Kluwer Arbitration Blog

Anti-Arbitration: Answers to the Summer Quiz!

Michael McIlwrath (MDisputes) · Friday, July 22nd, 2011

Last week's summer quiz on international arbitration and mediation provoked a happy flurry of answers from around the world from a broad range of practitioners. Before we get to the answers, here are some interesting observations from the empirical data that we unintentionally gathered.

Conclusive Empirical Data about International Arbitration and Mediation Practitioners ("Practitioners")
As readers may recall, the quiz offered a free lunch or dinner in Florence to the first person to send in a perfect score or closest to it. Based on the objective data acquired via the responses, we can now declare the following with a high degree of certainty:

– International arbitration & mediation practitioners ("practitioners") are right 48.72% of the time.

– Practitioners who use hotmail as their e-mail service are right on average 8% more often than those who use gmail. And those who do not use a free e-mail service score on average 12% higher than their colleagues who do. This ran counter to our expectation that the trend towards efficiency would have resulted in higher-scoring practitioners using less expensive or free e-mail systems. Alas, this does not appear to be the case.

– International practitioners in North America like good food four times as much as practitioners in Australia. This came as a real shocker. Decades of studies have attributed greater costs of dispute resolution in North America to procedural practices that are peculiar to the common law. Since North America and Australia are both common law countries, however, our empirical data points to a decidedly different element of causation: more refined culinary tastes.

– There are no hungry practitioners in France.

– Remarkably, 100% of Scandinavians scored a near-perfect 12 out of 13. (And he won!)

Congratulations to Cornel Marian in Stockholm, for delivering the winning score!

And now, here are the answers to the Arbitration & Mediation Summer Quiz, posted on July 15, 2011.

1. Applicable Law: Answer (a): The order of authority should be contract language, CISG (as French law with respect to international goods sales), followed by French law. It's an unfortunate thing that arbitration awards are not published, because it is likely there would be today a vast body

of jurisprudence on the application of the CISG to transnational commerce. The body of case law from courts applying the CISG in most countries is not exactly robust, even though "the CISG is the uniform international sales law of countries that account for over three-quarters of all world trade". https://www.cisg.law.pace.edu/cisg/cisgintro.html By its own terms, the CISG is applicable (unless excluded expressly) in contracts for the sale of goods between parties headquartered in contracting states (see: https://www.cisg.law.pace.edu/cisg/countries/cntries.html), which includes the USA, Italy, and France. The CISG can even apply if the parties choose a third country's law. Art. 1(a) expressly states that the CISG applies "when the rules of private international law lead to the application of the law of a Contracting State". But the CISG, above all, sets out the "primacy" of private contract, allowing parties to derogate from any of its provisions (Art. 6). Thus, in the order of interpretation of the example in the question, the contract language should be given first priority, followed by the CISG (as French law of international sales of goods), followed by French domestic law.

2. Arbitration Law: Answer (c). France and Italy both revised their arbitration laws in 2011: France with the décret n° 2011-48 portant réforme de l'arbitragel; Spain with the reform of the Arbitration Act of 2003. The United States' statute on arbitration, the Federal Arbitration Act ("FAA," found at 9 U.S.C. Section 1 et seq.) was enacted in 1925 and is now eighty-two years old.

3. Arbitration Costs: Answer (d). Costs in ICC, SCC, CAM, and DIS arbitrations are all determined on an ad valorem basis by reference to the value of the claim as well as the number of arbitrators. Some apply a sliding scale to the amount based on the difficulty of the claim (the ICC, for example, allows adjustments between a minimum and maximum) whereas others, (the DIS being a good example), apply a straight, fixed price based on the amount in dispute. This difference in ad valorem approaches can impact the dynamics of the arbitration, and may be one reason that tribunals in DIS arbitrations have been known to spare themselves considerable effort for the same fee by strongly encouraging parties to settle early in proceedings, and almost always before they set down to write an award. By contrast, the AAA/ICDR provides for arbitrators to charge using an hourly rate submitted to the institution, with the parties being billed at regular intervals for the tribunal's services.

4. Procedural Efficiency: Answer (d). Mark was way ahead of his time. The specific citation is 9.01 at §12.01 of Mark Cato, Arbitration Practice and Procedure (Informa Law 1997). The documents listed in (a) and (b) do not exist, at least not yet. Not only is the document in (d) nonexistent, so is the organization mentioned. The approach that Mark recommended nearly 20 years ago has gained currency in recent years, especially among parties who have been demanding it as a way of making arbitration more palatable for commercial disputes. As of this writing, the Arbitration Committee of the CPR Institute is exploring the possibility of a Protocol for the Early Disposition of Issues. It does not exist yet, but it may soon.

5. Ethics: Answer (b). Of the institutions listed in the question, only the AAA/ICDR has enacted a code of ethics for arbitrators in commercial disputes to which arbitrators are held in proceedings conducted under the institution's auspices (see https://www.adr.org/si.asp?id=4582). That said, the arbitration rules of the other institutions are not completely silent on core ethical issues, e.g., ICC Article 7(1) requires arbitrators to sign a statement of independence, and LCIA Article 5(2) that requires arbitrators to remain impartial "at all times."

6. Jurisdiction: Answer (b). Alliance SpA applied to set aside an order granting leave to West Tankers to enforce an arbitration award that West Tankers had no liability in regard to one of their

ships crashing into an Italian port. The same dispute was already ongoing in Italian courts, pursued by the insurers against West Tankers. In a decision that has received substantial criticism for its failure to appreciate modern arbitration law and practice (see e.g., https://wolterskluwerblogs.com/blog/2009/02/12/ecj-in-west-tanker-shocker-london-anti-suit-injunctions-fall-foul-of-ec-law/), the European Court of Justice held that it is incompatible with EU law for a court of a Member State "to make an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on ground that such proceedings would be contrary to an arbitration agreement."

7. Mediators: Answer (a). The AAA/ICDR relies on a list of mediators who must maintain their qualification with the institution in order to obtain appointments. This is a model followed by many mediation institutions, such as CEDR or the Netherlands Mediation Institute, but has not yet been adopted by many arbitration institutions. For example, the ICC adopts a "go to market" approach in which any mediators demonstrating sufficient experience and skills relating to the dispute may be considered for appointment (see https://www.adr.org/si.asp?id=4648 for qualification requirements). It is worth noting that approximately half of the mediators included in the AAA database also have their profiles listed with the International Mediation Institute, together with party feedback about their performance. See www.IMIMediation.org

8. In Defense of Slow Justice: Answer (c). An Italian Legislative Decree requiring mandatory pre-trial mediation of civil and commercial cases came into effect on March 21, 2011. In response, Italy's national lawyers union (Organismo Unitario dell'Avvocatura) called a national strike beginning March 16, coinciding with a key skiing weekend. (see "Mandatory Mediation in Italy? Mamma Mia!" available at https://blogs.wsj.com/law/2011/03/14/mandatory-mediation-in-italy-not-if-the-lawyers-have-any-say/)

9. Fast Track, Who Needs Fast Track? Answer (b). The following institutions have all adopted rules for expedited proceedings:
• AAA/ICDR (see "Expedited Rules," available at https://www.adr.org/sp.asp?id=22440#A8);
WIPO (https://www.wipo.int/amc/en/arbitration/expedited-rules/);
• SCC (see "Expedited Rules," available at https://www.sccinstitute.com/filearchive/3/35892/K3_Skiljedomsregler%20eng%20EXP.%20TRYCK_4_100927.pdf ; see also https://www.sccinstitute.com/forenklade-regler-2.aspx);
• DIS (Sec. 1.2, see "Supplementary Rules for Expedited Proceedings," available at https://www.dis-arb.de/download/2008_SREP_Download.pdf).
• CPR (see Rules for Accelerated Arbitration, at www.cpradr.org).

In contrast, the current version of the ICC rules (1998) contains no specific rules for fast-track procedures.

10. Joinder of Unrelated Parties: Answer (a): Article 22.1(h) of the LCIA allows joinder of a third party upon application of one party, provided that the third party and the applicant have consented to the joinder in writing. Neither the AAA/ICDR nor ICC Rules currently provide for joinder of unrelated parties in the same arbitration, only consolidation of claims among the same parties.

11. Satisfied (or not) with Arbitration: Answer (c). Without detracting from the unquestionable reliability of the empirical results discussed at the outset of this posting, the fact that surveys of the

same constituency, corporate counsel, have yielded diametrically opposite results probably says more about the state of the research than the actual views of those who were purportedly surveyed. Apparently, the CCIAG results were gathered years ago but, with a pace rivaling the issuance of arbitration awards from certain institutions, have yet to be released. Fortunately, Lucy Reed divulged some of the results in a blog post here last year (https://wolterskluwerblogs.com/blog/2010/07/16/more-on-corporate-criticism-of-international-arbitration/").

12. Cost of Dispute Resolution: Answer (a). All of the responses represent actual numbers for the resolution of $20 million disputes under the ICC Rules, but only (a) relates to mediation. The remaining numbers were taken from the ICC's arbitration costs calculator for a dispute of the same size.

• $20,000 was the average amount billed to parties by the ICC for mediations, inclusive of administrative charges and mediator fees, most often shared equally by the parties (in other words $10,000 each).

• $67,000 is the amount of the advance on ICC administrative fees for an arbitration, regardless of the number of arbitrators;

• $128,000 is the ICC advance on the fees for a sole arbitrator (in addition to the $67,000);

• $385,000 is the advance on fees for a three-member tribunal (in addition to the $67,000); and

• $453,000 is simply the combined advance against ICC administrative and arbitrator fees for a three-member arbitral tribunal, or approximately 22 times the average amount paid in mediations for disputes of the same size.

All of these charges exclude the additional costs of external counsel and lost productivity (internal employee time), which is typically much greater in arbitration than in mediation.

13. Transparency: Answer (d). Institutions likely to engage in some type of vetting, but they don't exactly trumpet their quality improvements. Instead of making available the good stuff about the actual performance of those conducting disputes, they tend to publish reams of trivia about how many arbitrations they administered involving countries the parties came from or the laws they applied, all of which make reading that Fifth Post-Hearing Submission again a welcome diversion for summer reading.

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