TOPICS FOR DISCUSSION

LCIA
Arbitration and ADR worldwide

European Users’ Council Symposium

Tylney Hall, 15-17 September 2017
SESSION 1
GOOD PRACTICE – CHARGING AND BUDGETING

1. According to the ICC, arbitrator fees and expenses are about 18% of the total fees and expenses of an arbitration. Counsel fees and expenses are around 80%. According to a recent study by Deloitte, the differential is even larger – arbitrator fees and expenses are roughly 7% of counsel/expert fees and expenses in int’l commercial arbitration. Should arbitral institutions require the parties themselves to acknowledge in writing at the commencement of the arbitration that arbitrators’ fees and expenses are not a large component of the expense of an arbitration, and agree to ride herd on their own and their counsel’s conduct to control expenses?

2. Do participants consider that the use of increasingly detailed time records for arbitrators could potentially open the door for challenges based on time spent (or more likely not spent) on aspects of the arbitration? Concerns about party perception can lead tribunals to adjust fees to ensure they are in line with each other – have participants experienced this and is it a problem? Normative guidelines could assist but can they be nuanced enough to reflect the different size and importance of cases, and the relative importance of the same issue in different cases? Do participants have feedback from their clients about the increasing emphasis on lowering arbitrator fees given that arbitrator fees are such a small fraction of the total costs of the arbitration?

3. At the outset of an arbitration, when institutions or parties ask arbitrators to offer estimates of their fees through Award, is there a “rule of thumb” (for example, multiplying the parties’ estimated hearing time by three) that is approximately correct at least some of the time?

4. Should arbitrators be bound by their fee estimates?

5. Should arbitrators respond to party requests for budgets or estimate of fees prior to accepting appointments?

6. I had an instance where, on an Article 34 application to set aside an award (based upon an allegation that a party appointee misconducted himself by looking at material not presented by counsel) the applicant sought and obtained copies of invoices rendered by the arbitrator to counsel for the party that had appointed him. In the case, each party appointee invoiced their appointing parties, and the hourly rates were not the same. Based upon the possibility that time records can be used to question aspects of the deliberative process, does this not speak to the need to say almost nothing by way of service description, other than time actually spent? Where time entries are deliberately vague, is the door not opened to inferences that should not be drawn?

7. Is the level of detail an arbitrator should give in time entries different in ad hoc v institutional arbitration? In an institutional arbitration, it is really only the case managers and not the parties who see the detail of the arbitrators’ invoices (presumably). Are there differences in practices in this regard among the institutions? In an ad hoc arbitration, however, the invoices go directly to the parties. In one ad hoc case where I am a coarbitrator, the other coarbitrator’s invoices have no detail – they just say “award drafting” (even though what he actually is doing is writing a dissent). Is this barebones time entry satisfying to the user community? In other words, what does the user who has opted for ad hoc arbitrator want to see in terms of what the user is paying for?
8. As a matter of sound practice and in order that all parties be treated equally, should 3-member tribunals always harmonize their hourly rates (recognizing that some arbitrators will invariably spend more time than others performing similar tasks? Or should time spent by party-appointees be equalized as well?

9. It happens sometimes that party-appointed arbitrators give a different contribution to the proceedings, in particular when discussing/commenting upon drafts of orders or awards prepared by the Chair:
   a. should the institution take this factor into account when determining the arbitrators’ fees?
   b. always ex officio (to the extent the institution has visibility of such a situation) or only when this is brought to its attention?

10. When working at an hourly rate, how do solo practitioners charge for work they do that normally might be done by a paralegal or administrative assistant/secretary whose rates would be far less? How do practitioners from law firms charge the hours of paralegals or administrative assistants when the practitioner is charging his/her hourly rate, e.g., in a LCIA arbitration. This is distinct from obtaining permission from the parties to have a Tribunal secretary at a rate agreed by the Parties.

11. Even when there is no appointment of a secretary to the arbitral tribunal, arbitrators, particularly when working in structured law firms, may seek the assistance of junior colleagues in order to carry out legal researches, keep the file in order, check documents, etc. This activity has a cost but may contribute to the efficiency of the proceedings, given the lower cost of junior professionals
   a. as long as this practice does not translate into an abdication of the arbitrator’s duty to personally perform his/her adjudicatory function, is there a reason why it should not be considered for charging/budgeting purposes?
   b. should this be rather a service offered by institutions? But would it be a service of the same type and quality?

12. Should arbitrators assign simple tasks and support services to assistants? Which type of tasks and services? File creation?

13. Should different hours attract separate rates? Can/should “administrative” tasks, and “decision making” tasks be priced separately? Would it really be possible to make that distinction with any precision? Should tribunal secretaries charge the lower rate for administrative tasks?

14. The agreement to pay an hourly rate does not assume a standardised unit of productivity per chargeable hour per service provider. Neither do different people think in a standardised way. Would guideline fees discourage different thinking? If that made things cheaper, would that be better for users of arbitration?

15. Should arbitrators exercise their own judgement about the number of hours reasonably and productively devoted to each task or should uniform criteria be set for all the members of the tribunal?
16. Where there is a panel of 3 arbitrators, should the tribunal budget on the basis that all of the tribunal members will read all of the Statements of Case, exhibits etc. in detail immediately when received or on the basis that the Chair will read in greater detail at first so as to be in a position to take the lead on interlocutory disputes about timetable etc. with the co-arbitrators reading briefly and only in detail when a hearing approaches?

17. By charging/budgeting for the arbitral tribunal’s costs arbitral institutions may contribute to the efficiency of the arbitral proceedings. Efficiency, however, is not only a matter of time and cost, it is also a matter of quality (a difficult procedural or merit issue may need more time to be properly addressed, an order or award may be longer if it contains extensive reasons for all decisions, etc.):

a. should the institutions clarify that the application of their charging system is flexible, so that hourly rates and budgets can be increased (or decreased) depending on the circumstances?

b. in order to enhance predictability should such clarification be made not only by way of « general clauses » (« rates appropriate to the particular circumstances of the case, including its complexity », rates increased in « exceptional circumstances », etc.) but also through guidelines where more concrete examples are given?

c. should the parties be free to request « cheaper » arbitrations, i.e. lower budgets resulting from the parties’ agreement on format and content of orders and awards (e.g., very short procedural history, succinct reasons, no analysis of issues which have become moot, etc.)?

d. should such freedom of the parties be limited only by mandatory rules of the State of the seat or the State of enforcement as to the requirements for a valid order or award or also by institutional rules aimed to guarantee a minimum « quality » of the proceedings the institution administers?

18. Tribunal fee notes often provide very little detail on the actual work that has been done and how long particular tasks have taken. This lack of detail would almost certainly lead to clients refusing to pay the bills of their counsel team if they were similarly sparse. In practice, the brevity of tribunal fee notes makes it very difficult for clients to assess whether they are getting value for money and can lead to considerable frustration. What level of analysis / due diligence does the LCIA conduct to satisfy itself that time is being charged appropriately? Can it give any (anonymised) examples where an arbitrator’s fee note was actually rejected or reduced?

19. What are the effects within the tribunal if arbitrators disclose their time records to the other arbitrators?

20. Peremptory Orders: are Tribunals still too wary of making them?

21. Preparing detailed and accurate billing guides tends to be very time consuming:

- Should time spent on billing guides chargeable?
- Should block billing (ie, assigning a block of time to more than one task) acceptable in order to save time in preparation of billing guides?
- How to deal with time spent in becoming familiar with the business sector? And with legal research time? How much business and legal research is reasonable?
- How to deal when two arbitrators have each a very different amount of hours?
- How to deal with travel time and time spent outside one’s own city?

22. Should arbitrators follow the billing guide system that most international law firms use?
23. Are there inherent problems in arbitrators revealing how much time they spend in deliberations? Would significant time imbalances between co-arbitrators pose any risks to the integrity of final awards?

24. Recognising that at least some practitioners find guidelines (see for example www.ciarb.org/guidelines-and-ethics) extremely useful, the idea of ‘normative guidelines’ and/or rules requiring budgeting and formal rules for assessing costs is a step too far. The English civil justice system has tried to address the issue of costs with evermore complex rules which themselves have added a whole new level of complexity and opportunity for lawyers to run up huge bills, while recalcitrant parties can use them to delay and add additional cost pressure on their opponent. The answer, if there is one, must be to simplify and not over complicate. Ld Jackson in his latest proposals is for the first time moving in the right direction by introducing the idea of capping recoverable costs. Is it time for the arbitral institutions to do the same?

25. Is it not sufficient that arbitral institutions receive (as the LCIA requests) records of time spent with a brief summary of the arbitrator’s activity during that time? The complexity of tasks differs from case to case.

26. Wouldn’t it create risks to the arbitral process itself if arbitrators confer with one another in order to compare time spent on a particular activity?

27. How could there possibly be “normative” guidelines applying standard charges for certain activities given the diversity in the types of cases arbitrated, the varied experience level of arbitrators, the style of different arbitrators etc.?

28. Could the institutions provide a standard template for use by arbitrators in claiming (and estimating) fees? This might assist them to provide the right type and amount of information but not too much.

29. On time recording, should institutions adopt a practice of random audits?

30. Can the complexity of an arbitration always justify charging for all the hours needed to deal with it regardless of the amount involved?

31. I have recently, and for the first time, not disclosed how many hours I had spent on a matter as co-arbitrator because I was disappointed by my co-arbitrator who I felt had not familiarized himself sufficiently with the file and also had not participated in drafting and reviewing the draft award. Nevertheless, and miraculously, he always ended up with a very similar amount of hours as I had when we reported the time spent to the institution. In another recent case, the question came up whether we could tell the institution that the fees (determined ad valorem) of the co-arbitrators should not be equal in order to reflect differences in the time spent by the co-arbitrators in the context of drafting the award.

Is unequal fees of co-arbitrators problematic in the eyes of the parties? If yes, only as a matter of perception or also legally? Experiences with unequal fee agreement among arbitrators in "ad valorem” systems? With the LCIA this does not seem to be a problem since the fees are per hour. Are there any limits of acceptable differences between co-arbitrators in practice with the LCIA?
32. Should arbitrators charge for dealing with every email received however small and insignificant? If not, where is the line to be drawn? Is it acceptable to include a composite “catch all” charge from time to time to deal with this?

33. Should there be a central, standardised time-recording system (e.g. 3e) for arbitrators, to which all participants (including the parties) have access to, throughout the arbitration?

34. How much detail should be recorded on arbitrators’ fee notes? Is there a tension between the level of detail and preserving the secrecy of deliberations / discussions between arbitrators?

35. Should parties submit budgets at the outset of arbitrations (to which they will in principle be held)?

36. Rather as a background issue: Can anybody confirm my observation that in systems operating on an hourly remuneration basis the Parties file considerably less useless and abusive applications?

37. Has the ICC Fast Track Procedure resulted in more cost efficient arbitration processes for smaller claims?

38. Random fixing or “alignment” of hours by co-arbitrators in LCIA arbitrations: what should the presiding arbitrator (and the co-arbitrators) do? Should the LCIA set the ground rules at the outset or at least specify that hours will be scrutinized in view of the work done and as the case may be discussed openly with all of the members of the Tribunal?

39. Could the LCIA issue (or endorse) some general time recording guidelines with a view to unifying time recording practices?

40. Considering the recent tumble of the Sterling, should the LCIA reconsider the maximum of 450 GBP per hour?
41. Can/should an arbitrator, at the commencement of the arbitration, request any party in an arbitration for which he/she is proposed as an arbitrator to promptly disclose any facts or circumstances leading that party to question his/her impartiality or independence as soon as that information is reasonably available to the party and, for that purpose, to undertake a reasonable search of publicly available information and make reasonable inquiries promptly after learning of his/her prospective appointment as arbitrator? Does doing so create a form of estoppel to mitigate the risk that parties will wait to see the outcome of the arbitration before deciding whether to make an investigation and challenge?

42. What is the position of a panel member who is also appointed in related arbitrations involving parties that are closely related to the party on one side and in which the other side insists that there be no disclosure of the material received in one arbitration in the other arbitrations? What is/should be the position of the other panel members?

43. If one of the parties to a current reference (or an associate) offers to a tribunal member a nomination to serve as arbitrator in a new and unconnected case, should he or she consult with the parties to the current reference before accepting?

44. Search technology is evolving rapidly. When used correctly, “machine learning” and other forms of computer-assisted review allow a party making disclosures to search large amounts of electronically stored information both high recall and high precision.

Article 3.3(a)(ii) of the IBA Rules on Taking Evidence in International Arbitration contains this text:

“In the case of Documents maintained in electronic form, the requesting Party may, or the Arbitral Tribunal may order that it shall be required to, identify specific files, search terms, individuals or other means of searching for such Documents in an efficient and economical manner.”

Has anyone experienced a demand by a requesting party that a particular type of search technology or combination of search technologies be used because it or they would be more “efficient and economical”? If so, what did the tribunal do? Do the IBA rules contain a bias in favor of a means of search chosen by a requesting party if it can be shown that the means would be efficient and economical? Is there any experience with what it means to search in an “efficient” manner?

45. In what circumstances, if any, should an arbitral institution make disclosures regarding: (i) the level of prior use of their services by a particular party to an arbitration; or (ii) the appointment history of a particular arbitrator?

46. The never ending question seems to be how many details should be disclosed?

47. Is there a duty of disclosure where a nominee has a well-used but uncomplicated overdraft arrangement repayable on demand with a bank that is one of the parties?

48. Should an arbitrator’s failure to disclose, in and of itself, colour challenge discussions?
49. Do advance conflict waivers work? Can an arbitrator in a large law firm insulate himself from conflicts of interest by establishing an information barrier?

50. In an arbitration governed by English law where the IBA Rules on Conflicts of Interest in International Arbitration do not apply, is it nevertheless (a) permissible and/or (b) advisable or inadvisable for an arbitrator to have regard to the Rules and disclose a potential conflict and/or resign in a case where an IBA 'orange list' conflict arises but disclosure or resignation would not be required by English law? [See e.g. H v L and Others [2017] EWHC 127 (Comm); A v B [2011] 2 Lloyd’s Rep 591]

51. According to Pierre Bellet (former president of the French cour de Cassation) "ties of friendship may be disregarded as matter of professional rigour". A "close personal friendship" between arbitrator and counsel of a party falls within the orange list for disclosure under the IBA Guidelines (3.36). What test should apply in our close-knit community? What would a fair-minded observer make of tonight?

52. In a small arbitration world, when should a professional friendship be disclosed?

53. Conflict: where do you draw the line in terms of “friendship” between arbitrator and counsel? What about between the arbitrator and, not the counsel involved, but a partner of his or hers?

54. How should Arbitrators (and Counsel) conduct if they know of facts that an arbitrator is failing to disclose?

55. Is the lack of a relevant disclosure a factor when deciding a challenge to an appointment/confirmation of an arbitrator, and, in the affirmative, to what extent? Experiences?

56. Conflating standards for disqualification with standards for disclosure: Is that a problem in not least the early phases of an arbitration, i.e. do some arbitration institutes/courts treat matters on the “orange list” as implying a presumption of bias in case of a challenge – at least if the challenge is lodged prior to the appointment/confirmation of an arbitrator? Experiences?

57. The highest court in Germany recently set aside an award because the Expert appointed by the Tribunal had not disclosed a relationship to one of the parties.

Extract from PLC Legal update: case report | Published on 20-Jul-2017 | Germany: "The Federal Court of Justice explicitly turned away from its previous jurisprudence, now emphasising that if a tribunal-appointed expert (or arbitrator) does not disclose all circumstances that might raise doubts as to his independence and impartiality, this leads to a violation of sections 1049(3) and 1036(1) of the ZPO. Therefore, the proceedings were not in accordance with section 1059(2)(1)(d) of the ZPO. In this case, it is also to be presumed that this affected the award, as the arbitral tribunal relied on the expert report in its award and the circumstances not disclosed by the expert would have sufficed to challenge the expert."

Reactions? Experiences in other jurisdictions, in particular where is the non-disclosure as such sufficient to successfully challenge an arbitrator (or expert)? Do arbitrator need to be more diligent when appointing experts?
58. Should all institutions adopt "blind" appointment of arbitrators, like the CPR?

59. Diversity on tribunals: it appears that institutions, including the LCIA, have improved, but has there been any real change when the parties appoint their arbitrators or select the president? If not, is there anything more that should be done?

60. Is it ever a good idea for potential appointees to attend interviews in the presence of only one of the parties?

61. What should an arbitrator do when, after a hearing commences, a witness is unexpectedly called and is someone who has had a personal or professional relationship with the arbitrator?

62. How many party appointments is too many?

63. Article 18.4 of the LCIA Rules authorizes an arbitral tribunal, in the circumstances described in that article, to withhold approval of “any intended change or addition to a party’s legal representatives”. Sometimes, counsel in the same firm or chambers as a member of the tribunal is instructed late in the proceedings. What guidance for LCIA arbitrations is available to a tribunal (sole and multiple) in such situations?

64. In a current LCIA arbitration between Chinese and CIS parties, the Tribunal has (pursuant to Article 18.3 of the LCIA Rules) withheld its approval to the appointment of counsel from the same chambers as one of the arbitrators, observing that since the Laker Airways decision, the position internationally in respect of counsel and an arbitrator from the same chambers appearing in the same arbitration has evolved considerably. Is that view also held by the LCIA Court? Has the LCIA Court refused to accept party-appointed arbitrator nominees on this basis?

65. Are there different standards for the impartiality and independence of a party-appointed arbitrator and the chair/sole arbitrator? Should there be or not?

66. Article 13.5 provides an arbitrator who is required to participate in the selection of a presiding arbitrator may consult any party in order to obtain the views of that party as to the suitability of any candidate or nominee as presiding arbitrator provided the arbitrator informs the Registrar of such consultation. While an arbitrator may, on occasion, consult the party which appointed them in relation to the appointment of a presiding arbitrator, how common is it for an arbitrator to consult with the other party or parties to the proceedings with regard to appointment of a presiding arbitrator? Are there any requirements or courtesies which should be observed when doing so?

67. Recently, a Korean court has appointed an international arbitrator for the president of the tribunal for an ad hoc arbitration case after receiving recommendations from the Korean Commercial Arbitration Board. This is the first time that a Korean court has appointed an international arbitrator taking into account the international nature of the dispute. Where the appointing authority is a local court (which may not be familiar with international arbitration and qualified international arbitrators) what would be the best way to approach the court? Please share your experiences and tips.
68. Does it take too long to appoint 3 member Tribunals (giving a recalcitrant Respondent the ability to prolong the process)?

69. What is the position of an arbitrator whose availability changes substantially during the arbitration? Does it matter whether this is likely to affect the arbitrator’s responsiveness and effectiveness?

70. What do we think of the 2017 statement of Standards and Responsibilities for Members of the American Arbitration Association Roster of Arbitrators and Mediators, which now includes this requirement: “Arbitrators and mediators must advise the AAA/ICDR of any personal, physical or mental condition that may impair their ability to fully execute their responsibilities during all phases of a case. In addition, this responsibility extends to any such condition an arbitrator or mediator observes in another AAA/ICDR arbitrator or mediator or co-panellist.”?

71. Notwithstanding explicit waivers, should a potential arbitrator ever accept a nomination where counsel is a former law partner?

72. What should be done if an arbitrator knows or suspects that another member of the tribunal is colluding with a party?”

73. As part of his/her appointment should an arbitrator member of a 3-main arbitration panel be entitled or permitted to exclude or limit his potential legal liability (to say acts of bad faith) to his appointing party in his contractual terms of appointment? Should s/he be entitled or permitted to exclude or limit such liability to the other party by a collateral contract in the same terms?

If so, what about the position of the other party appointed arbitrator and the tribunal chairman?

If so, and in any case, how should be enforceability and/or reasonableness of the exclusion/limitation be assessed?

74. As users see arbitration as a service, and arbitrators as service providers, what are the appropriate way of arbitrators undertaking business development? Should they advertise? Can they seek and publicise endorsements? Should they self-assess and promote what benefits they believe they bring?

75. Why institutions don’t ask arbitrators about their non-arbitral professional commitments? These may be as important as their arbitration commitments in order to determine whether the candidate will have enough time and availability.

76. The 2014 IBA Guidelines on Conflicts of Interest say little about issue conflicts other than that a published opinion on a legal question is identified as a Green List item (item 4.1.1) and a reference to the arbitrator’s judgment in relation to a situation “when an arbitrator concurrently acts as counsel in a case in which similar issues of law is raised” (para 6). Is further guidance needed in relation to issue conflicts?

77. Various projects are currently run by academic institutions, legal journals, service providers for the collection of data about arbitrators:
   a. are they a contribution to transparency or rather a marketing tool which may distort competition?
   b. should arbitral institutions, which are depositaries of important data bases, play a role in these projects?
   c. are there data protection/privacy issues involved?
   d. are there confidentiality issues involved?
78. Since October 2014 the LCIA Rules (Article 18.4) have provided expressly that an Arbitral Tribunal may withhold approval of any intended change or addition to a party’s legal representatives where such change or addition could compromise the composition of the Arbitral Tribunal or the finality of any award (on the grounds of possible conflict or other like impediment). What experience has been gained in the operation of this provision or otherwise in addressing such a situation in non-LCIA proceedings? How should arbitrators deal with the appearance in an arbitration of expert witnesses whose appearance could compromise the composition of the Arbitral Tribunal or the finality of an award?

79. In the context of the need to improve diversity and help new wannabe arbitrators break into the profession, what can arbitral institutions do to help new and/or younger arbitrators get practical experience? Can the arbitration community learn from the mediation community and have a programme to get wannabes flying hours by placing them as ‘observers’ alongside experienced practitioners?

80. There has been some discussion of the proper role of secretaries to arbitrators. Should arbitrator candidates disclose an intent to use a secretary as part of the appointment process?

81. Has the LCIA observed any meaningful improvement (i.e. reduction) in the number of cases leading arbitrators take on following the introduction of Article 5.4(ii)?

82. The LCIA Rules provides that an arbitration cannot be, in principle and unless all the parties agree differently, of the same nationality of one of the parties involved. Should permanent residents in one of the parties’ countries be prevented from acting as arbitrator?

83. There have been various movements to promote diversity in arbitrator appointments such as the Pledge for Equal Representation. Are we seeing a real effect in this regard? What are the measures taken by LCIA to promote diversity in arbitrator appointments?

84. In investment arbitrations should the fact that an arbitrator acts as counsel in unrelated investment arbitrations disqualify him/her?

85. What are the circumstances that can give rise to justifiable doubts as to arbitrator’s impartiality and independence. Were there any cases when an arbitrator’s appointment was revoked on this basis? Can this ground be invoked when an arbitrator acts as an advocate for a party during the hearing?

86. Is so-called ‘double-hatting – acting both as arbitrator and counsel – acceptable? If so, are there limits and how should they be enforced?

87. Is anyone aware of the application of the Guidelines in the Annex to the LCIA Rules? If so, was a violation found?

88. Regarding the nationality of an arbitrator (Article 6.2 of the Rules): how the LCIA establishes the nationality of an arbitrator. For example, a hypothetical situation, when a party to the arbitration is a British company owned by a BVI trust. The owners of the trust are not disclosed. What is the nationality of the party in this case?
89. What does LCIA do to promote young lawyers to act as arbitrators?

90. Is enough being done to promote female arbitrators?

91. Brexit – will continental arbitrators be regarded as practicing law when sitting as arbitrators in England or Scotland?

92. Is the practice of international arbitration becoming over-reliant on the IBA Guidelines on Conflicts of Interest?

93. Are arbitrators too complacent about data protection? For example, should any arbitrator operating in the UK have individual registration under the Data Protection Act 1998?

94. Modes of address in email correspondence to a group – what are the best alternatives so as to avoid “Dear Sirs”? “Dear all” is perhaps too informal, “Dear colleagues” or “Dear parties” are better but often not quite right.

95. Under the IBA Guidelines on Conflicts of Interest, the usual time period triggering a disclosure obligation under the Orange List is three years. Is this time period sufficient or should arbitrators go further back in time with their disclosures?

96. To what extent are the IBA Guidelines on Conflict of Interest in international Arbitration useful as a guide to disclosure, particularly the three year periods mentioned in the sub articles of Article 3.1 of the Orange List?

97. The LCIA Rules give the Tribunal the power to decide on questions of joinder once it has already been constituted. This means in practice that if additional parties are joined to the proceedings, those parties will have no say in the selection of the arbitrators. This seems contrary to the intent behind Article 8 of the Rules (Three or More Parties) which provides that the LCIA Court shall appoint the Tribunal unless the parties have “all agreed in writing that the disputant parties represent collectively two separate ‘sides’ for the formation of the Arbitral Tribunal...”

98. The VIAC has recently published the names of arbitrators sitting in VIAC cases, following what it describes as calls for more transparency in institutional appointments. We have also in recent months seen the emergence of GAR’s “Arbitrator Research Tool (ART)” and other initiatives such as “Arbitrator Intelligence” taking shape. Should the arbitration community be concerned by the light now being shone on aspects of arbitration proceedings which parties ordinarily have expected to be confidential? Or is the emerging trend to be embraced and celebrated?

99. Should a non-lawyer or non-retired judge ever sit as a tribunal chair?
100. What can or should a party appointee do when it becomes apparent that a tribunal chair is unfit to fulfill that role (e.g., lack of arbitration experience and knowledge, pre-judgmental, bias). How can this be dealt with without threatening the integrity of the arbitration?

101. What relationships between a new counsel and a member of an established arbitral tribunal, apart from the well-known instance of membership of the same barristers’ chambers, might require disclosure by counsel or justify the exclusion of counsel?

102. Is too much expertise a bad thing?

103. Should a strict limit be imposed to the number of arbitrations that one can handle at the same time or in each year?

104. Independence and impartiality – the question of whether to remit an award after a finding of serious irregularity raises an interesting question about whether the arbitrator/arbitral tribunal can ever be truly impartial second time around – what does fairness require in this context? And does the potential for legal challenge and consequent public judgment sufficiently incentivise the maintenance of independence and impartiality by arbitrators generally during the arbitration process?

105. Could there be a role for reciprocal arrangements whereby (particularly in problematic situations), Arbitral Institution A administers a challenge to an arbitrator brought under the Rules of Arbitral Institution B?

106. On arbitrator challenges, one area I am interested in is whether arbitrators of a certain stature are more keen to get presiding arbitrator appointments to avoid conflicts rather than party-appointed roles, and what this means for the selection process. I have recently heard of arbitrators declining to be appointed by the party but stating they would be happy being chair. Is this a natural evolution?

107. Is the attitude towards arbitrator challenges becoming more uniform in different sectors/seats/institutions etc? Are differences desirable?

108. Should an appointing authority be allowed to decide challenges of arbitrators that it appointed even if through an independent commission?

109. Supposing a case turns in part or even in substantial part on an issue that the arbitrator has addressed in an article. At the time of appointment, neither party raised an “issue preclusion” challenge although it is not clear either party realized the case would turn on that issue from the outset or was aware of the article. Then, after hearings, one of the parties quotes the arbitrator’s article in its post-hearing brief. Is this problematic?

110. Should parties be allowed to challenge an arbitrator’s “intellectual bias”? Should an arbitrator’s scholarly views and/or decisions on abstract legal questions be admissible as a basis of challenging his appointment?
111. It appears we are seeing a trend of increasing challenges against arbitrators; is this notion backed by statistics (for example, has LCIA seen an upward trend of challenges made against arbitrators)? If so, are there particular reasons for such increase of challenges?

112. If the arbitration world shows sometimes symptoms of “due process paranoia », also the concern for avoiding challenges on impartiality/independency grounds seems sometimes to be a bit extreme:
   a. should arbitrators and arbitral institutions get a bit bolder when dealing with disclosures and challenges
   b. could lessons be learned from the rules which advanced jurisdictions apply with respect to court members
   c. could the case-law of the European Court of Human Rights, which has dealt with the issue of the impartiality and independency of adjudicators under the aegis of the « fair trial » principle (Art. 6(1) ECHR) be also a source of inspiration?

113. To what extent can/should costs orders be used to discourage frivolous and/or repeated challenges to arbitrators?

114. Is it reasonable and acceptable that an arbitrator that has disclosed certain info but has accepted the appointment eventually resigns on the basis that one of the parties has challenged him? In theory, once the arbitrator has accepted, he has obligations vis-à-vis both parties (ie, the party that has not challenged him has the right to have him on board)

115. Why does the LCIA, alone among arbitral institutions (I believe), (a) decline to pay the full fees of LCIA tribunal members when they are successfully challenged, and (2) withhold all payments to challenged LCIA tribunal members from the moment they are challenged until the moment the challenge is rejected (including extending such withholding through any judicial proceedings seeking to overturn the LCIA Court's rejection of the challenge).
   Also, why does the LCIA, alone among arbitral institutions (I believe), not only request the equivalent of "time sheets" from arbitrators, but then release them to the Parties, rather than just summaries of the totals paid to each arbitrator. The releasing of the details to the parties facilitates challenges based either on an arbitrator having allegedly spent too little time realistically to carry out his or her duties, or on the Tribunal Secretary having been the "fourth arbitrator."

116. The Follow-up Arbitration: Claimant seeks declaratory relief in an arbitration against Respondent on certain liability issues. Arbitrators A (appointed by Claimant), B (appointed by Respondent) and C (appointed by the party-appointed arbitrators) decide in a final award that Respondent is liable to Claimant.
   Thereafter, Claimant commences a follow-up arbitration against Respondent claiming damages. Claimant decides not to appoint Arbitrator A anymore, but appoints Arbitrator D. Claimant also declares vis-à-vis Arbitrator D that it does not consider Arbitrator C to be an appropriate candidate for chairperson of this second arbitral tribunal. If Respondent now decides to nevertheless appoint Arbitrator B for the follow-up arbitration, should Arbitrator B accept the arbitrator mandate? Alternatively, would Claimant have sufficient grounds to successfully challenge Arbitrator B because Arbitrator B would be the only member of the second arbitral tribunal who has precise knowledge of the first arbitration and the intentions of the first arbitral tribunal which led to the final award in the first arbitration?
SESSION 3
THIRD-PARTY FUNDING

117. Should the hours spent by law firms in connection with securing third-party funding be included as part of the legal costs incurred in connection with the arbitration proceedings or as “investment costs” that should be assumed by the law firms?

118. In many (if not most) cases which are funded by a third party funder, the costs potentially payable to the funder represent a substantial proportion of the total sum in dispute (for example, a typical market rate might be the greater of one-third of the damages awarded and 3x the funding advanced).

119. Is there therefore a risk that any uncertainty as to whether a tribunal would be prepared to exercise its discretion to award some or all of the third party funding costs in a particular case (if the funded party is ultimately successful) may present a significant obstacle in any settlement negotiations?

120. To what extent are the factors and circumstances a tribunal is likely to take into account in exercising its discretion to award third party funding costs widely recognised and accepted (given that, in certain jurisdictions, the ability of a tribunal to award third party funding costs at all has only recently been confirmed (for example, in England and Wales, see Essar Oilfield Services Ltd v Norscot Rig Management Pvt Ltd [2016] EWHC 2361 (Comm))?]

121. Should there be legislative oversight on third party funding, whether for international or domestic arbitration?

122. When does a third party funder provide funding for the arbitration, as opposed to funding for the claimant’s business generally?

123. Are there practical ways to join a third party funder to the proceedings? Is this possibility of joinder desirable or not as a matter of principle?

124. How do law firms ensure that they maintain “proper” relationships with third party funders? How should law firms go about suggesting (or recommending) third party funders to clients bearing in mind their duty to act in the best interests of their client? I am asking against the background of fairly well established relationships between certain law firms and certain third party funders.

125. The fact that an impecunious party may be precluded to commence or raise counterclaims in arbitral proceedings due to its inability to pay advances on the arbitration costs may raise « access-to-justice »/human rights issues and potentially affect the validity/enforceability of the arbitration agreement:

a. may third party funding be the solution to this problem?

b. should arbitral institutions take a more active role in this respect, from the minimum of signaling to the avourious party the existence of third-party funding to establishing contacts between such party and a funder, before « removing » an unfunded claim/counterclaim from the arbitral tribunal’s jurisdiction, or declaring it inadmissible or taking any other equivalent measure?
126. In commercial arbitration setting, are there particular areas where third party funding is more frequently used compared to other industries/fields?

127. It seems third party funding is here to stay. Would third party funding pose any potential enforcement problems if the jurisdiction where enforcement action is conducted does not allow third party funding in litigation/arbitration?

128. Is it a good or bad thing for the arbitrator to know who is funding a case? How does it affect how the arbitrator sees the case? In other words, does the arbitrator’s knowing that a claimant has a third party funder give an unconscious bias or prejudice him or her to thinking that the Claimant doesn’t really believe in its case? Or, on the contrary, would an arbitrator develop a bias towards the strength of the Claimant’s case since an independent third party apparently has been willing to invest in it?

129. Should third party funders be directly liable for adverse cost awards, and if so, how can this best be achieved?

130. If the costs of third party funding are recoverable (Essar Oilfields Services Ltd v Norscot Rig Management PVT Ltd [2016] EWHC 2361), as a quid pro quo, should there be a mechanism in arbitration to discourage hopeless claims (Excalibur Ventures LLP v Texas Keystone Inc & Ors [2016] EWCA Civ 1144)?

131. The description ‘third party funder’ covers a multitude of operators: is regulation a fantasy?

132. Will greater regulation/more transparency create opportunity for third party funders to operate/invest in law firms? Would this be a positive development?

133. The ICCA-Queen Mary Task force on Third-Party Funding has now submitted the draft report on Third-Party Funding in International Arbitration for public comment until 31 October 2017. Do we need “Principles of Best Practice” on third party funding?

134. In the recent decision of RBS Rights Issue Litigation [2017] EWHC 1217 (Ch) the English High Court held that it was relevant to consider where a third party funder may lie on the 'spectrum' of funders when dealing with applications for security for costs. Should arbitrators do the same or is 'a funder a funder' when it comes to dealing with security for costs applications in arbitration?

135. Should lawyers who represent parties in international arbitration on a contingent fee basis be themselves liable for part of the winner’s costs if their client loses?

136. Does a bank, or other lending institution, which holds a first fixed or floating charge over the assets of an arbitration claimant (or a claimant’s parent) for monies loaned generally to permit the claimant to undertake its business, including the prosecution of an arbitration claim have a “direct economic interest in the award”? Does the answer depend on the level of the business done absent the arbitration claim and/or the value of the potential arbitration award compared with the sum lent?
137. Do the disclosure obligations apply where a party has the benefit of insurance in respect of its expenses of bringing or defending the arbitration proceedings, or does the existence of insurance remain res inter alia acta (legally irrelevant)?

138. Can soft law pre-empt more rigid and maybe inappropriate hard law rules on this topic?

139. Should the third-party funding’s nationality be considered as one of the nationality of the parties involved for the purposes of Article 6 of the LCIA rules?

140. How much influence should TPF have in the conduct of a funded case?

141. How does the principle of party autonomy jibe with regulatory oversight?

142. Is it adequate to determine the validity of a funding agreement (and the PoA of counsel) under the lex arbitri?

143. How to deal with success fees? And what about contingency fees?

144. Is TPF as prevalent in commercial arbitration as we are led to believe?

145. Other than the obvious fact that counsel’s identities are automatically disclosed in the arbitration, how is third-party funding different from contingency or success counsel’s fees?

146. Are arbitrators seeing much, if any, voluntary compliance with the requirement in the IBA Guidelines on Conflicts of Interest in International Arbitration to disclose “relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, such as an entity providing funding for the arbitration, or having a duty to indemnify a party for the award.”

147. Should the Rules require that where a party is funded by a third party funder, that party must disclose the fact that it is funded and the identity of the funder at the commencement of the proceedings or first procedural conference, or if funding is arranged subsequently, promptly after funding is established?

148. Are there circumstances where an arbitrator may (or should), on his or her own initiative, enquire as to the existence of funding (for instance, if the arbitrator has previously had significant involvement with a funder and wishes to ascertain whether that funder is involved in funding a party in the proceedings, so the arbitrator can assess whether a disclosure may be required to be made by the arbitrator)?

149. What is the extent of disclosure which should be required in relation to a third party funding arrangement – simply the fact of funding and the identity of the funder or also the terms of the funding? Is the extent of disclosure required dependent upon the purpose at which disclosure is directed (eg identification of possible conflicts of interest or provision of security for costs)?
150. How much disclosure is appropriate for third party funding?

151. Are requests for parties to disclose third party funding (and/or the identity of funders) appropriate? Always? Never? Sometimes?

152. Are there circumstances in which a party should be required to disclose the terms of a third-party funding agreement in connection with an application for security for costs? If so, should there be any safeguards applied?

153. Should there be a requirement to disclose the fact that a claim is third-party funded outside of a conflict situation?

154. Do participants have experience in applying the disclosure requirements to law firm contingency fee arrangements and the extent of detail being required from law firm and third-party funders? To the extent that the name of a third-party funder is disclosed to avoid conflicts, what justifies are being given to require more detail? From their personal experience, do participants believe that funding (either from the firm or third parties) impacts the loyalties (for want of a better word) of counsel?

155. Is there an obligation of a party in international arbitration to disclose third party funding to the other party / the arbitral tribunal and, if yes, under which circumstances?

156. Please consider the following scenario of family funding of a dispute: Investor Tywin Lannister from Clanlandia has been expropriated in Absurdistan – completely! He has basically no financial means anymore. He nevertheless finds a reputable law firm which agrees to work for him basically on a contingency basis whereby all administrative costs, arbitrators’ fees and expenses have to be covered by Investor Tywin Lannister. Whenever a payment is due, Tywin Lannister is struggling hard and telling his lawyers that he has to collect the monies in the closer as well as in the wider Lannister family. The lawyers overhear from conversations from time to time that the life insurances of the Lannister children have been cancelled to receive some money and agreements with more remote cousins have been made in order to finance the ongoing arbitral proceedings. Investor Tywin Lannister tells his lawyers that it is his business to talk with his family and clan members in order to get the financing. The lawyers would not understand in any way what family, clan and blood bonds are about. The lawyers estimate that at least 50 family and clan members have put in money to keep the arbitration alive.

In this situation, the lawyers of Absurdistan make a request to the arbitral tribunal to have Investor Tywin Lannister disclose all relationships with persons or entities having a direct economic interest in the award to be rendered in the arbitration, in particular persons and entities providing funding for the arbitration.

Is Investor Tywin Lannister obliged to disclose all the names of his family or clan who have provided funding for the arbitration? Is Investor Tywin Lannister also obliged to disclose all the oral or written terms of any funding agreement? What about the lawyers – are they under a similar obligation? What should they do if Investor Tywin Lannister simply tells his lawyers that they should not meddle with his family business but concentrate on the arbitration? Would you consider it appropriate that Absurdistan – a state which has a record for going physically after its opponents – knows all the names of family or clan members of Investor Tywin Lannister who have provided funding – or would you exclude at least minors and persons who have donated less than USD 500.00?
157. Must one declare the involvement of a funder in a matter in which one was previously appointed upon becoming aware of a funder in a current appointment?

158. Is it better that the burden of disclosure rests with the legal practitioner (as in Singapore), than with the funded party, as in Hong Kong?

159. Who controls counsel’s conflicting interests – the party, the arbitrators or the litigation funder who is not present in the arbitration?

160. As the potential for conflicts of interest from third party funding have been addressed fully in the last few years, are there other situations which contain potential for conflicts of interest that should now be higher on the agenda? For example, what about very large repeat users of arbitration services?

161. Has anyone had difficulties where a third-party funding agreement has been concluded AFTER commencement of the arbitration and, therefore, obviously third-party funding could not have been disclosed at the outset of the arbitration?

162. Should regulation of third party funding depend on the degree of involvement of the fund in the conduction of the case, in particular in respect of conflicts of interests?

163. Shouldn’t be mandatory to always disclose the identity of the third-party? Otherwise, how can a conflict of interests be prevented?

164. The IBA Guidelines appear to state that third party funding is a disclosable issue only when a party is a “legal entity”. Does this mean that there is no obligation to disclose third party funding of an individual party to arbitration? If so, what is the justification for this distinction?

165. Among the new conflict issues which third party funding may generate should one list also those stemming from more or less direct or indirect relationships between the funder and an arbitrator, e.g.: a. is there a conflict if the same person sits as arbitrator in a funded dispute and acts as counsel in another funded dispute when the funder is the same; b. should appointments of an arbitrator in different disputes by different parties funded by the same funder be relevant for the issue of « repeated appointments » ? c. should the funder be treated for conflict purposes as if it were a party?

166. Why all the excitement about “third-party” funding (which incidentally defies definition)? Isn’t the only concern the integrity of the arbitral process itself? If so, isn’t the concern to have a process by which arbitrators have knowledge of such funding sufficient to determine whether they have a conflict? Would it be a solution to adopt a rule that no arbitrator may be a shareholder, officer, director of, or have any other financial interest in, a third-party funder?

167. Article 25.2 of the LCIA Rules authorizes an arbitral tribunal to order security for costs. Should a tribunal appointed under the LCIA Rules require disclosure of any third-party funding on request as part of the application for such security. And, what weight should be given to the other party’s objection that details cannot be provided because the funder insists that they be kept confidential?
168. Where a party’s legal costs are being funded by a third party, should the Tribunal routinely order that party to provide security for costs? What approach should the Tribunal take if the funder threatens to withdraw its funding if security for costs is ordered?

169. No international arbitration rules or laws (of which I am aware) subject a claimant party’s right to arbitrate to the condition of securing the other party’s costs. Notwithstanding this, many rules empower an arbitral tribunal to order a party to provide security for costs, and applications for security for costs appear to have gained increasing avour in international arbitration over the last two decades. A link is often made with third-party funding. Thus, a leading commentary states: “Where a party appears to lack assets to satisfy a final costs award, but is pursuing claims in an arbitration with the funding of a third party, then a strong prima facie case for security for costs exists.” Is this a widely-held view and what is the basis for it, where the parties have not dealt with the issue in their arbitration agreement and neither the applicable arbitration rules or law create any right to such security?

170. Third party funding is now firmly established as an acceptable way of funding arbitration but distrust born out of the old law of champerty still lingers in some quarters. Funders of spurious cases in the hope of a lucrative windfall may be less willing to fund if there was an obligation on the funded party to disclose the identity of the funder with the attendant risk of adverse costs consequences. Is it time for institutions to assist the funders gain respectability by requiring transparency? Should they also give arbitrators express powers in those circumstances to order security for costs?

171. When a claimant is funded by a third party funder - Can a tribunal order security for costs absent specific provisions in the arbitration rules?

172. Can funders be made liable to pay security for costs and eventually the costs of the arbitration?

173. Insofar as security for costs is concerned, is the situation of a funder similar to that involving an obligation to provide a bank guarantee – either the funder is in the same position as a bank guarantor and no further security is required or, all else being equal, security has to be provided and found elsewhere?

174. Relationship to security for costs: some (e.g. Gary Born, International Commercial Arbitration, 2d ed 2014, p. 2496; the tribunal in RSM v St Lucia) have argued that, where a claimant is impecunious and relies upon third-party funding to bring its claim, a prima facie case for security for costs has been made out. However, it seems that many arbitrators have been reluctant to embrace this view. Is such hesitation justified, and if so, why?

175. When considering security for costs in the context of third party funding does it make a difference whether the claimant is a special purpose vehicle?

176. Security for costs – is it perhaps time for greater institutional guidance on the circumstances in which security for costs can and should be ordered (including where third party funders are involved) so that there is greater consensus and consistency in this regard?
The State’s Third Party Funding Case:

JustOil Ltd’s oil exploration license in Absurdistan has been terminated without prior notice soon after construction of all necessary buildings and equipment. All JustOil personnel have been forced to leave the country at short notice. Thereafter, the license was awarded to NoCompromise Oil Ltd. Who took over the JustOil facilities and equipment as a lease from Absurdistan’s oil ministry. JustOil has commenced arbitration proceedings against Absurdistan requesting to get its initial license back and, at the very least, damages including its lost profits. JustOil has received via Wikileaks a transcript of a telephone conversation between NoCompromise Oil’s CEO Vito Corleone and Absurdistan’s President Tougherthantherestov with Mr. Corleone stating: “Don’t worry, Mr. President, if the JustOil whimps commence an arbitration against Absurdistan, we will take care of that. We will defend our license for you.” The authenticity of this transcript is not seriously put in question. Absurdistan is represented in the arbitration by lawyers who regularly represent NoCompromise Oil. Absurdistan offers witness testimony by NoCompromise Oil senior management to prove that JustOil would not have made any profits with the oil exploration license the way it had structured its business.

JustOil now requests the arbitral tribunal to have Absurdistan disclose all details of its relationship with NoCompromise Oil relating to NoCompromise’s direct economic interest in the award and to provide any concrete funding agreement between Absurdistan and NoCompromise Oil. Is Absurdistan obliged to disclose the nature of its relationship with NoCompromise Oil relating to its funding for the arbitration? Pursuant to Absurdistan’s laws, disclosure of documents and information relating to the oil business are subject to absolute state immunity once declared confidential by the President (which has happened already).

Should the arbitral tribunal care about the funding of Respondent Absurdistan’s legal defense? If yes, should the arbitral tribunal respect Absurdistan’s national law requirements relating to state secrets and immunity?

What is the likely impact, if any, on arbitration in a State which prohibits third party funding?
SESSION 4
ORDERS, AWARDS AND ENFORCEMENT IN THE CONTEXT OF GLOBAL DEVELOPMENTS

179. How will immigration restrictions in the UK, the US and elsewhere affect the choice of the arbitral seat and location for hearings?

180. Can US President Donald Trump and his administration really do much to hurt or help international commercial arbitration? Are they likely to do whatever they can do?

181. To what extent is arbitration likely to be used in post Brexit UK/EU dispute resolution?

182. Will Brexit place UK Courts in a better position to issue anti suit injunctions in relation to court proceedings before the courts a member state?

183. Will London be seen as a more neutral seat post Brexit (no influence of EU law and Courts)?

184. Will arbitration be a clearer alternative to courts post Brexit given that regulation 1215/2012 will no longer be applicable?

185. In the wake of Brexit, should the LCIA relocate to Dublin, or to Frankfurt?

186. Brexit – whilst there are several good reasons why international arbitration in London should not be unduly affected by Brexit, will there nevertheless be an adverse impact through Brexit’s impact on substantive law and uncertainty over future legal development in areas where traditionally EU law has had an influence?

187. A lawyer recently said at a legal conference that the growing number of arbitrations and the confidentiality over their awards may lead to known legal precedents becoming outdated. Is this a genuine concern and, if so, how can it be addressed?

188. Do the emergence of specialist arbitral institutions tied to economic sectors or industries pose a threat to the credibility of international arbitration?

189. Does the decision of the English High Court in Guidant LLC v Swiss Re strike the right balance of avoiding consolidation through the back door, or encourage reluctant respondents to undermine the efficiency of arbitration?
190. Does the recent US Second Circuit decision in *Venezuela v. Mobil*, which holds that Mobil’s ex parte application for enforcement of an award failed to comply with the FSIA (Foreign Sovereign Immunities Act) requirements for notice create a disparity which might mitigate against attempts for enforcement of awards, or at least awards involving states, in that circuit? Some district courts already held the same but this is the first time I believe a circuit court has so held.

Given that states seeking to enforce awards for costs against claimants are not subject to FSIA requirements, and may therefore seek enforcement ex parte, but private parties are subject to FSIA requirements, is that a disparity or disadvantage which could cause the private parties to seek enforcement elsewhere? And does it give an advantage to England where ex parte enforcement is permitted subject to certain conditions?

191. Is the Delhi High Court’s recent decision restraining Vodaphone from proceeding with an arbitration against India under the UK-India Bilateral Investment Protection Agreement (BIPA) a one-off, given the judge’s reason was that Vodaphone had already started similar proceedings on the same tax dispute under the India-Netherlands BIPA—or is this a decision for concern for investors in India?

192. Should arbitrators be proactive in taking steps to enhance the enforceability of their Awards in jurisdictions where assets of an unsuccessful party are likely to be located e.g. By declining to award compound interest where this may be unenforceable in such jurisdictions?

193. S.67 jurisdiction challenges to the Award – should a losing party get a second bite of the cherry in a full re-hearing on jurisdiction? Should new evidence be permitted?

194. After Ampal and Orascom Awards denying jurisdiction when parallel arbitration proceedings may amount to duplicate claims, are there any consequences for commercial arbitrations?

195. Are there any recent experiences of Arbitrators accepting to dispose of claims (or defences) by summary judgments? What about jurisdiction and what procedure to hand down “summary awards”?

196. Is the “contrary to public policy” ground for refusing to recognize and enforce an arbitral award under the New York Convention likely to expand bigly, particularly when the domestic party is the loser?

197. More and more often both commercial and investment arbitrations take place in a context where other arbitral or judicial proceedings are pending between the same or related parties on the same or connected claims. This may obviously give rise to issues of *res judicata*.

a. in some jurisdictions *res judicata* is considered a principle of procedural public policy the breach of which may lead to the annulment of the award : can it also be a ground for resisting the enforcement of the award and, if so, under which clause of New York Conv. Art. 5?

b. is *res judicata* to be determined by reference to the law of the seat of the arbitration, to the law governing the merits, to the law of the State of enforcement or rather by reference to a « transnational » uniform rule to be developed by the practice of international arbitration?

c. is this question to be answered differently when it arises in the context of investment treaty arbitrations?
198. Throughout Europe international lending arrangements, also between parties having no link whatsoever with the UK, customarily contain dispute settlement provisions which refer to the (non-exclusive) jurisdiction of the courts of England and Wales. These provisions are entered on the assumption that the English court judgments would benefit of the regime of quasi-automatic recognition set out by the EU Brussels I Reg. Brexit will likely result in the English court judgments losing this benefit.

a. is ratification by the UK of the Hague Convention a full solution to this problem?
b. if not, is a London seated-arbitration the closest equivalent? a priori, or depending on the way the arbitral tribunal is formed and the arbitral proceedings are organized?
c. can arbitral institutions play a role in this respect?

199. There is much discussion on the need of an investment arbitration court with permanent panel members who would be prohibited from acting as counsels/experts in other investment arbitration cases. This movement may be contrary to the increasing need of diversity in arbitrator appointments and may not be ideal in retaining most qualified arbitrators, especially when the stakes are so high. Any thoughts?

200. When considering that two of the four major European hubs for international arbitration (Stockholm and Geneva), arguably (at least in part) owe their success to the perceived historical neutrality of Sweden and Switzerland, can an argument for Brexit as adding to the attractions of London as a seat for arbitration be made?

201. Assume multiple contracts relating to the same project among companies from two groups of companies, with the contracts having separate arbitration clauses and non-consolidation provisions. With a view to enforcement of the arbitral award, may testimony and/or other evidence from one arbitration be introduced into a second arbitration by a company that was not a party to the first arbitration? If so, under what circumstance? With what limitations, if any?

202. In investment arbitration, dissenting opinions have become commonplace. Concerns have emerged about the neutrality of dissenters and the authority of the awards – for example, the ICSID ad hoc committee endorsed the dissent in annulling the Occidental v. Ecuador award. Supporters of dissents in treaty arbitration often refer to the development of international law as a justification. In the commercial arbitration context where most awards are known only to the parties, how useful are dissents?

203. More international treaties and conventions will provide more rules that can be qualified as mandatory law. Can we develop a general understanding of what constitutes a norm of international public policy and which violations of such norm can be regarded as a violation of international public policy?

204. In the recent case of Noble Resources v Shanghai Good Credit International a court in Shanghai refused enforcement of a sole arbitrator’s award where the parties’ arbitration agreement expressly specified that the arbitration would be referred to a three-member tribunal. The court found that the parties’ arbitration agreement was not overridden by the expedited procedure permitted under the 2013 SIAC rules which provides for “the case shall be referred to a sole arbitrator, unless the President determines otherwise”. The latest (2016) version of the rule provides that the expedited procedure can apply even where the arbitration agreement contains contrary terms. Should that be sufficient to overcome the concerns expressed by the Shanghai court?

205. Why do we still have so many national institutions on the continent - is there no demand for a Pan-European
Do we need specialist judges (or special training of existing judges in the relevant issues of public international law) to deal with enforcement of investment awards?

Looking beyond 2019 – will arbitration remain ring fenced from EU rules? The Recast Brussels I Regulation will come up for amendment following a report due in 2022. The London lobby worked to avoid extended EU competence last time but will probably not be sitting at the negotiating table this time. Consumers are likely to benefit from EU regulation but what gains and risks are there for the rest of us? EU arbitration centres may gain at least some advantages although at the price of higher regulation.

Are participants aware of examples of spill over affects into the commercial arbitration space either from concerns about investor state or consumer arbitration either in the press, legislative initiatives or the judiciary?

Article 26 of the UNCITRAL Arbitration Rules establishes standards that must be met before interim measures can be granted. Specifically, Article 26 provides:

“3. The party requesting an interim measure under paragraphs 2 (a) to (c) shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.”

Article 25 of LCIA Rules does not establish any standard by which “Interim and Conservatory Measures” might be ordered. What standard should an LCIA tribunal apply?

Article 25.3(ii): a requirement to fully litigate a claim for interim or conservatory measures twice?!

Has anyone had any experience with a “class action” arbitration in an international arbitration setting? Does class arbitration present procedural difficulties under the LCIA’s rules?

In the Volkswagen case, the Austrian Supreme Court has upheld a jurisdiction clause in the articles of VW AG. If this was an arbitration clause - can we cope with arbitrations in which mass claims are being enforced?

Is a breach of LCIA article 18(5) a new basis to challenge enforcement under Article V.1(d) of the New York Convention?

Why should it be objectionable for a Tribunal Secretary to draft a full text of Decisions and Awards as long as each member of the Tribunal has carefully read the draft, offered changes as advised, the changes of any member have been deliberated among the members and each member takes responsibility for the final text?