TOPICS FOR DISCUSSION

LCIA
Arbitration and ADR worldwide

European Users’ Council Symposium

Tynney Hall, 12-14 May 2017
SESSION 1: GOOD PRACTICE – CHARGING AND BUDGETING

1. Should each member of a three person Tribunal charge the same hourly rate?

2. It is important for institutions which operate a time-based system of remuneration to adopt an approved time-recording methodology. Practices currently differ according to the professional and cultural background of the arbitrator. There are occasionally dramatic differences which can undermine the confidence of users in the process.

3. The hourly time charges and incremental deposits in LCIA arbitration are important differentiating characteristics of that system, valued for their transparency and fairness. Uniform time recording (for example, in 6 or 15 minute increments) and basic vetting for consistency (for example, so that the time recorded by arbitrators for hearings is consistent), is common practice in law firms. Would the LCIA system be enhanced by adopting a similar approach, to be directed and monitored by the LCIA secretariat?

4. Should charge-out rates/fees of arbitrators be set out or limited by institutions or guidelines? What about setting out a reasonable scale of fees according to the experience of the arbitrator? How then would such experience be assessed - by profession (eg. engineer, lawyer), by number of arbitrations (by hours, value, relevance ...)? How would such a scale be affected by location (seat of arbitration/residence of the arbitrator?)? Should an arbitrator from Newcastle be cheaper than a Parisian? The imposition of fee charging guidelines may not be such a simple affair.

5. Do arbitral institutions:
   (i) Exercise control over time recording of arbitrators?
   (ii) Apply uniform standards when reviewing time recording of arbitrators, irrespective of the seniority or stature of the arbitrators?

6. For systems operating on an hourly remuneration basis, is there a case for the institution to establish uniform procedures requiring regular review and updating of the costs budget for the tribunal at key stages of a reference leading up to the final hearing, to take account of unforeseen developments (eg applications for interim relief, unexpectedly numerous/time-consuming procedural applications etc)?

7. Should institutions question, or even cap, arbitrators time-based fee claims if the institution considers them excessive? Are there any guidelines or rules of thumb institutions could use?

8. In certain national court systems (e.g England & Wales) it is necessary for the parties to submit budgets to the court for its approval. Should arbitral institutions do likewise? Should budgets be required from arbitrators as well as the parties?
9. What good reason is there for arbitrators not to record their time (a) contemporaneously (b) in sufficient detail to allow easy review of what they did and when, whatever charging system is applicable?

10. If arbitrators were to compare the time spent they spent on a case, could this could lead to a lazy arbitrator increasing his/her fees to match the time of the other members of the Tribunal?

11. Do arbitrators always give reasonable attention to proper time recording?

12. In hourly-based systems there is a role for the institutions in monitoring time spent, both towards the parties as in between arbitrators. Would it not be appropriate for a tribunal to set – in consultation with the institution - a budget in the initial phase of the arbitration and for the institution then to periodically check development of hours against budget? And if the budget is not timely amended by tribunals, to keep tribunals to their budget? And to introduce a cut-off date after which no amendments can be made (e.g. two weeks after the last hearing)?

13. How good are arbitrators at budgeting, and who suffers when they get their budgets wrong?

14. Can arbitrators be asked to “budget” for a case, i.e. give an estimate of the number of hours they expect to spend on a certain task? Would this make arbitrators more accountable for their hours or would we only see a laundry list of caveats?

15. Institutions appear to be competing amongst themselves to assert control over the process and costs, including arbitrator fees, in the name of efficiency, to satisfy user concerns. Does this competition risk driving participants to ad hoc arbitration where the ultimate control resides with the user, allowing freedom of choice in an open marketplace? In some areas, such as investor state, some counsel are already expressing a preference for ad hoc over institutional. Is this an expanding trend? Are institutions already anticipating this by offering to administer arbitrations under UNCITRAL Rules or other ad hoc rules? (note LICIA Schedule of Costs in ad hoc arbitration administered by the LCIA which still place limits on arbitrator fees)?

16. Certain arbitral institutions are setting low levels of fees (and expenses) for arbitrators - presumably in a bid to gain market share and/or to encourage the appointment of local practitioners as arbitrators. Is this a good thing?
17. In recent times I have experienced repeatedly that the institution under which the arbitral tribunal was formed significantly undercut their own rules/guidelines as to minimum/maximum fees for arbitrators, in one case dramatically only 1/4 of the minimum, which meant 1/8 of the maximum fee. As dramatically, the same institution has undercut its minimum fees repeatedly in other cases in which I was involved. What is the experience of other practitioners? Why should the tribunal as such accept such practice against the institution’s own standards? Has there been a discussion on this? I feel, that this is not best practice at all. Is this view shared by others?

18. Now counsel can see how much time a particular arbitrator has spent on a matter, in particular, to see whether the arbitrator has devoted enough attention to the matter. Is this a good or bad thing?

19. Now counsel can see how much time a particular arbitrator has spent on a matter. Can the arbitrator be challenged on the basis that he/she did not devote enough attention to the matter?

20. Institutions are increasingly seeking to control arbitral efficiency and costs with a focus on arbitrator fees when studies have shown that the most significant costs are those of counsel. Is the recent focus on arbitrator fees the thin edge of the wedge? Will institutions seek to introduce guidelines, tariffs or other controls for the amount of counsel fees that may be recoverable? If not, why the focus on the arbitrators?

21. The arbitral tribunal acting as settlement facilitator: a method to save considerable time and costs

1. 8 years after the introduction of the CEDR Rules for the Facilitation of Settlement in International Arbitration of 2009: Has the idea been accepted by the Anglo-American legal community that an arbitral tribunal may act as settlement facilitator without losing its independence or impartiality.

2. The presence of representatives of the parties with decision making authority in the first case management conference, where the method of an arbitral tribunal acting as settlement facilitator should be introduced by the chairperson of the tribunal, greatly enhances the possibility that the case may be settled prior to the taking of evidence. This method is therefore particularly effective to save time and costs in systems operating on an hourly remuneration basis for tribunals and counsel.

22. Back to basics: How the “private justice” is approached; is this still contractual arrangement “run” by negotiations (ad hoc) or semi “fully administered justice” where the arbitrator is simply a contractor of a particular institution?

Elements: (i) what type of financial modelling (risk handling / return on time invested versus opportunity costs) prevails in a current arbitrators’ thinking, and (ii) what the costs of justice versus allocation of resources should be (institutions perspective).

Reference points:

(i) Lawyers’ charging models (time-based fees versus fixed fees) & market forces;

(ii) Institutions’ competition driving fee models and control levels;
(iii) Time based fees versus ad valorem fees – time spent on a case versus its size matrix;

(iv) Overriding principles (CPR: “The overriding objective - 1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly and at proportionate cost.”).

Exemplification of - effectively - a mixed system: ICC (range of arbitrator(s) fees + time sheets requests + “penalties” for delays).

23. There are frequent complaints at the time and cost of proceedings. Perhaps some statistics relating arbitrator time and cost to length of submissions and/or witness statements and/or expert reports would be helpful?

24. While arbitrator billing can sometimes be a concern, the overall impact of arbitrator charges is comparatively small in the process. What is much more significant is the continuing tendency of arbitrators to award adverse costs on an indemnity-plus basis, without doing the kind of review essential to a cost-shifting system that occurs in every court with such a system. As costs continue to mount and as arbitrators continue to entertain all sorts of frolics and detours in the name of due process, isn’t this a much more serious problem than arbitrator charging?

25. Shall the secretary’s time be charged and how?

26. LCIA Rules Article 18, the guidelines about conduct, and wayward legal representatives. I would be interested to learn whether this has, so far, proved to be a deterrent, or a weapon that has actually been used, and in either case whether it has actually worked. Or has it been an example of officious, over-regulation?
SESSION 2: ARBITRATORS – APPOINTMENTS, DISCLOSURE AND CHALLENGES

27. We all know how important it is to select the right arbitrator. There is increased transparency. GAR’s Arbitrator Research Tool, for example, allows access to an up to date and (reasonably) complete list of the co-arbitrators and first chair counsel we have worked with in the last three years. Counsel can always quiz potential nominees on their availability and experience. What more can be done?

28. It appears that it is not always easy for members of the Tribunal to agree on a hearing date earlier than later due to some members’ heavy schedule. Some arbitral institutions require a prospective arbitrator to submit the number of pending cases and/or information on his/her availability in the interest of efficient case management. Could arbitration institutions have more control or say in the appointment of arbitrators in terms of “availability”?

29. Is now the time for arbitral institutions to give the parties their full reasons for appointing any particular arbitrator? If not, why not? If so, would it be the thin end of the wedge, providing a discontented party with something concrete with which to object and delay?

30. Is there a case or a need for the more frequent nomination of appointees with non-legal expertise as members of tribunals in appropriate cases? Or is this effectively addressed by the greater use of existing powers to appoint expert(s) to the tribunal eg in cases where it important to ensure that relevant expertise, such as on complex loss quantification, is available to the tribunal, and expert evidence from the parties may not suffice?

31. Is progress being made in increasing diversity on international arbitration tribunals? What more can be done?

32. Does more need to be done to increase public confidence in the systems of appointment in international arbitration?

33. Who is better when it comes to appointment of arbitrators: regional or international institutions?

34. Appointment:
   Interviews for arbitrator selection – despite the existence of guidelines such as those issued by the CIarb, is it really appropriate/sensible for a potential nominee to attend such an interview?

35. How long should elapse before it is appropriate for an individual who has retired from practice as counsel within a law firm to accept appointment as an arbitrator by one of his or her former partners?
36. It is common practice among American legal counsel and in American commercial arbitration to provide potential arbitrators with not only the names of the parties, but also the names of related companies, possible witnesses as well as legal counsel. During the course of lengthy arbitration proceedings, how as a practical matter, can an arbitrator properly maintain his/her on-going duty of disclosure?

37. Disclosure – how much is too much?

38. Do disclosure requirements suffice to address (a) perceptions of bias that arise from repeat nominations by a party of the same arbitrator, and (b) the risk of delay in resolving arbitration references as a result of the number of concurrent arbitral appointments an arbitrator has? (see Aldcroft v International Cotton Association [2017] EWHC 642 (Comm))

39. The ICC Court has set out in its updated “Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration” revised and extensive disclosure standards. Are these or should these be the applicable disclosure standards also in other kinds of international arbitration proceedings?

40. Given current expectation and practice on disclosures, have the IBA Rules on Conflict of Interest passed their “sell-by” date?

41. Have the IBA Guidelines on Conflicts of Interests in International Arbitration 2014 gone too far?

42. Several English High Court decisions have called into question what degree of respect may be due to the IBA Guidelines on Conflicts of Interest in International Arbitration, with one recently stating that, “if there is no apparent bias in accordance with the legal test [under English law], it is irrelevant whether there has been compliance with the IBA Guidelines.” What does this statement mean? Is it cause for alarm? Or is it just appreciation for what the IBA Guidelines themselves already state: namely, that “[t]hese Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties”? Either way, what does this say about the state of these Guidelines (or related guidelines efforts): that those who try to comply may be at a disadvantage?

43. Are there weaknesses in the 2014 IBA Guidelines on Conflicts of Interest and are the criticisms of those Guidelines by Knowles J in W Ltd v SDN BHD 2016 1 Lloyd’s Rep 552 justified?

44. Should there be an LCIA rule which requires disclosure of the number of appointments which any arbitrator has from any law firm and positively restricts the number of such appointments, as opposed to reliance on the guidance in the IBA Rules. See by analogy: Aldcroft v International Cotton Association [2017] EWHC 642 (Comm)
45. Is the ICC not overshooting the purpose by its current requirement that any previous appointments by counsel to any of the parties needs to be disclosed? Is the IBA “three past years-rule” not more realistic and adequate?

46. Under the IBA Guidelines on Conflicts of Interest, a party and an arbitrator are required to make “reasonable enquiries” of circumstances that may give rise to a conflict. What does “reasonable enquiry” mean? How far must one go? For example, an arbitrator may suspect that a claimant is funded or that the claim is a subrogated insurance claim. The arbitrator has had an extensive insurance practice for insurers in the same field or alternatively has done or is doing work for a major third party funder. Does the arbitrator make an inquiry or does the arbitrator refrain from doing so, on the theory “what I don’t know cannot hurt me”. Does the English Court decision in W Ltd v. M SDN BDH [2016] EWHC 422 promote the latter approach?

47. “I was trained and I believe in the system of full disclosure – on many occasions “over” IBA requirements (say: 3 time period threshold not applied).”

The question remains – how to deal with the challenges based not on “legitimate grounds/doubts” but on dilatory / guerrilla tactics basis.

Provocative proposition for “conceptual consideration” - should there be a system where:

In case of a challenge “an immediate replacement” (no stay of proceedings) is made by the institution, if the nominating party so agrees or at the institution discretion in case of the Chair (reasonable caveats / conditions to be setup); and

If the challenge is lost the challenging party pays “penalty” consisting of (i) full (or percentage of) arbitrator “not having the job any more” fees (allocated to him) plus (ii) reasonably high “delayed procedure fee” shared by the winning party and the institution in certain proportion. Such payment could / should be made in advance (as a pre-condition for challenge filing) and would be reimbursed in case of a successful one; and

For avoidance of doubt - ad hoc cases would have to be structured differently on “operational” level.

48. Article 2.3(a) of the IBA Rules on the Taking of Evidence in International Arbitration requires the Tribunal to identify to the Parties, as soon as possible, any issues that the Tribunal may regard as relevant to the case and material to its outcome. In reality, Article 2 remains very limited in its use – the data suggests that it is used in only 8 per cent of cases where the Tribunal applied the IBA Rules (see: Report on Reception of the IBA Arbitration Soft Law Products dated 16 September 2016, ¶47). Do you think that arbitrators are reluctant to identify any such issues because of a fear that early determination of various evidentiary issues may lead to allegations of pre-judging the dispute and challenges to arbitrators who seek to apply Article 2.3(a)?

Equally, in some instances a refusal by the Tribunal to order production of documents may pre-determine the outcome of the dispute, for instance, where the Claimant does not have access to the document and cannot discharge its onus otherwise. Can this be a ground for recusing the arbitrator?
49. (i) A prospective arbitrator can be interviewed by representatives of a party on matters relating to the existence of conflicts of interest; at the same time, there should be no questions on the prospective arbitrator views on the merit of the case nor any testing on the position/strategy of the party wishing to appoint him/her. Should a report of the interview be disclosed to the parties by the prospective arbitrator, if appointed?

(ii) The IBA Guidelines on Conflict of Interest and the section on Practical Application of General Standard, establish a few non-binding set of principles (i.e. the Non-Waivable Red List; the Waivable Red List; The Orange List; the Green List) which “have gained wide acceptance within the international arbitration community.” Should these principles should be made/considered as binding?

50. What guidelines are there for party-appointed arbitrators as to when and how to consult with the party that appointed them on the appointment of the presiding arbitrator? Article 13.5 requires that the arbitrator inform the Registrar of such consultations. Does that happen? When is the arbitrator required to inform the Registrar – immediately, within a few days?

51. Is there a role that institutions can play in record keeping that would assist arbitrator disclosure?

52. In an initial arbitration (first case), an arbitrator, appointed by the Claimant, signed a unanimous award based on a contractual interpretation that was adverse to the Claimant's position. In the next case (second case), exactly the same contractual provision is in issue with a different Respondent party who has appointed the same arbitrator that the Claimant appointed in the first case. Are these circumstances likely to give rise to justifiable doubts as to his/her impartiality?

Caratube International Oil Company LLP & Mr Devincci Salah Hourani v Republic of Kazakhstan, ICSID Case No ARB/13/13

EnCana Corporation v. Republic of Ecuador, Partial Award on Jurisdiction, 27 February 2004

53. Does the risk of being found liable for costs as a result of failure to make proper disclosure affect the extent to which Arbitrators make disclosure?

54. Should one disclose either formally or informally that one has a personal friendship as arbitrator with the appointing counsel or other members of the tribunal? Should one disclose that one is on a first name basis, with one of the counsel or one of the other members of the tribunal and should one disclose personal friendship?

55. Much attention is devoted to pre appointment conflicts and connections between Arbitrators and parties. How should one deal with professional and social contacts that occur during the period with parties their representatives and experts that the Arbitration runs?

56. Should regular attendance at Tylney Hall be disclosed? Does it add to the “conspiracy theory” that international arbitration is a secret system designed to be abused by those in the know?
57. Just as the Claimant's first expert is sworn in and about to begin testifying, your co-arbitrator to your left leans over to whisper that the expert has appeared before him in another case and to suggest that he (your co-arbitrator) believes that he ought to disclose the fact. Before you can react, your co-arbitrator to your right, who seems not to have heard these goings-on, leans over to inform you that the same expert has appeared before her in many cases but that she (your co-arbitrator) has no intention of saying anything to the parties.

What - if anything - to do, as president?

Is there any appetite, or any sense, in extrapolating from certain primarily domestic institutional rules a broad duty on arbitrators to disclose connections and contacts with experts with whom there is manifestly no direct conflict or lack of independence?

58. Arbitrator Challenge/Use of Arbitral Secretary:

In P v QRS [2017] EWHC 194 (Comm), the English Commercial Court stated that:

"the critical yardstick for the purpose of s.24 of the [1996] Act is that the use of a tribunal secretary must not involve any member of the tribunal abrogating or impairing his non-delegable and personal decision-making function. That function requires each member of the tribunal to bring his own personal and independent judgment to bear on the decision in question, taking account of the rival submissions of the parties; and to exercise reasonable diligence in going about discharging that function. What is required in practice will vary infinitely with the nature of the decision and the circumstances of each case."

How would courts in other fora approach the question of when the use of an arbitral secretary will become improper so as to give rise to a valid challenge?

59. Why have there been in recent years more challenges on the basis of the use of a secretary?

60. When, if at all, it is appropriate for a tribunal secretary to produce a first draft of an award? Does the answer depend on what has been disclosed to the parties about the role of the secretary (either expressly or as a consequence of provisions in the procedural rules about the role of a secretary)? Does the answer depend on whether the tribunal has already decided (and told the secretary) how it will dispose of the case?

61. Given the increasing use of challenges to arbitrators, including as tactical "gamesmanship", is it time for tribunals to be braver in the use of costs awards as a way of sanctioning behaviour that amounts to "playing the man and not the ball?"

62. Jurisdictions may vary as to their approach to disclosures and challenges, so is international arbitration experiencing rise in 'artificially induced challenges'?

63. Is increased transparency in international arbitration (including arbitrator intelligence tools) likely to result in an increase in challenges, and specifically challenges based on "issue conflicts" in commercial arbitration (as opposed to investment arbitration)?
64. Has arbitrator misbehaviour become more prevalent and what is the arbitral community doing about it?

65. How should the chairman of the tribunal handle the proceedings when one of his co-arbitrators obviously lacks the technical, legal or linguistic skills to be able to follow the proceedings?

66. Deliberation confidentiality:

The English Commercial Court recently decided in P v QRS [2017] EWHC 148 (Comm) that deliberation documents were confidential and not subject to disclosure in the context of an arbitrator challenge application before the court of the seat. Would this decision be decided the same way in other jurisdictions?

67. Do arbitrators’ have a duty of collegiality? If so, what is the appropriate sanction for breach of this duty?

68. Generally, who is more decisive when it comes to procedural and substantive matters: common law or civil law based arbitrators? Are there any visible trends or inclinations?

69. Can strategic planning create a 'beneficial' rather than 'adverse' inference in disclosure? The announcement by a party that a pertinent document has been discovered at a late stage in proceedings will surely attract objections from the other party, but the mere suggestion that such evidence exists in support of a key issue can surely be enough to influence the tribunal's minds? Agreement to or admission of such a document on to the record may not be just or appropriate, especially where the provenance is questionable, but continued resistance to such disclosure can play into the disclosing party's hands. How can this game-playing be prevented?
SESSION 3: THIRD-PARTY FUNDING

70. How should third party funding be defined? Should any distinction be made between professional third party funders and attorneys/law firms that have a contingency fee arrangement with their client?

71. Can funders be exhaustively defined and categorized? Do we need global regulation of third-party funders and funding arrangements?

72. The definition of third-party funding: Is traditional bank lending against collateralizing any claims advanced in an arbitration third-party funding?

73. Can third party funders be considered ‘investors’ for the purpose of BITs and investment arbitration?

74. Have you ever seen champerty rules applied vis-a-vis a third party funder? For instance, if the funder is in the driving seat of the arbitration and speaks on behalf of the party?

75. The role played by funders varies widely from case to case (and from funder to funder) in terms of actual involvement in the case. For purposes of the present discussion, does it matter whether a funder is very hands-on or very laissez-faire?

76. Are there commonalities between ‘third-party funding’ in international arbitration and ‘project finance’ in the transactional world?

77. Is security for costs the only way in arbitration of ensuring that a third party funder will be liable for the costs of an unsuccessful funded party?

78. Security for costs
   Unless the third party, funding one side of the arbitration, guarantees openly to the other side that it will fully reimburse the costs incurred by the other side to the extent as ordered by the arbitral tribunal should the other side win, security for costs should be ordered by the arbitral tribunal as if the party being financed were insolvent. This – obviously - requires full disclosure by the party using third-party funding as a method to finance its arbitration.

79. Should the mere existence of a TPF without coverage of adverse costs suffice to order security for costs, or should other standards such as the change of circumstances, for example, be also taken into account or even prevail?
80. How does a Tribunal evaluate the likelihood of the funder coming up with the money when considering a security for costs application? If an insurer is the funder what sort of non-avoidance clause is appropriate and is it normally provided?

81. Would it be negligent for a Respondent’s lawyers to fail to ask for security for costs when a Claimant is third-party funded?

82. Should in commercial cases where a less solvent party is financed through third-party funding a request for security for costs by its counterparty not routinely be granted? It seems to give to the third party funder an appropriate balance of upside and downside risk allocation.

83. Might there be a common thread that runs from the privilege issue to the security for costs issue? That is, could amenability to a security-for-costs order be viewed as the price of claiming privilege? In this connection, what is the relationship between privilege and control?

84. Third party funding/ security for costs:
The draft report of the ICCA-QMUL TPF Task Force on Security for Costs stops short of addressing the applicable test for awarding security for costs. Do participants consider that the requirement for a commercially unforeseeable material change of circumstances should form part of any such test? If so, when would a TPF agreement be commercially unforeseeable?

85. Does ATE (After the Event) insurance obviate the need for security for costs?

86. There is no need for disclosure of third party funding in commercial arbitration or treaty arbitration except for a party to disclose (a) the fact that there is funding; and (b) the identity of the funder. Discuss.

87. Should the level of detail of disclosure applicable to the third-party funder, be the same as any other party to the arbitration? If so, should the LCIA Rules be amended in order to include the third-party funder in art 5.3?

88. In the absence of any express power in procedural rules, in what circumstances (a) can and (b) should a tribunal order disclosure concerning third party funding? If a disclosure order is made, what factors might affect how detailed the disclosure should be?
89. Should the LCIA rules be amended so as to require disclosure of 3rd party funding and consent by the third party funder to power on the part of the Tribunal to order the funder to pay the other party’s costs in appropriate circumstances. The courts have power in exceptional circumstances to order a funder to pay the other side's costs; see e.g. Excalibur Ventures v Texas Keystone Inc [2016] EWCA Civ 1244.

90. Should disclosure extend beyond the fact that there exists a Third Party Funding Agreement to production of the TPFA itself?

Should the existence of a TPFA automatically lead to an order for security for costs?

91. Should there be a duty of disclosure on a party which has entered into a third party funding arrangement? Should an Arbitral Tribunal ever make enquiries on its own initiative as to whether a party has entered into a third party funding arrangement?

92. What is the extent of disclosure that should be required from a party in relation to the third party funding arrangement? Should it be limited to the identity of the third party funder or should it include some or all of the terms of the funding agreement?

93. Given the potential relevance of the involvement of a third-party funder to disclosures, should a party be required to disclose the fact that it is being funded and the identity of the funder at the outset of proceedings or, if later, when the funding is arranged?

94. If arbitrators should make a disclosure where the same law firm has been involved in their appointment on multiple occasions, should the same principle apply in cases where the same funder has been involved?

95. Does an arbitral tribunal have a power to ask a party to disclose regarding the details of the agreement with the third party funder, such as the parties’ agreement on the responsibility for the cost order in the awards?

96. Should full disclosure of the agreement with third party funders be required of the funded party? If so, at what stage of the proceedings?

97. Should arbitral institutions that do not have the power of bestowing immunity on arbitrators serving under their rules, purchase a private insurance for the benefit of the arbitrators and charge the premium to the administrative costs? In the alternative, can an arbitrator be admitted to charge to the case expense account insurance premium for a special policy that she had to purchase given the propensity of courts in the place of arbitration to hold arbitrators civilly or criminally liable or the notorious reputation of one party to sue the arbitrators for alleged wrongdoing?
98. Is it not right and just that a party with a valid claim should be assisted in obtaining justice? Is there a danger that over-regulation of such assistance will inhibit or prevent it completely? Surely, the development of third party funding should not be shackled by the fear, often unfounded, of misuse. There is now such a broad range of funding opportunities and structures, often complex and sophisticated, that it must be difficult to provide effective guidelines that can be applied sensibly across the board.

99. With respect to the question of what is third party funding, there seems to be a growing inclination to enquire into the facts and to require disclosure from parties as to such arrangements. How far does this sort of enquiry properly go? For example, why would contingency fee arrangements be open to scrutiny in the context of security for costs applications? Should tribunals be able to sanction parties that withhold such information? What are the implications of normal course banking loans which are secured by corporate assets, but used to sustain significant arbitration proceedings? Is that sort of financing really anyone else's business?

100. The amount of costs required to pursue investor state claims is often in the tens of millions of dollars or pounds or Euros. Smaller Claimants can hardly be expected to rely solely on their limited resources without outside support. States, even smaller or less developed ones, have enormous resources compared to such Claimants. Why then is there any opprobrium for third party funding? Doesn't it simply provide a useful and, in some cases, necessary service?

101. Is there a case for further (and if so what) developments and changes to institutional rules and guidance required in order to deal more specifically with disclosure of third party funding arrangements? Or should it simply be left up to the arbitral tribunal to decide whether or not to require disclosure of third party funding arrangements in a given case?

102. Given the growing use of TPF in both commercial and investment arbitrations, would it be prudent (or necessary) for arbitral institutions to proactively inquire whether any of the parties have a TPF arrangement before appointing arbitrators for the purpose of checking potential conflict of interest? Would it be appropriate for an arbitral tribunal to proactively make an inquiry to the parties whether the parties have an arrangement with TPF?

103. Information about arbitral practice is often crucial to the development of arbitration and institutions have been at the forefront of publishing statistics and anonymised decisions on e.g. challenges and procedural decisions. Is there any benefit in institutions gathering data on the use of third party funding — the types of funding agreements used, the nature and size of funded arbitrations, industries involved, etc.?

104. The Hong Kong bill to allow third party funding includes provisions regarding the issuance of a code of practice for third party funders that covers a wide range of issues from promotional material, the features of funding agreements, the handling of conflicts of interest and complaints, capital adequacy and the relationship with the funded party. Is such a wide ranging code of practice necessary or desirable?
105. To what extent are or should uplifts or success fees be recoverable as costs in the arbitration? Does anyone have experience of cost awards to that effect, as counsel or arbitrator?

106. Should a funder’s premium be a recoverable cost?

107. In *Essar Oilfield Services Limited v. Norscot Rig Management Pvt Limited*, the English Court upheld an arbitral award which ordered the losing party to pay the winning party’s litigation funding costs. What factors and conduct should a Tribunal take into account in deciding whether to award such costs, and in particular should pre-arbitration conduct (e.g. the very breaches of contract complained of) be taken into account? What are the advantages or disadvantages of disclosing to the Tribunal the fact that a client is receiving litigation funding?

108. Is third party funding a growing ‘business for profit’ or a ‘tool for access to justice’?

109. Proponents of third party funding say it allows impecunious claimants to bring deserving claims. Opponents say it allows rich investors to hold respondents to ransom over claims with little merit. Is the real issue that third party funding shows up the flaws in tribunals’ reluctance to exercise their power?

110. ‘(Investor-State) Does third party funding inevitably skew relief claimed by investors away from restoration of property (e.g. licences) towards damages (e.g. for lost opportunity), or are there ways of overcoming this apparent conflict of interest?

111. Earlier this year, the EU held a further public consultation on its proposed investment court system. Is a multi-lateral investment court an idea worth pursuing?
SESSION 4: ORDERS, AWARDS AND ENFORCEMENT IN THE CONTEXT OF GLOBAL DEVELOPMENTS

112. Trump, Brexit, populism/anti-globalism, ISIS and North Korea – Is it the case that for the business of dispute resolution (including International Arbitration) the greater the uncertainties, the better the future?

113. What can – and should – we all do to promote a message that London will continue as an attractive place to arbitrate (or litigate) post-Brexit?

114. Is the UK arbitration community too complacent about the effects of Brexit on UK’s position in international arbitration?

115. “Keep calm and carry on arbitrating.” As far as that is a response to Brexit, there is probably no reason to disagree with that in the short to medium terms. However, the economic effect of Brexit will not be felt for many years to come. Threats and opportunities abound for the Brits selling England as a seat and English law. But we won’t know what they will be for years to come.

116. In the process of negotiation of an arbitration clause, the choice of a seat is probably the most politically sensitive one, at least in State-Investor Contracts.

In this context, any politically sensitive development, including Brexit, may affect the position of London as a seat of International Arbitration.

Anything we can do?

117. When faced with a mandatory statute in the place of arbitration, can foreign arbitrators decide to displace the venue for the hearings to avoid either being influenced by the local statute or exposing themselves to liability? Assume that at least one party objects to the change of venue. Examples include a local law that requires suspension of arbitral proceedings in case of a local criminal investigation, etc.

118. What should the attitude of the forum (be it the arbitral tribunal or a court) to the public policies of the supervising jurisdiction, the arbitral seat, and other jurisdictions relevant to the arbitration?

119. A question of curiosity which may be of interest to other non-British EU – delegates

What had the ECJ done to annoy the brexiteers?
120. Who will be or not be the arbitrators/judges in (a) the EU’s proposed multilateral investment court and appellate court and (b) the UK Government’s proposed system for resolving disputes between the UK and the EU after Brexit, as outlined in its White Paper of 2 February 2017

121. Should the arbitration community, including institutions, be actively promoting use of international arbitration as a tool for use in whatever trade or other UK/EU structures prevail post-Brexit?

122. Brexit and governing law clauses:

What does the choice of substantive English law mean at the signing of the contract, at the time of notification of Brexit, at the time of the actual Brexit taking effect, or at the time of the actual dispute maybe a couple of years down the road? Should one petrify the status of the law as of signing of the contract, at the time of actual Brexit? Should one identify specifically whether all of the European Union Law, or which parts thereof should be read into the contract? What happens to all those already implemented directives?

123. Global developments:

TheCityUK Brexit Report dated December 2016 recommends amongst other things exploring collaboration between arbitral organisations and the judiciary to aid the ongoing development of English law. How might this best be achieved whilst retaining respect for the parties’ choice of dispute resolution? How do jurisdictions other than UK view such collaboration?

124. The return of the anti-suit injunction in EU cases – how big a deal is that?

125. Will international arbitration witness a transmogrification in the scope and role of public policy as a bar to enforcement of awards in a world that is increasingly becoming more connected and more divided? Will public policy append a notable ‘political’ dimension?

126. Is it really time to rethink the need for vacatur motions or setting aside actions amidst a growing trend of ‘delocalization’ and ‘enforcement of annulled awards’?

127. A tribunal bifurcates liability and damage and in due course renders an award on jurisdiction and liability with damages. The losing respondent commences a set aside application and asks the tribunal to stay the arbitration. The tribunal refuses, noting that the damage determination will provide further context for the reviewing court due to the inter-relationship the damage and liability issues. Claimant seeks a stay of the set aside application until the final award. Should the reviewing court stay its process and await the final award, or should it press on with the set aside application on jurisdictional issues?
128. Do we need a convention for the global harmonization of the procedures for enforcement and recognition of arbitral awards?

129. Should an arbitral tribunal react when a party objects or reserves its rights further to a decision/procedural order issued by the arbitral tribunal, in particular when the arbitral tribunal is convinced that such objections/reservations are not justified and are submitted for strategic reasons?

130. Was the Supreme Court right in IPCO v NNPC to hold that an award debtor challenging an award on public policy grounds under the New York Convention cannot be ordered to provide security for its challenge whereas if the same challenge was made in domestic proceedings such an order could be made?

131. What concrete effects is Article 257 of the UAE Penal Code having on the appointment of arbitrators in UAE cases?

132. If a party deliberately conceals a document which is crucial for determination of the dispute and such concealment contributed to misleading the Tribunal, should the court set aside the award as having been procured by fraud?

133. Is there a general scepticism towards awarding moral damages? What are the criteria for calculating and awarding same?

134. Interest awarded in arbitral awards: never a topic that stirs the blood, but one with significant financial implications. Arbitrators tend to dismiss interest in a paragraph and award something generally below the actual cost of funds to the respondent and almost always below the claimant’s genuine loss. Claimants tend not to devote more energy to pleading about interest in more detail because the conventional wisdom is that arbitrators will not countenance such arguments. This vicious circle is denying proper compensation to claimants. How can we break the circle?

135. When is it appropriate for a tribunal to issue an early order for disclosure?

136. In the jurisdiction where TPF is viewed as a prohibited champerty, could the winning party’s reliance on the TPF in the arbitration proceedings be the grounds for setting aside the award based upon “public policy” under the New York Convention?
In ISDS cases, an investor having won a monetary award has a very significant hurdle to overcome - state immunity – in the course of enforcing and executing the award. It takes years for investors to be able to collect from defiant Respondent states. Any creative idea for the resolution of this issue, other than securing of an explicit waiver of the state immunity in an BIT or other instrument which a respondent state would not issue. The balance of interest in this point is heavily in favor of the States.

Conflicts in an arbitration between insolvent members of an insolvent former group of companies

1. Arbitrations between liquidators of insolvent members of an insolvent group of companies are quite common in domestic or international arbitration. According to EC-Regulation 1346/2000 it is the duty of each liquidator to effectively collect the total assets of "his or her" insolvent company against the liquidator of the other former group company. Hence, the insolvency terminates automatically any affiliation between former group members in the sense used by the IBA Guidelines on Conflicts of Interest. An arbitrator nominated by the liquidator of the former group member in an arbitration against the liquidator of another former group member should disclose under General Standard 3 of the IBA Guidelines any previous services to former group members, but such disclosure does objectively not justify the non-appointment of the arbitrator by the institution.

2. Does this remain to be an acceptable position under post-Brexit English law?

Is immunity of arbitrators from suit increasingly under attack? Is there a global concern?