SESSION A
ARBITRATORS: SELECTION, QUALITY AND DIVERSITY

1. Do you select a co-sole arbitrator the way you do for a chair?

2. Selection of co-Arbitrators:

Ways the quality of a co-Arbitrator can be proven when the other party has rejected him on different grounds, i.e.
- He/she doesn’t know the applicable law.
- He/she doesn’t have any practice in this particular area.

3. Arbitrator Bias

The preface to the 2014 IBA Guidelines on Conflicts of Interest in International Arbitration states that “the revised Guidelines are not in any way intended to discourage the service as arbitrators of lawyers practising in large firms or legal associations”. However, query whether this can be reconciled with paragraph 1.4 of the Non-Waivable Red List, which includes “The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom.” A number of questions arise:

1) Is it right that an arbitrator in a large global law firm is necessarily lacking impartiality and independence in circumstances where an overseas office regularly advises an affiliate of a party (but not a party)?

2) Is it ever appropriate for an arbitrator to make a disclosure in respect of a “non-waivable” circumstance within the scope of paragraph 1.4 of the IBA Guidelines, rather than decline to accept the appointment? In the 2016 decision W Limited v M SDN BHD the English High court implicitly condoned such an approach, but might courts in other jurisdictions take a different view, and could an appointment in such circumstances potentially endanger enforcement of the award?

3) Is the reference to “the party” rather than “a party” in paragraph 1.4 of the IBA Guidelines deliberate? I.e. is paragraph 1.4 intended to apply only to the party who nominated the relevant arbitrator? If the arbitrator’s firm advises an affiliate of the party who did not nominate him or her, is this situation intended to be captured by paragraph 1.4?

4) How should “significant financial income” be measured - in the context of a large global firm is this a percentage of global turnover? 10%, 20%, or less? Or would it be sufficient for there be apparent bias if a significant proportion of one office’s income (albeit an office other than the arbitrator’s office) is derived from a party or an affiliate of a party, even though this is a tiny fraction of the firm’s overall revenues?

4. Efficiency and transparency in the selection of arbitrators (by parties and institutions)

5. Assessment of arbitrators – Is this an opportunity for greater transparency and more diversity in appointments or will it simply reinforce the existing pool?
6. Should institutions such as the LCIA obtain assessments of arbitrator case management, decision making and/or award writing performance, from the Parties at the end of an arbitration; for example, along the lines of the Questionnaire developed by Arbitrator Intelligence Inc?

7. Have you been ever faced with a dilemma between competence and total neutrality?

8. How to deal with the delicate issue of an arbitrator that does not keep pace with the other arbitrators or the proceedings (because he is unwilling or uncapable) or that is partisan but not in an obvious way or that is deliberately too difficult (too busy, too rigid...)

9. If diversity can be achieved, how come South American arbitrators have managed to arise where African and Arabs have less?

10. International arbitration has commonly been regarded as an exclusive club of “internationalised elite”. Statistics show that arbitrators of certain nationalities dominate appointments in international arbitration. The lack of diversity in the arbitrator appointment process with regards to nationality results in parties of different cultures and nationalities submitting their disputes to a not so diverse pool of arbitrators.

What impact could this phenomenon have on the development of the international arbitration case law and the propagation of certain legal cultures as opposed to others and how this can affect the development of international arbitration?

11. Is the Arbitration Pledge properly understood, is there buy in from all concerned and is it having an effect?

12. Lots of firms, companies, arbitral institutions, arbitrators etc. have signed the ERA pledge. Are there signs that it is working and should thought be given to a much broader pledge?

13. To what extent has the gender pledge become a reality?

14. The Pledge in practice: what are we seeing “on the ground”?

15. Diversity in Arbitration and Behavioral Design: should we not resort to behavioral design techniques to tackle unconscious bias and bridge the gender gap in international arbitration?

16. How do you explain there are still so few young people (in their 40’s) appointed as arbitrators?
17. Is it in the interests of the development of the arbitrator community to adopt any of the following approaches: a) compulsory sole arbitrator tribunal for claims below a certain value, b) minimum/maximum PQE requirements for accepting appointments; c) that 3-person tribunals appointed by an institution should always have at least one member who is under 45?

18. “Diversity as a factor in arbitrator selection: is it an appropriate consideration for arbitral institutions, for party appointed arbitrators or for the parties themselves?” Why?

19. Selection of Chairman.

   Most important criteria to be considered when choosing a Chairman.

   Best practice for choosing a Chairman.

   Meaning for “diversity” when dealing the election of a Chairman: Nationality, gender, practice, background...

20. Overestimation of Selection Process of Arbitrators

   Is the selection process of the arbitrators not sometimes overestimated? After all, there are so many parameters in a case that it is impossible to predict any decision taking. Neither his/her earlier writings nor decisions will influence an independent and impartial arbitrator.

21. Does article 30.2 of LCIA arbitration rules allow a co-arbitrator to disclose to the LCIA Court evidence or justifiable doubts on the impartiality or efficiency of a co-arbitrator? The requirement to disclose in such article 30.2, is limited to a refusal of co-arbitrator to participate in the arbitration? The reference to article 10 in article 30.2 seems to suggest that the exception to the secrecy of deliberations also extends to disclosure of the improper conduct of a co-arbitrator.
22. Emergency arbitration:

Is it a norm or an exception for an emergency arbitrator to ask for a hearing even if a short one such as one day hearing?

Is this a norm or an exception for an emergency arbitrator to deal with costs incurred during the emergency proceeding such as allocating the costs in his/her decision or is that normally left to the final award of the main proceedings for the tribunal to deal with?

What is the norm in relation to the title of the emergency arbitrator’s decision? An order? Decision? Interim Award? Emergency Arbitration Award?

23. Have the emergency arbitrator provisions in the LCIA Terms restricted a domestic court’s power to grant urgent interim relief (e.g. freezing orders)? If so, should the LCIA give fuller reasons for appointing emergency arbitrators or declining to do so? There was harmony between the decision of the court and the LCIA in Gerald Metals v Timis [2016] EWHC 2327 on whether urgent relief was required but is there sufficient clarity as to whose view (the court or LCIA) takes precedence and why it should?

24. In view of the English Commercial Court's decision in Gerald Metals SA v Timis (2016), should Parties to arbitration agreements "opt out" of emergency arbitrator provisions such as Article 9B of the LCIA 2014 Rules?

25. Will it be a general trend that more and more institutions will incorporate rules on Early Dismissal as seen for instance in the SIAC Rules Article 29. Are Rules on Early Dismissal a step too far in trying to enhance efficiency at the cost of the parties right to a fair process?

26. How can tribunal's more effectively identify and decide possibly dispositive or critical issues at earlier stages of the case?

27. In what circumstances should a Tribunal entertain an application for summary judgment or an application to strike out a claim?

28. Expedited arbitral proceedings, early dismissal of claims and defenses, sole arbitrators against the parties' will (as expressed in the arbitration agreement) – What the users of arbitration really want? Or what arbitral institutions need to promote themselves?

29. Expedited Arbitration

Is there a need for expedited arbitration, consisting in proceedings conducted primarily on a documents only basis, and without organising hearings with parties and witnesses?
30. Should all sets of arbitral rules include a small claims procedure?

31. Expedited proceedings – a comparison

32. Should the LCIA offer an expedited procedure? If so, should it be limited to certain kinds of cases?

33. Do we need more expedited procedures?

34. Expedited procedures: mamma mia!

35. How much do you use IT in your arbitrations? For instance, how frequently do you use video-conferencing (for hearings) to avoid the travel costs?

36. Is the technique of witness conferencing efficient and/or often used in your experience?

37. Are IBA Rules on Taking evidence too cumbersome?

38. Are “Cut-off” dates a good idea or an invitation to the parties to blaze away just before the relevant date? Are “Responsive Cut-off dates” the antidote to tactical withholding of evidence etc.?

39. If the parties are required to comply with directions for attending final hearings, why can’t arbitrators be required to comply with a timetable for their award in the immediate period following a hearing?

40. How long is too long to wait for an award? Should more steps be taken to “encourage” the busy or “relaxed” arbitrator to produce the award? What (if any) steps can you take as a co-arbitrator to try and ensure you are not blamed as well when the Chair has been writing the award “for some time”?

41. Scrutiny of Draft Arbitral Awards
   - Is there a need or desire that arbitral institutions scrutinize draft arbitral awards before the awards are rendered by arbitral tribunals?
   - If so, can the scrutiny be done by an arbitral institution without an express stipulation in the institution’s rules providing for such scrutiny?
42. Confidentiality amongst arbitral procedures

Is the duty of confidentiality breached if information obtained in a confidential arbitral proceeding is produced in a second arbitration proceeding between parties of the same group or that are otherwise related amongst each other?

The parties to an arbitration had both been involved in a previous and related proceeding deemed confidential in accordance to the applicable arbitration law. In the second arbitration, one of the parties produced, and intended to use as evidence, documents and information from the first arbitration proceeding. The other party argued that these documents could not be produced because they were procured in the context of a confidential arbitral proceeding.

Arbitrators are generally subject to their own obligations of confidentiality vis a vis the arbitration institution. This could serve as a protection for the parties insofar it ensures that the information that the arbitrator comes about in an arbitration proceeding is kept confidential and is not disclosed. Does this “protection” justify making an exception to confidentiality in arbitration when confidential information is disclosed to arbitrators in different but related arbitral proceedings?

43. Case Management of an Arbitration and Administrative Support

- Should the administrative support of the arbitral tribunal be given by the secretariat of the arbitration institution or by the arbitral tribunal?
- Can an arbitral tribunal be assisted by an administrative secretary without the agreement of the parties?

44. Based on you recent experience, do you believe we are going towards more or less document production?

45. Are terms of reference of any use in international arbitration?

46. Are arbitrators still (too much) obsessed by due process or are they more courageous to promote further efficiency?

47. Dissenting arbitrators: procedural conduct during the arbitration, in the deliberation phase and when drafting the dissenting opinion. Right to dissent and duty to cooperate.

48. If the claimant fails to identify the respondent properly with the result that the award is issued in the wrong name, can Article 27 of the LCIA rules be used to get it right, maybe 6 years later? Is this the proper purpose of the slip rule? Knowles J appears to say yes in Xstrata Coal Queensland v Benzi Iron & Steel [2016] EWHC 2022 (Comm).
49. Discovery in arbitration

Based on the principles of speed and efficiency, there is a common understanding that discovery should be limited in international arbitration. Apart from speed and efficiency, limitations on discovery help to deter the onset of fishing expeditions, or such scenarios where a party initiates legal action based on a hypothesis which it hopes to prove with the help of an extensive amount of documents obtained by means of discovery.

On the other hand, however, arbitration also provides the advantage of flexibility, which allows for parties to tailor procedures to a specific set of factual and legal issues, selecting procedural rules appropriate to the contours of each dispute.

In view of this, what could parties and arbitrators do, in terms of procedure, to deter parties from going on fishing expeditions?

50. What can be done when a party refuses to engage properly with an IBA Rules disclosure process, when the effect is to frustrate the requesting party's ability to challenge the producing party's case?

51. "Does the arbitral tribunal have jurisdiction also on tortious liability when this is not expressly indicated in the arbitration clause? Is there a common approach to this in different jurisdictions?"

52. Negative Inference: can it go as far as shifting the burden of proof?

53. Is any purpose served by providing in arbitration rules for summary procedures?

54. Arbitration agreement must be in writing – still a necessity?

55. Does the desire for increased transparency around arbitration risk attacking key benefits of the process such as confidentiality? Or are confidentiality restrictions creating problems which the user community would prefer to have removed? What are the goals of the transparency initiatives, and are there better ways of achieving them?

56. To what extent do arbitrators have jurisdiction to review/reconsider the decisions of arbitral institutions? Is there a uniform rule or best practice?

57. To what extent do cultural differences influence the outcome of arbitral proceedings:

   (i) From counsel’s perspectives?
   (ii) From arbitrators’ perspectives?
   (iii) From parties’ perspectives?
58. Does the selection/choice of arbitrators influence the proceedings and their outcome:

   (i) Do common law and civil law based arbitrators look at ascertaining the content of the applicable substantive law differently?

   (ii) Do common law and civil law based arbitrators look at questions of evidence and burden of proof differently?

59. Arbitration about an expert determination when the contract does not regulate the matter. Grounds? Is the general arbitration clause applicable? Can the arbitrator fix the errors and determine the value?

60. Should interim measures ordered by an arbitral tribunal be an “award” capable of separate enforcement under the New York Convention? and should the Tribunal make clear its own view on whether its decision is an award capable of enforcement under the Convention?

61. Procedural streamlining: could we achieve greater efficiencies if counsel were required to "meet and confer" (virtually or otherwise) before resorting to extensive correspondence, procedural applications and hearings before the tribunal?

62. Perceptions of comparative efficiencies and costs savings in the arbitral process

63. The limits of natural justice or procedural fairness in the arbitral process.

64. Publications by experts seem to be fair game to question their credibility or consistency. But how significant are publications by opposing counsel which appear to be inconsistent with the case they are advising for their client?

65. Secretary of Tribunals.

   Selection: by the Chairman, by the 3 Arbitrators, by the Arbitral Institution.

   Their role, their limits.
66. **Mock arbitration**

In the United States, mock arbitrations are becoming a more commonly used method for assessing the strength of a case and improving the presentation. To calibrate the mock to the needs of the case, careful consideration should be made to when to conduct the mock, who should be chosen as mock arbitrators and how they should be selected, what the mock should cover, and how feedback should be given, among other issues. To what extent is mock arbitration being utilized in other jurisdictions? What issues have arisen and to what extent have parties and counsel found it valuable?

67. **Appellate procedures**

The ICC Report on Financial Institutions and International Arbitration reported a minority of financial institutions expressed an interest in an appellate procedure in arbitration. To what extent are you seeing an interest in appellate procedures in the financial industry or other sectors and what has been the experience to date?

68. **The Practice of "Internet +" era online arbitration in China**
SESSION C
QUANTUM: DEVELOPMENTS AND ISSUES

69. Do arbitrators still tend to be bad at maths? Are sections on damages in awards usually, sufficiently and well expanded?

70. Is there a general skepticism towards awarding moral damages? If not, what are the criteria for calculating and awarding same?

71. The tax treatment of awards can be somewhat arbitrary. For example, a tribunal may simply award damages based on the amounts that a firm would have earned before tax, even though the tax treatment of the award might be quite different. Given the sums are often material, why is more attention not given to tax issues?

72. Could we have better guidance on when VAT is payable on arbitrator’s and institution’s fees? Frequently exemptions are requested but the tax authorities, courts and institutions do not give us clear answers on how to apply the exemptions. What sort of evidence should be provided to justify an exemption from VAT on such fees?

73. Is there ever a reason to deviate from the respondent’s borrowing costs when setting pre-award interest rates?

74. Pre-award interest in times of low international rates: how wide is the Tribunal’s discretion in the absence of express contract or treaty provisions?

75. How careful have arbitrators actually become when it comes to justifying the allocation of costs in their awards?

76. Should a successful party’s cost of funding its claim or defence be recoverable in an award of costs?

77. Given the English Commercial Court's decision in Essar Oilfields Services v Norscot Rig Management (2016), should arbitrators award costs of third party funding, as well as legal and arbitration costs?

78. What rules should apply to third party funding both in international investment and commercial arbitration? What rules should apply to law firms representing parties pro bono or on the basis of success fee arrangements?

79. Are requests directed at the parties to disclose (i) any third party funding (ii) identity of funders (always) appropriate and/or necessary?
80. After the landmark ruling in Essar Oil, what is the future of litigation funding in arbitration both in England and elsewhere in the world.

81. Do you see many cases pending and could not be carried forward because one party (usually the respondent) refuses to pay arbitration fees and the claimant has difficult to pay on behalf of the respondent? Any suggestion or study on how to resolve this issue?

82. Fees and costs

To what extent and how are parties disclosing success fees in their cost submissions?

83. Success fees: given their prevalence, should the tribunal take the initiative at an early stage in the proceedings by enquiring whether a party proposes to factor a success fee into its costs submission if successful? And make clear how it proposes to deal with any alternative fee arrangements at the costs stage?

84. Under LCIA arbitration rules, in case of guerrilla tactics causing undue delay and inefficiencies by repeated unjustified requests by one party, can the arbitrator or tribunal request parties to provide a statement of legal costs on such specific dismissed requests without waiting for a final award? In such circumstances, would LCIA Court also agree to determine the arbitration costs for such specific dismissed requests at the request of the arbitrator or tribunal? If the cooperative party were to request a partial award for allocation and immediate payment of such specific legal costs and arbitration costs, could the arbitrator or tribunal issue such partial award on costs? If an arbitrator or tribunal is empowered to adopt such measures, the uncooperative party may be deterred by the immediate effect of its inefficient tactics resulting in anticipated payments of costs. Moreover, an arbitrator or tribunal may be more inclined to decide on costs caused by guerrilla tactics on the basis of procedural efficiency at an earlier stage where such decision is not shadowed by the success on the substantive issues in the final award.

85. Interim costs orders ("pay as you go") – a good idea, a costly nuisance, somewhere in between or it all depends?

86. What is the current position on ordering a Claimant to provide security for costs. Is the fact that the Claimant cannot fulfill a potential cost reimbursement to the Respondent sufficient reason for such an order or does it require additional reasons such as the Claimant’s conduct or deterioration of the Claimants financial position over time?

87. Faced with uncertainty in quantum, Tribunals often deem it ‘conservative’ to under estimate damages than over estimate them. From a public policy perspective is this really a ‘conservative’ approach?

88. Tribunal appointed/party appointed quantum experts – preferences and experiences.
89. Do Tribunals pay enough attention to quantum?

90. Should arbitrators defer to prior precedents when assessing quantum?

91. Is it reasonable for an expert’s valuation method to differ from the method which the Claimant applied prior to the dispute? Should we accept that Claimants make mistakes, and do not always act with full information or rationally?

92. The ICCA-ASIL have convened a Task Force on Damages with the aim of promoting consistency and rigor in damages estimation. The stated aim is “not only to achieve consensus on the fundamentals, but also to identify and disentangle the legal principles from the financial ones.” In the view of the participants, what are the key issues which most urgently require a consistent and rigorous approach?

93. Damages deriving from an antitrust violation. Guidelines. The eu directive...
   Precontractual damages when no contract has not finally been entered into
   How to reach the right balance between certain and speculative damages?
   Shouldn't the party that breached the contract or did not fulfilled its obligations bear all the consequences (100%, ie not weighed by the probability) of a lost opportunity or a frustration of a reasonable (although uncertain) expectation?

94. Are ex ante damages required for full restitution?

95. Do you think financial experts should be treated as a different sort (unbiased, totally independent with more demanding duties) of witnesses or are they actually no different than fact witnesses?

96. Is there truly a clear dividing line between direct and consequential loss(es)?
SESSION D
GLOBAL DEVELOPMENTS AND THEIR IMPACT ON ARBITRATION

99. What impact will Brexit have on international arbitration, both in London and elsewhere?

100. Does Brexit present an opportunity for arbitration? If so, what should the arbitration community be doing to make best use of it?

101. How will BREXIT affect the enforcement of British seated awards in the European Union and the enforcement of EU seated awards in the United Kingdom?

102. The impact of Brexit on arbitration: may Brexit result in a more hostile attitude by domestic courts in EU member states with respect to awards rendered by UK-seated arbitral tribunals? May this be the case at the stage of recognition and enforcement? Or may this also be the case ex ante, at the stage of the assessment of arbitrability or of validity of the arbitration agreement? Is the language of Article 32.2 of the LCIA Arbitration Rules (as compared, for instance, to Article 41 of the ICC Rules) problematic in this respect?

103. Do you believe the contraction of international trade and/or the recent Brexit will reflect adversely on international arbitration or rather create new opportunities?

104. Arbitrations have grown massively on the back of globalisation. With Brexit, Trump and other populist anti-globalisation trends, are we looking at future shrinking of demand for international arbitration?

105. The criticism of globalisation and its impact on international arbitration

Recent political developments in economically important nations have brought to light the growing criticism of globalisation in favour of nationalist sentiment. Do you think this poses a threat to international arbitration, which has thrived on internationalisation and the progressive convergence of different nationalities and cultures? Will the relevance and success of international arbitration be overshadowed by a tendency towards giving power back to national governments and authorities?

106. Is it fair to say, as the Lord Chief Justice said last year, that arbitration impedes the development of the common law and should there be a redressing of the balance between the two. Are common law jurisdictions missing out on essential precedent as a result in the increase of arbitration in specific areas of the law in which arbitration has become almost the only way of dispute resolution, such as shipping and commodities disputes.

107. The Influence of Global Internet developments on the Concept of “seat of arbitration”

(Internet-based Global developments and their impact on the Meaning of “seat of arbitration”)
108. What does the computerization of jobs mean for those working in international arbitration?

109. Should we (still) depart investment arbitration from commercial arbitration? Is there any upside to attempt to merge those 2 creatures?

110. Regarding the principle of ‘legitimate expectations’:
   (i) Is it truly under attack in investment arbitration?
   (ii) Can it not be easily invoked in commercial arbitration?

111. Global Developments

   There appears to be haste in adopting new procedures for expedited procedures. Are these really a marketing ploy to keep up with competing jurisdictions? Is there a genuine need for another layer of rules when tribunals should already adopt robust case management, and already have powers to make immediate partial awards for many debts, decide jurisdictional issues at the outset and hive off preliminary issues?

112. Has arbitration become too expensive?

113. Are sanctions, embargo and compliance issues an increasing hot topic for arbitrators to settle in arbitrations?

114. CETA permanent international investment court

   As a response to criticism of investor-state dispute settlement (ISDS), the European Union has offered alternative forums which have crystallized in, among others, the EU-Canada Free Trade Agreement. One of the proposals of this treaty is the creation of an international investment court to replace investor-state arbitration. One of the main objectives of the EU in creating this permanent investment court has been the elimination of party appointed arbitrators. Moving forward, do you think this will be the tendency in investment arbitration, or is this EU measure an isolated case?

115. Are we witnessing a change regarding arbitral institutions and arbitrators’ liability?

   (i) Do arbitral institutions and arbitrators need immunity from liability?
   (ii) Does the new Spanish Supreme Court decision in Estudio 2000 S.A. vs. Puma AG Rudolf Dassler Sport (Puma) mark a new trend?
   (iii) Are other jurisdictions across the globe experiencing a rise in claims/challenges against arbitrators/arbitral institutions?
   (iv) What impact does all this have on perceptions towards arbitration?
116. If arbitration is not justice, but also a market, how can we, as service-providers really improve so it better meets the users’ needs?

117. Do we need a new NY Convention?

118. How does an "up and coming" institution make a mark that materially improves its prospects of attracting international work? What are the levers that attract parties to the use of an institution’s rules? How does the answer differ between a jurisdiction where there is already a well established institution and a jurisdiction where the institution is a new entrant?

119. The Practice of National Judiciary supports Arbitration under the framework of “the Belt and Road Initiatives” of China

120. Suing the Arbitrator
   How widespread is this phenomenon?

121. Is there a need specialization in International Arbitration?

122. Does the new art. 257 of the UAE Penal Code mark the end of Dubai as a preferred seat for arbitrators?