TOPICS FOR DISCUSSION

LCIA
Arbitration and ADR worldwide

European Users’ Council Symposium

Tynney Hall, 12-14 May 2017
A. Issues of Jurisdiction

1. 1(a). Would English arbitration law benefit from the revision of the principle that the tribunal's decision on its own jurisdiction has no legal or factual weight before a Court which is asked to set aside an award on the grounds that the tribunal did not have jurisdiction?

1(b). Does the "bootstraps" argument really prevent the law being changed to require the Court to have regard to the tribunal's decision on its jurisdiction (or to respect it unless it can be shown, for example, that some clear error of law was made), notwithstanding the benefits that that might provide, including avoidance of waste and inefficiency, and respect for the decision of the party's chosen tribunal?

2. Gerbay, Scherer and Richman suggest, in Arbitrating under the 2014 LCIA Rules: A User’s Guide, Scherer, Richman, et al. (2015) that, under Article 22.1(i) of the 2014 LCIA Rules, "new claims (or defences) may be added by a party even after filing the initial submissions either upon application by a party or the Tribunal's own initiative." Are they correct?

B. Investor-State issues

3. A US investor recently served a notice of arbitration under the Australia-US FTA, a treaty in which Australia refused to include ISDS provisions, in reliance on the MFN clause in that treaty. An interesting tactic to establish jurisdiction, or an outrageous attempt to usurp the need for State consent?

4. Should investment treaty claims be assignable and, if so, in what circumstances?

5. Restructuring foreign investments - what is the difference between legitimate corporate planning and abusive treaty shopping? Does it matter whether the man on the Clapham omnibus or the general counsel on the Amsterdam Intercity can tell the difference?

6. Do you think that there is a climate in which States are increasingly looking to withdraw from or water down their existing trade agreements so as to avoid adverse awards? And as a consequence, will we see a slowdown in the growth of investment treaty arbitration? i.e. India and the White Industries arbitration, Indonesia’s withdrawal from BITs, the US looking to withdraw from NATO etc.

7. Investment Treaty/Arbitrator Selection:
   Are repeat appointments in investor-State arbitration (by investors or States) a threat to the perceived integrity of the system?

8. Addressing bias in international arbitration – it may be said that there is a perception that arbitrators are either for or against states in investment arbitration. Do you think such a perception is valid? Does such a perception cause bias and conflict in arbitration – i.e. does it make it difficult for arbitrators, who want to be appointed, to decide against the party that elected them?
C. The tribunal
(i) Diversity and choosing your arbitrator

9. Do online databases of arbitrators promote diversity or not?

10. Global Arbitration Review has set up an online ‘Arbitrator Research Tool’. Is this good news or is the prospect of ‘Tripadvisor’ for Arbitrators a step too far?

11. The Equal Representation in Arbitration Pledge: is it working, or now that the fanfare has died down have people simply carried on as before?

12. BLP’s survey on diversity in international arbitration indicates the following:

   92% of respondents to the survey said that they would welcome more information about new and less well-known candidates; and
   
   81% of respondents said that they would welcome the opportunity to provide feedback about arbitrator performance at the end of a case, though only 36% thought that such information should be made publicly available.

   Should arbitral institutions do more to provide information about new and less-well-known candidates?

   In addition, 28% of respondents to the survey believed that they had lost appointments because they were considered too young. Do we need a pledge for the under 40’s?

13. How 'healthy' or important are party-nominated arbitrators in international arbitration with a view to the principle of impartiality?

(ii) Tribunal secretaries

14. Tribunal secretaries: where’s the line between genuine assistant and fourth arbitrator, and how often does the boundary get blurred?

15. After Yukos and P v Q [2017] EWHC 194 (Comm), trust in the use of tribunal secretaries is at risk of waning. Will further rules or guidance as to the role of the tribunal secretary (perhaps implementing the 2014 Young ICCA Guide) ensure party confidence, or is there another way?

16. Should multiple tribunal secretaries be allowed to work concurrently in an arbitration to assist the tribunal in rendering timely awards?
17. Should more be done to prevent frivolous challenges to arbitrators? Would an automatic (or usual) costs consequence to a failed challenge to arbitrators be a sufficient disincentive?

(iii) Control over arbitrators

18. Arbitrator challenges: are they becoming more common, and if so why?

19. In *T v V and others [2017]* the English Commercial Court dismissed an application to remove an arbitrator on grounds of bias and failure properly to conduct the proceedings under section 24 of the English Arbitration Act. A party had sought to remove the arbitrator on the basis that the arbitrator had improperly made a peremptory order requiring him to serve documents on which he had sought to rely within a certain period failing which he was debarred from relying on them (an order made after he had been given numerous extensions of time due to being very ill). The arbitrator refused further extensions when he did not comply with the order. Popplewell stressed that removal was an extreme remedy available only where no reasonable arbitrator could have reached the relevant decision, which was not the case here because that party had been given a reasonable opportunity to submit the documents and the arbitrator had acted consistently with her duty under section 33. It is a good thing that the English Court remains reluctant to intervene in the conduct of arbitrations and is willing only to remove arbitrators in exceptional circumstances. Other national courts should follow suit. Do you agree?

20. Not good enough but what do we propose to do about it? Sleeping arbitrators: recourse for arbitrators that do not prepare adequately or pay attention during hearings.

21. Does the system of "supervising or policing" arbitrators' remuneration produce efficiency?

D. Questions of evidence

(i) Privilege

22. Is there a case for the introduction of an international set of guidelines for matters of privilege in international arbitration, or are parties best served by preserving arbitrator discretion in this area?

23. Regarding legal privilege, what is the best way to achieve fairness between the parties? Should rules relating to legal privilege be accommodated in institutional rules?

(ii) Adverse inferences and burden of proof

24. Parties regularly request arbitrators to draw adverse inferences for document production-related conduct, but such applications appear to be a rarity in practice. Is this because arbitrators are reluctant to make adverse inferences, or because they are reluctant to acknowledge that they have made them?
25. Adverse inferences – in a recent decision, the Paris Court of Appeal has upheld an award referring to adverse inferences as one of the reasons for the decision (on the merits) of the majority of the tribunal. The tribunal concluded from a party’s failure to produce certain documents requested by the other side that these missing documents were detrimental to that party’s case (article 9.5 of the IBA Rules on the taking of evidence in IA). Interestingly the Tribunal had not ordered the production of the documents and the party which had requested the documents in the first place had not even requested the tribunal to draw adverse inferences. So the adverse inferences appear to have been solely based on the failure to produce documents requested or provide a valid reason for not producing the documents (CA Paris, 1, 1, 28-02-2017, No 15/06036). Any experience/views on adverse inferences being referred to in an award?

26. Should an allegation of corruption switch the burden of proof?

(iii) Expert evidence

27. Should a party who has put in a defective expert report be permitted to cure the defect with a supplementary report at a later stage of proceedings?

28. Can an expert make a submission that is contrary to a position they have taken on a previous case?

29. If an expert submits a position that is contrary to position they have taken on a previous case should counsel make this known?

30. Are joint expert reports helpful in terms of narrowing down the areas of disagreement between the parties’ experts? Or do they give experts and parties an opportunity to restate and amend their arguments, effectively becoming an additional round of written pleadings? What best practices should be followed in order to maximise the efficiency and utility of joint expert reports?

31. There’s been a huge amount of focus on the role and duties of the tribunal secretary. There has been far less focus on the role of a tribunal appointed expert.

Article 6 of the IBA Rules on the Taking of Evidence in International Arbitration provides some guidance on the use of tribunal-appointed experts but is it sufficient to allow parties to guard against a tribunal-appointed arbitrator usurping the tribunal’s role as decision making on both legal and technical issues?

32. When the Tribunal appoints its own expert, based on its own assessment of the need for such an expert, is it a waste of time and/or resources if the parties also have their own experts?
(iv) Witness evidence

33. Should Tribunals, Arbitral Institutions or international organisations such as the IBA introduce stronger guidelines on witness preparation?

34. Do the differing practices regarding witness preparation and coaching raise concerning equality of arms problems for advocates in international arbitration?

35. Has anyone seen a tribunal order a timetable whereby the Claimant’s witnesses give both written and oral evidence before the respondent’s witnesses give any evidence?

E. Practice and procedure - the conduct of the proceedings

(i) Questions of (in)efficiency

36. Several General Counsel for large companies have expressed that they prefer arbitration for large disputes where the right outcome is critical. However, there are many small and mid-sized disputes where they prefer to get the dispute solved in a more expedited manner rather than getting a “perfect” (and expensive) award after several years. Are arbitrators and counsel sometimes making the proceedings more complicated and lengthier than necessary, and what should be done to make arbitration attractive also in less complex cases?

37. Pushing for shorter written submissions: is arbitration really that much more complex than commercial litigation that we cannot have the discipline of more succinct pleadings?

38. Whose role is it is ensure efficiency in arbitration? The parties, the arbitrators or the arbitral institution? Article 14.5 LCIA Rules gives the tribunal a wide discretion as to the conduct of proceedings and provides that the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration. Is this enough or should the rules spell out specific sanctions that the tribunal may impose (e.g. cost sanctions) in circumstances where the parties fail to co-operate in the effective conduct of an arbitration?

39. Should tribunals be bolder in the orders that they make and ensuring compliance with them?

40. With English High Court litigation becoming ever more focused on costs and the quantum of costs "approved" by the Court, is international arbitration too laissez-faire or does the system generally avoid a needless quagmire?
41. Deliberations – any experience/views to share in relation to Article 15.10 of the LCIA Rules “... When the Arbitral Tribunal (not being a sole arbitrator) establishes a time for what it contemplates shall be the last submission from the parties (whether written or oral), it shall set aside adequate time for deliberations as soon as possible after that last submission and notify the parties of the time it has set aside.”

42. Should Tribunals be more ready to penalise parties in costs for unmeritorious applications and delay during the arbitral process?

(ii) Third party funding

43. Should the LCIA Rules be amended to include guidelines for third party funders which parties who are funded are required to ensure their funder has agreed to comply with (in a similar way to the guidelines for Parties' Legal Representatives)? If so, what should be included in such guidelines?

44. Should the recovery of third-party funding costs as per Essar v Norscot be applauded? Will arbitral tribunals follow this approach? What consequences could this have?

45. Should third party funding costs be recoverable? If so, as costs or damages? And how can they be challenged?

46. In light of the Essar decision (in which the arbitrator ordered the Respondent to pay the premium which the Claimant had paid to its third party funder) it is likely that other funded Claimants with English-seated arbitrations will now seek to recover their funding costs under s59(1)(c) of the Arbitration Act 96. Should the LCIA amend their rules to provide for disclosure of funding arrangements at the start of the proceedings to enable the Respondent to know the ultimate costs they may face in fighting the claim?

47. For those who have worked with funders, what have you found to be the usual level of involvement by the funder in the proceeding? On the same topic, what approach have you taken to disclosure?

48. Presently, the disclosure of an identity of a third-party funder is voluntary and not required in international arbitration proceedings, which may result in the real risk of challenges to arbitrators or awards, based on undisclosed ties between an arbitrator and the third-party funder. Consequently, should arbitral institutions amend their rules to include a duty of the parties to disclose an identity of a third-party funder if one is engaged?
(iii) Interim relief

49. **Emergency Arbitrators v. Injunctive Relief in Courts:**
In cases where the arbitration clause or the relevant rules leave open both the possibility of seeking injunctive relief in the courts of the seat and emergency, what factors should we consider in choosing one over the other?

50. **What advantages over interim relief from English courts does the emergency arbitrator procedure under the LCIA rules have?** In light of Gerald Metals SA v Timis & Others [2016] EWHC 2327, do you recommend excluding the emergency arbitrator procedure in your clients’ arbitration clauses if they may potentially wish to seek interim relief from English courts?

51. **In Gerald Metals SA v Timis [2016] EWHC 2327 (Ch) the court made it clear that parties should, in the first instance, seek urgent relief from the arbitral tribunal by way of emergency arbitration or the expedited formation of the arbitral tribunal. Does this work in practice? If urgent relief is granted by the arbitral tribunal, is it of any use?**

52. **Will the High Court decision in Gerald Metals v Timis make the concept of emergency arbitration less attractive to parties?**

(iv) Early or expedited determination

53. **Although early days, has anyone seen SIAC’s early dismissal procedure in operation? If so, how well did it work?**

54. **The SCC (Article 39) and SIAC (Article 29) summary procedures: Window dressing or valuable innovation?**

55. **Should the LCIA consider the introduction of a summary procedure for the early dismissal of claims that are manifestly without merit?**

56. **Summary judgment procedure – any real life experience to share in relation to a successful summary disposal in international arbitration?**

57. **Should other institutions implement an expedited procedure for smaller claims, as per the new ICC Rules?**

58. **Is it a step too far to introduce expedited procedures that can, on the application of one party, override the express terms of the parties’ arbitration agreement? (see, for example, SIAC Rules 2016, Rule 5)?**
59. Should institutional rules expressly provide arbitrators with a power to order a stay for the parties to explore settlement/mediation?

(v) Other

60. Do different professional obligations in different legal cultures create inequalities for party representation in international arbitration?

61. The imposition of international financial sanctions is becoming increasingly common. To what extent have participants experienced sanctions related procedural and substantive law issues being raised in international arbitrations?

F. Awards and enforcement

62. What, if anything, can a tribunal do if evidence adduced at the quantum stage undermines its partial final award on liability?

63. Did the UK Supreme Court get the decision in NNPC v IPCO ([2017] UKSC 16) right?

64. Anecdotally, end users not infrequently express the view that Tribunals "split the baby", and that this is a reason to opt for court litigation rather than arbitration. Is there any truth in it? If not, how can the arbitration community address such (mis)conceptions?

65. “Even though [ arbitral] awards are not subject to a formal system of stare decisis, the decisions of arbitral tribunals may provide a substantial and importance contribution to commercial jurisprudence” (Corrie-Thomson, A Statement of Arbitral Jurisprudence: The Case for a National Law Obligation to Publish International Commercial Arbitral Awards, Journal of International Arbitration, 2017, Vol. 34, Issue 2, p. 281). Should the English courts afford precedential weight to international commercial arbitration awards and how might this work in practice?

66. Does the prevalence of arbitration in certain sectors cause the law to 'stand still' on important issues and what can and should be done about it?

67. Should in-house counsel costs and costs for management and witness time be awarded in international arbitration? If so, how should those costs be calculated?

68. Is it ever appropriate for the tribunal to start drafting the award before the evidentiary hearing?
69. Facilitating the original goal of faster arbitrations: whether parties should insist on Tribunal deliberations to occur immediately after the hearing? If so, experience of this amongst participants and a discussion of pros/cons.

70. Role of place of jurisdiction regarding the annulment of awards

71. In the case of annulment of award by the court of place of arbitration, within which framework is the enforcement at the competent court at the corporate seat of the respondent possible?

72. Should awards and/or institutions’ decisions (or, at least, elements of them) be made public?

G. Other

73. Is Brexit good news for UK based arbitration?

Recent ICC Commission Report on Financial Institutions and International Arbitration found that most financial institutions do not have substantive experience of international arbitration. Will Brexit encourage banks and financial institutions to consider using arbitration to resolve disputes?

74. How can international arbitration better be used and developed to resolve environmental (including climate change) disputes?