# Kluwer Arbitration Blog

## The Results are in for the Summer 2020 Kluwer Arbitration Quiz!

Catherine A. Rogers, Gregory King (Arbitrator Intelligence), Michael McIlwrath (MDisputes), and Fahira Brodlija (Association ARBITRI) · Saturday, September 12th, 2020

The Summer 2020 Kluwer Arbitration Quiz was met with a very enthusiastic response: 271 submissions from around the world!

The quiz focused on how the conduct of arbitrations may differ, depending on industries and regions, as revealed by data collected to date by Arbitrator Intelligence. That data is collected through responses submitted by parties and counsel at the end of an arbitration through the Arbitrator Intelligence Questionnaire (AIQ). We are still building our database, which means some of these answers may change over time.

We wish to thank everyone who took the time to send in their answers, especially since the questions were no day at the beach! And please help us continue to build our database by submitting an AIQ at the end of your next arbitration.

The following winners all had a perfect score, and will receive the prizes listed below:

1. **Nikolay Ivanov, Bulgaria** (Prize: Crina Baltag & Ana Stanic, The Future of Investment Treaty Arbitration in the EU: Intra-EU BITs, the Energy Charter Treaty, and the Multilateral Investment (Kluwer 2020)
2. **Viktoriia Tolochko, Ukraine** (Prize: Bruno Guandalini, Economic Analysis of the Arbitrator's Function (Kluwer 2020))
3. **Iryna Ivanova, Ukraine** (Prize: The Born Lectures (6-month access))

A warm congratulations to all!*

And what were the correct answers? The creators of this year's KAB Summer Quiz, Catherine Rogers and Michael McIlwrath, discuss and debate the data behind the answers.

**Duration of arbitral proceedings (commencement to award)**

**1. For three-member tribunals conducting "oil and gas" arbitrations, the average duration is approximately 1,396 days with a three-member tribunal. For sole arbitrators it is:**

a. approximately 400 days

**b. approximately 600 days**

c. approximately 800 days

The correct answer is (b), approximately 600 days.

**Mike:** No one who has participated in the appointing process or negotiated schedules for a hearing will be surprised that things happen more quickly with one arbitrator. But this difference is huge, going from a year and a half to nearly four years just by adding two arbitrators. While that seems far too long for any commercial dispute, is it possible that the reason for this difference is that parties tend to designate three arbitrators in larger contracts that could give rise to complex disputes with more evidence and complex issues?

**Catherine**: You are right, this is an *unexpectedly* big difference. But there is an interesting explanation. In our data regarding three-member tribunals, the mean has been skewed by a small number of cases (i.e., cases that took 2,000+ days, or well over five years). The median number of days is approximately 878 days for three-member tribunals and 628 days for sole arbitrators. This distinction between mean and median holds a potentially important insight: a three-person tribunal may not simply take longer time overall—it may also increase the risk that the proceedings could take A LOT longer. That risk may be relatively small overall (only eight cases out of 48 took 2,000+ days), and due factors, beyond the arbitrators' control. But it is risk we did not observe with sole arbitrators.

**Document production**

**2. According to AI data, tribunals sitting in "banking and finance" arbitrations mostly order document production with what scope?**

**a. Narrow: only narrow and specific requested categories of documents that are reasonably believed to exist**

b. Moderate: a limited number of individually identified documents

c. Broad: broad categories of documents based on general statements of materiality and relevance

The answer is (a): narrow.

**Mike**: This answer is reassuring to see, and it may be that banking and finance disputes more often focus on purely legal than factual issues, so the universe of documents might be smaller. If so, this would mean that arbitrators are not granting unnecessary amounts of document production.

**Catherine**: Perhaps one reason for the narrow document production is that the jurisdictions for

which we have most of our banking and finance data are Chile, Peru, and Dubai—none of which are jurisdictions with traditions of broad document production requests (or grants).

**3. Regional differences: According to AI data, parties seeking document production are most likely to have their request granted in full in proceedings seated in:**

a. the Western Balkans

b. the Middle East

**c. Latin America**

The answer is (c): Latin America.

**Mike**: Instead of complaining about discovery being too broad in the USA, or "North America," should we be worried about this being an Americas/Western Hemisphere phenomenon?

**Catherine**: No. At least not based on the answer to this question. In the majority of Latin American arbitrations, parties do not request document production at all. When they do, in our data, they tend to request either documents based on party agreement (50%), narrow categories or a limited number of specific documents (31%). Within this larger context, tribunals in Latin American-seated arbitrations tend to grant what is requested. So, even if the requesting party gets everything, the scope will end up being much narrower than if, for example, only some document requests in US-seated are granted in full.

**Documents-only arbitration**

**4. Tribunals are most likely to hold a documents-only procedure (no oral hearings) in disputes in which of the following sectors?**

a. construction

b. shipping and transportation

c. sports

d. telecommunications

**e. trade in goods**

f. banking and finance

g. oil and gas

h. investment

The answer is (e) trade in goods.

**Mike**: Again, I have to ask, is this because the value and complexity of disputes arising under "trade in goods" contracts is likely to be less fact-intensive and technical than the others?

**Catherine**: Good question, and one for which we don't yet have sufficient data to provide a definitive answer. Perhaps trade in goods disputes often involve letters of credit, which tend to be narrow and—as you suggest—open to only a limited range of factual questions. I was a little surprised banking and finance did not come in first.

**Appointment of tribunal secretaries**

**5. In which of the following sectors, are tribunals mostly likely to appoint tribunal secretaries/assistants?**

**a. Trade in goods and shipping and transportation**

b. Shipping and transportation and construction

c. Construction and energy

The answer is (a) trade in goods and shipping and transportation.

**Mike**: This made me scratch my head a little, after seeing the answer for question 4. If tribunals in "trade in goods" disputes are ordering "documents only" arbitrations, then why do they need tribunal secretaries?

**Catherine:** According to our data, the appointment of tribunal secretaries is more frequent in higher-value arbitrations. This applies across various subject matter sectors. But your question raises an interesting point, which is whether tribunals are appointing secretaries because they add value or as a matter of habit. From a functional perspective, our data has not shown that secretary appointments affect the duration of proceedings, positively or negatively.

**Encouragement and facilitation of amicable settlement and mediation**

**6. Tribunals are most likely to encourage and facilitate amicable settlement and mediation in which of the following sectors?**

a. energy (other than oil and gas) arbitrations

**b. banking and finance arbitrations**

c. investment arbitrations

The answer is (b) banking and finance.

**Mike**: In the energy and oil and gas (equipment and services) sectors in which my company operates, we tend to see efforts to settle achieved through a contractual requirement of mediation before embarking on arbitration. This reflects the importance of relationships in our industry, and

also the desire to avoid the costs of arbitration.

Outside of this, I do not see much settlement effort by arbitral tribunals, except those made up of predominantly German arbitrators (or Austria and Switzerland), which follows the German court tradition of encouraging parties to settle.

**Catherine**: You appear to be right (is that ever not the case?) about there being a strong regional preference to settle cases. Our data indicates that tribunals seated in Central and Eastern Europe reportedly seek to encourage settlement in 57% of cases vs only 16% in cases seated in North America. That's an enormous difference. In Latin America the statistic is 38% of cases and the Middle East 25%.

As for industry sectors, our data shows that the tribunals in banking and finance are particularly inclined to encourage or facilitate amicable settlement and mediation (in 67% of the cases), which is more than tribunals in oil and gas and energy (other than oil and gas) arbitrations. The question in our AIQ specifically inquires about tribunal efforts (not tiered clauses).

**Awards of interest**

**7. Tribunals in which sector award interest most frequently?**

a. trade in goods

b. banking and finance

**c. oil and gas**

The answer is (c) oil and gas.

**Catherine:** One insight on interest rates—for most cases in our database, no interest was awarded. One arbitrator suggested to me that the likely reason is that parties rarely request interest. So I would have guessed oil and gas because they tend to be some of the largest disputes. For data collected by Arbitrator Intelligence this far, the median value of oil and gas arbitrations is significantly higher than the median value of the arbitrations in banking and finance and trade in goods arbitrations.

**Mike:** Possibly, but I don't buy it. I'd be even more surprised to hear that banking and finance clients forget to ask for interest! (Or at least my bank never forgets any interest owed.) My somewhat cynical hunch is that tribunals may be denying requests for interest as a concession to the party that is perceived to lose the dispute. I sometimes feel they do the same with costs.

**Catherine:** You may be right (again!)—and perhaps it would be worth including a question to address to have parties clarify in our forthcoming AIQ 2.0 whether the parties requested interest in the first place.

**8. What is the most common interest rate applied in arbitral awards across sectors and regions?**

**a. the rate imposed by the applicable law**

b. the rate agreed by the parties

c. the inter-bank rate

The answer is (a) the rate imposed by the applicable law.

**Mike**: I suspect most parties do not specify an interest rate in their contracts, which is why (b) is not the correct answer. No surprise to me that, in the absence of a specified rate, arbitrators are looking to the applicable law to determine the rate of interest.

**Allocation of costs and fees**

**9. Tribunals in which sector are most likely to award *all* of the claimed costs of the arbitration to prevailing party, in favor of both claimants and respondents?**

a. construction

**b. trade in goods**

c. shipping and transportation

The answer is (b) trade in goods.

**Mike**: I am not surprised that (a), construction, is not the correct answer. Construction cases often have multiple claims asserted by each side so that awarding "all" of a party's claimed costs will be difficult in most cases, as each side may prevail on some claims and not others

Tangentially, however, this question raises a pet peeve of mine, which is that parties often do not know which rules of cost recovery a tribunal in an international arbitration will apply until they reveal it in their final award. In theory, the "costs follow the event" concept seems the one most frequently applied, but in practice this means different things to different arbitrators. In your next data gathering exercise, can you let us know the cost methodology that each arbitrator commonly adopts? I would love to see that.

**Catherine**: Your pet peeve is precisely why we ask these questions—some parties really want costs (and fees) to follow the event, typically of course the prevailing party. And some have a national tradition or expectation that is different. Particularly for a responding party that prevails, not recovering costs and fees would still seem like a significant loss, particularly if you are not from a jurisdiction with a "loser pays" rule.

**Conclusion**

We hope that the data behind this summer's quiz has challenged some your assumptions about some issues and trends in arbitral proceedings. And, above all, we hope you enjoyed it!

**Two additional contestants may be eligible for prizes and will be announced if they claim their prizes.*

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