Kluwer Arbitration Blog

New Year's Quiz Answers, Winner…

Michael McIlwrath (MDisputes) · Wednesday, January 15th, 2020

Nkiru Agbu is the winner of the 2020 Kluwer Arbitration Quiz. Nkiru spent New Year's Day researching the Quiz in order to be the first to submit the correct answers. Now that's passion for international arbitration!

Nkiru won a very special prize for her correct answers for which she will be contacted. In addition to Nkiru, KAB also congratulates runner up Mihaela Apostol, for her submission of correct answers.

This particular quiz was not easy, since its focus was domestic arbitration around the world, ranging from quirky localisms to counterintuitive and utterly strange practices. And our readers sent in some additional reasons to prefer international practice over domestic dispute resolution practices filled with landmines. For example:

Brazil: Diogo Araujo pointed out that the jurisdiction now permits consumer arbitration, but only if certain, specific formalities are met, *i.e.*, that either the consumer is the one that initiates the arbitration or has agreed to arbitrate in a separate document or has signed a contract containing an arbitration clause written in bold letters. Diogo pointed out a recent decision that invalidated such a clause because the clause with bold letters appeared on the same page as the contract signature, and the consumer signed the page only once.

India: In addition to the unusual practices mentioned in the quiz, **Aman Mir** noted some 2019 changes in Indian law that will undoubtedly reinforce perceptions of hostility towards international arbitration. One was the official designation of eight categories of persons who may act arbitrators, none which include foreign-qualified lawyers.[1)] Another is the introduction of a government body that will "grade" the performance of all arbitration institutions, and the government's grading will be used by the courts when appointing or designating institutions.[2)]

Answers to the Quiz

1. **Arbitrators.** *Match the arbitrator and the country whose courts decided the issues in 2019:*

a. Arbitrators imprisoned for accepting compensation based on ICC fee scales in ad hoc arbitration proceedings. **4. Peru:** On 4 November 2019, a Peruvian court ordered the "preventative detention" (imprisonment) of 14 arbitrators who had sat in cases between the Peruvian construction company, Odebrecht, and the Peruvian government. Several are charged with bribery for having accepted compensation based on the ICC fee scales instead of the lower arbitrator fees published by the Lima Chamber of Commerce. As discussed on the Kluwer Arbitration Blog on 10 December 2019, the court ignored widely-accepted international practice and also Peru's own domestic arbitration law, which permits arbitrators to increase their fees based on the complexity of a dispute or the amount of work. On 28 November 2019, the Peruvian court had released some of the arbitrators from temporary detention, although the charges remain pending and they are prohibited from leaving Peru.

b. Arbitrator's failure to disclose an ownership stake in the institution that administered the arbitration held to be grounds for annulment of award. **1. USA.** *MonsterEnergy Company, v. City Beverage, LLC (doing business as Olympic Eagle Distributing)* (9th Cir. Nos. 17-55813, 17-55082, October 22, 2019). Failure by a sole arbitrator to disclose he was an "owner-shareholder" of JAMS, the institution administering the arbitration, was grounds to vacate award in a U.S. domestic commercial arbitration administered by JAMS on grounds of "evident partiality". The court also faulted the failure to disclose what it called the "non-trivial business dealings" of prior arbitrations JAMS had administered with one of the disputing parties.

c. Arbitrator allowed to remain on tribunal despite being a former employee of one of the parties to the dispute. **3. India.** Specifically, The Government of Haryana PWD Department Vs G.F.Toll Road Private Limited 2019(1) SCALE 134, decided by the Supreme Court of India on 03.01.2019.

d. Court granted a professional body access to the arbitration hearing transcript and witness statements so it could determine whether an arbitrator should be disciplined for failure to disclose circumstances of possible bias. **2. England.** The Chartered Institute of Arbitrators v B & Ors, (2019) EWHC 460. In reaching this conclusion, the High Court held that maintaining the quality and standards of arbitrators outweighs preserving the confidentiality of the arbitration itself.

2. **Skeletons in the domestic closet.** *Match the practices with the domestic jurisdictions with which they are most associated.*

a. Pre-hearing written skeletons. **3 – UK.** They are a requirement of English litigation procedure. See CPR 52. And let's be honest, there's often little that is skeletal about them. Practitioners reveal their distinct English influence when they request or insist on the opportunity to provide this additional exchange of submissions after all the other memoranda have been submitted.

b. Pre-hearing oral examination of opposing witnesses with a written transcript that can be used later during the oral examination of the same witnesses at the arbitration hearing. **2 – USA.** Just as insisting on "skeletons" will type cast a practitioner as being influenced by England, "depositions" will define someone as American. This staple of legal practice across all 50 of the US states is virtually absent from legal systems outside of North America.

c. *Iura novit curiae*. **4 – Prague Rules.** An arbitrator who insists on the tribunal's right to inject its own legal arguments, even if not raised by the parties, is likely revealing a strong civil-law origin

or influence. Loosely translated from Latin, *iura novit curiae* means "the arbitrators now wish to demonstrate their superior knowledge of the law versus the counsel retained by the parties". The Prague Rules on the Efficient Conduct of Arbitration, which draw heavily from certain domestic practices of civil-law jurisdictions, expressly incorporate *iura novit* at Article 7, providing at least the guaranty of a framework by which a tribunal may "rely on legal authorities even if not submitted by the parties".

d. "Sittings" as term for calculating arbitrator fees for hearing time (usually a half day). **1 – India**. If the arbitrators have scheduled a "sitting", to be followed by other, future, sittings, then most likely you are in India. Unlike international practice, domestic Indian arbitral hearings are typically scheduled via a series of non-consecutive days. And arbitrator fees are assessed on a per-sitting basis. Even where an *ad valorem* fee scale is used, for example under the rules of the Indian Institute of Arbitration & Mediation (IIAM), the arbitrators' expenses are still be reimbursed on a "per sitting basis".

3. **Swearing!** *Match the oath with the place or rules.*

a. Witnesses must swear an oath to tell the truth**. 2 – UAE**. Failure to properly swear witnesses may have unfortunate consequences for the enforceability of an award rendered in the UAE. Article 33(7) of UAE Federal Law No. 6 of 2018 concerning Arbitration provides that "unless otherwise agreed by the parties, hearing the statements of the witnesses, including the experts, shall be carried out as per the effective laws of the State". The effect of an arbitral tribunal's failure to administer an oath to witnesses was recently addressed by the Dubai Court of Cassation in Commercial Cassation No. 364 of 2019 (hearing of 19 May 2019).

b. Arbitrators must swear an oath to decide based on the truth. **3 – New York** law makes this a requirement.

c. Arbitrators are expressly authorized to administer an oath to witnesses but are not required to do so. **1 – LCIA.** The institution's rules contemplate that arbitrators may occasionally have to contend with swearing requirements at the seat, and authorize arbitrators to administer "any appropriate oath to any witness" before they give testimony.

4. **Champerty**. *Third-party funding of arbitration is prohibited under the common law doctrine of champerty in which of the following Asian countries?*

- **5 – None of the above**. While champerty may still be recognized in some corners of the common law world, these major common law fora in Asia do not treat it as an impediment to third party funding. See "Champerty Is Dead: Long Live Champerty".

5. **Foreign lawyers**. *Match the rule with the jurisdiction*

a. Foreign lawyers are expressly authorized to appear in international arbitration and mediation proceedings. **1 – Singapore**. In 2004, Singapore amended its Legal Profession Act to expressly

permit foreign lawyers to represent parties to international arbitrations seated in Singapore, in order to make the jurisdiction more attractive.[3)] Before that, Singapore allowed foreign counsel to represent parties only so long as they appeared together with Singaporean co-counsel.

b. Foreign lawyers may appear in international arbitrations but only as co-counsel with an attorney qualified to practice at this seat. **3 – California, USA**. In order to make California more attractive to international arbitration, the state loosened its prohibition against foreign counsel beginning January 2019 if certain, specified conditions are met. Those conditions require a relationship between the dispute or client relationship and the law where the foreign attorney is licensed to practice or "private international law". The revised statute appears to still require co-counsel licensed in California for arbitrations that do not fall within these exceptions, such as cases in which counsel have no qualification in the law governing the dispute or the place where the dispute arises, and are not based in the same country as the client.

c. Foreign lawyers may reside and work at this seat, subject to regulation by a statutory body. **2 – England and Wales**. The Solicitors Regulation Authority permits foreign lawyers to practice in England and Wales and provides rules that regulate their conduct, and not just with respect to international arbitration.

6. **Enforcement**. *Match the requirement with the jurisdiction* (hint: one jurisdiction matches two propositions)

a. A party must pay a tax of 3% of the amount awarded in order to enforce an arbitration award. **1 – Italy**. The requirement is "only" applicable to enforcement of amounts awarded. Italian Decree No. 131/1986 (Tariff A, Part I, article 8). Instead, awards that only declare rights to be null or void are subject to a Euro 200 registration tax.

b. The arbitrators must read the entire text of their award out loud to the parties in order for it to become officially enforceable. **2 – Ecuador.** Arbitral tribunals sitting in Ecuador can still issue supercalifragilisticexpialidocious awards. Under Article 29 of the country's arbitration act, however, they just may not want to use that or other difficult-to-pronounce terms. The same requirement is imposed by Article 33 of Columbia's Arbitration Act.

c. Arbitrators do not have authority to issue provisional/interim measures. **1 – Italy.** But Italy does not prohibit arbitrators from issuing orders that the parties may spontaneously comply with. In 2019, the Milan Chamber of Arbitration, Italy's leading arbitration institution, issued a new Article 26 of its rules providing for a tribunal's order of provisional measures to have a contractual effect over the parties, substantially side-stepping what has long been a criticism of Italy's arbitration law.

7. **Employment arbitration not allowed in?**

- **c – Saudi Arabia.**

The use of arbitration to resolve employment disputes is very likely an exception around the world rather than the rule. Even where some employment arbitration is permitted, it is often limited to

certain, specified types of employment relationships. Therefore, we did not deduct or penalize any wrong answers to this question. (Almost none of the submitted answers agreed with ours.)

a. **USA**. Employment arbitration is a substantial practice in the USA. The US Supreme Court held in *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) that employers can require employees to arbitrate work-related disputes.

b. **China**. See "Law of The People's Republic of China on Labor-Dispute Mediation and Arbitration Order of the President of the People's Republic of China" No. 80. (PRC Labor Law).

c. **Saudi Arabia.** The entity responsible for adjudicating employment disputes in Saudi Arabia is the Commission for the Settlement of Labour Disputes, a body of the Ministry of Justice. But all cases must be first submitted to mediation under the auspices of the Ministry, and can proceed to adjudication only if the employee or employer rejects the mediator's proposed resolution.

d. **The Vatican**. Under procedures of the Labour Office of the Apostolic See, employment disputes in the Vatican may be resolved by mediation or arbitration. *See*, Statute of the Labour Offices of the Apostolic See (ULSA), Article 3(f).

e. **Brazil**. Chapter II, Paragraph 4 of the Brazilian Arbitration Act. In 2017, Brazil revised its labor laws to permit disputes of executive-level employees to be resolved by arbitration.

8. **Grounds for challenging an award**: *Which of the following statements is true about Singapore?*

- **c. Both are true**. With domestic awards "a party to arbitral proceedings may (upon notice to the other parties and to the arbitral tribunal) appeal to the Court on a question of law arising out of an award made in the proceedings". By contrast, the Singapore International Arbitration Act does not provide for an appeal on questions of law.

9. **Procedure**. *Which jurisdiction has enacted legislation to empower arbitrators to impose exemplary costs on parties seeking adjournments?*

- **c – India.**

a. Myanmar

b. Vietnam

c. **India.** Article 24(1) of the Indian Arbitration Act provides that, with respect to hearings, "the arbitral tribunal….may impose costs including exemplary costs on the party seeking adjournment without any sufficient cause."

d. South Africa

10. **"Which was established first?"**

- **a – The Finland Arbitration Institute.**

a. The Finland Arbitration Institute (FAI). **Founded 1911.** The FAI initially relied on a unique mechanism of "transparency" to ensure enforcement of arbitral awards. During its initial years of operation, parties that failed to voluntarily comply with an award would be fined 300 Finnish marks and have their name posted conspicuously on the bulletin board of the Helsinki Stock Exchange.

b. The Singapore International Arbitration Centre (SIAC). **Founded 1991**.

c. The Vienna International Arbitration Centre (VIAC). **Founded 1975**.

d. The Court of Arbitration of the International Chamber of Commerce (ICC). **Founded 1923**.

e. The American Arbitration Association (AAA). **Founded 1926**.

References

?1 The Amendment Act, Sections 43D(2)(c) and 43J.

?2 Id., Sections 43A to 43M.

?3 Alvin Yeo, Lim Lim Wei Lee, Arbitration Guide of the IBA Arbitration Committee: Singapore (Updated January 2018), at 4.