce the amount of damages awarded to the investor for the state's breach of an investment treaty. This article analyses fifteen arbitration cases in which the respondent argued that the claimant contributed to its injury, either as a result of the investor's bad business judgment or because the investor's behaviour provoked the state's wrongful conduct. The analysis shows that arbitral tribunals supported their decisions to reduce the amount of compensation by as much as 50% with strikingly brief reasoning and instead relied on their wide margin of discretion. The article discusses possible avenues to remedy deficiencies in arbitral practice dealing with contributory fault, both through the reform of investor-state dispute settlement and practical solutions that may be adopted by arbitral tribunals when considering allegations of contributory fault.

Patrick Dumberry, *An Empirical Study of How Tribunals Interpret Stand-Alone FET Clauses Regarding Their Relationship with the MST and How It Impacts Findings on Liability*

This article provides the first empirical survey since the 2012 UNCTAD Report of how tribunals have addressed a specific type of Fair and Equitable Treatment (FET) clause: stand-alone clauses containing no reference to international law or any other standard. The vast majority of awards did not take a position on the issue of whether that standard offers the same or different level of protection compared to the Minimum Standard of Treatment (MST) under custom. Yet, those that did have overwhelmingly concluded that the clause must be interpreted to have an autonomous character, not related to the MST. These tribunals have also given broad interpretation of the scope and content of the clause which, in turn, had an impact on how they have addressed matters of liability and compensation. The success rate of FET claims is higher for tribunals which have

expressly stated that a stand-alone FET clause has an ‘autonomous’ character compared to others which did not take a position on this question (two-thirds versus 50%). Notably, the overall success rate of FET claims under a stand-alone clause (50%) is much higher compared to that of awards examining FET clauses where the standard is expressly linked to the MST.

Rouven F Bodenheimer, ***The Tribunal Visualized Approach: Improving Proceedings by Visualized Case Introduction***

Efficiency in international arbitration has long been contentious, as promised benefits often fail to materialize, leading to user dissatisfaction. Despite ongoing debates and procedural innovations, underlying inefficiencies persist. Although existing tools aim to streamline proceedings, they often overlook root causes of inefficiency, including the tendency of parties and counsel to focus on enforceability and prioritize the right to present their case at its fullest, fearing that efficiency compromises quality. This mindset, coupled with uncertainty about arbitrators’ preparedness, leads to bloated submissions and prolonged proceedings. In this article, the author, drawing on extensive experience, proposes the Tribunal Visualized Approach (Trivis), which uses detailed visual presentations by arbitrators to improve trust among parties and expedite the settlement of disputes. The Trivis method counters inefficiency by enhancing clarity and transparency through visual aids, fostering the cooperation and confidence in arbitration that is crucial for improving efficiency in international dispute resolution.

Alberto Jonathas Maia, ***Impartiality of Arbitrators in Brazilian Law: An Intersectional Approach Between Arbitration, Economics, and Psychology***

This article deals with the arbitrator’s impartiality from an intersectional perspective, seeking support from procedural law, economics, and psychology. Impartiality can be analysed in its various aspects (aesthetic, multidirectional subjective, objective, evaluative-evidence, and normative). The topic has been the subject of intense debate in academic and judicial circles and, through this study, we intend to contribute to the debate by demonstrating that the arbitrator must possess a continuous and permanent commitment to preserve and cultivate impartiality.

Carlos A. Matheus López, ***A New Conceptual and Applicable Proposal on the Independence and Impartiality of the Arbitrator***

This article addresses the important issue of the independence and impartiality of the arbitrator. I analyse the current state of affairs regarding this concept, observing the efforts that have been made through soft law for its management and practical application. Then I put forward some new conceptual proposals about the matter, pointing out that it is a hybrid concept, and that—using Ronald Dworkin’s distinction—it functions more as a principle than as a rule. Finally, I suggest some applicable proposals that derive from the nature of this principle. First, I propose a multi-step model that allows us to analyse a specific case. Second, in the case in which the principle of independence and impartiality collides with another principle, I advocate the use of balancing.

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