**Jurisdiction and other preliminary procedural issues**

1. The extension of arbitration agreement to non-signatories

2. Joinder – Article 22.1(viii) of the LCIA Rules 2014 permits the joinder of a third party in an existing arbitration provided the third party and the applicant party have consented to such joinder in writing following the commencement of the arbitration or “(if earlier) in the Arbitration Agreement”. Does the incorporation of the LCIA Rules in the arbitration agreement suffice for the purpose of evidencing the parties’ consent to joinder or do the quoted words in fact require that the parties’ arbitration agreement contain an express agreement to joinder specifically?

3. Are multi-tier resolution clauses effective or are they more trouble than they are worth?

**The tribunal, the parties and the institution**

4. Are parties right to be concerned about arbitrators’ impartiality in light of recent court challenges and high profile stories? If so, what steps could or should be taken in order to affirm parties’ faith in the arbitral process?

5. Should the arbitrator selection process be driven by party selection or institution selection?

6. 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?

7. 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?

8. "State-ist" or "pro-investor" arbitrators – many prominent arbitrators are perceived as being biased in one way or another. One could argue that that is not necessarily a bad thing, and it is legitimate for experienced arbitration practitioners to make use of their relationship with / knowledge of arbitrators’ biases or preferences to inform their arbitral appointments or Chair selection. Do you think that that is valid?
Arbitrators conflict of interest: how far is too far? Facebook, Linkedin and other social medias – is it possible to draw a general rule or each situation must be addressed on a particular basis? Are technologies relationships or just means of relationship?

Arbitrator Conflicts of Interest

Article 1.4 of the Non-Waivable Red List of the IBA Guidelines on Conflicts of Interest in International Arbitration states: “The arbitrator or his or her firm regularly advises the party, or an affiliate of the party, and the arbitrator or his or her firm derives significant financial income therefrom.”

In W Ltd v M SDN BHD [2016] EWHC 422 (Comm), Knowles J stated that the circumstances of the case fell squarely within Article 1.4 of the IBA Guidelines: a regular, significant client of the sole arbitrator’s firm was acquired by the parent company of one of the parties to the arbitration, and the firm continued to act for that client, during the arbitration. However, he held, “without hesitation”, that the English law test for apparent bias was not satisfied (that is, the fair minded and informed observer would not conclude that there was a real possibility that the arbitrator was not independent and impartial) because the arbitrator had no knowledge of the conflict of interest.

Four points of interest:

1. “or his or her firm regularly advises”: the words “or his or her firm” were added in 2014 when the IBA Guidelines were revised. Is this too broad, especially given that many arbitrators operate within large, global firms?

2. Test for independence and impartiality: the test for bias differs by jurisdiction. For instance, the French Cour de Cassation recently came to the opposite conclusion in a case that was very similar on the facts, without regard to the arbitrator’s knowledge. Is the English test satisfactory?

3. Evidence: Knowles J accepted the statement of the arbitrator that he did not know, despite other factors indicating that it would have been likely he would have known of the conflict. Should an arbitrator’s own statements as to their knowledge be admissible evidence?

4. IBA Guidelines: Knowles J heavily criticised the IBA Guidelines; in some cases, rightly so. What can be done to remedy their deficiencies? And are domestic laws / professional ethics rules too diverse to sit easily under one set of guidelines?

What are the key factors for deciding whether to nominate a prominent but busy arbitrator or a less senior but more eager one?

Parties may be dissatisfied with the manner in which an arbitrator is handling a case, but the issues are not sufficiently serious to justify removal of the arbitrator - for example where an arbitrator is frequently inadequately prepared, accepts appointments without having sufficient availability to attend hearings or make orders or where applications are not dealt with sufficiently promptly. Should arbitral institutions play a more active role in scrutinising, or requesting feedback in relation to, the performance of arbitrators?
13. Arbitrators should be kept “blind” as to which party appointed them in arbitral proceedings.

14. How regularly should the rules of various arbitral institutions be updated?

15. Does anyone have experience of a third party replacing the original claimant in an arbitration? What types of issues may arise as a result, both in the arbitration and any supporting court proceedings?

Questions of evidence
16. Advocacy in international arbitration:
   a. To what extent is direct examination used in international arbitration? Should better use be made of it?
   b. Given the scope for differing ethical obligations in terms of preparing/coaching witnesses, is there a need for a uniform ethical code applicable to international arbitration practitioners to ensure a level playing field?

17. If a witness is refusing to answer questions posed in cross-examination, how much of a role should a tribunal play in attempting to bring that witness under control?

18. Witness evidence is typically given in the form of witness statements. The scope, length, and persuasiveness of a witness statement can vary widely depending on the witness themselves in addition to the parties and lawyers involved. Would it be helpful if either Tribunals (through procedural orders) or institutions (through rules, guidelines, or otherwise) were more prescriptive of how witness evidence is presented? For instance, what if there was a requirement that the contents of a witness statement were only limited to contentious facts that are relevant to the case and material to its outcome? Do we run the risk of “losing the whole story” if we constrain witness evidence in this way, or would we make proceedings more efficient?

19. Practitioners from different jurisdictions and legal traditions take different approaches to preparing witnesses and experts, and it is rare for Tribunals to take a proactive approach in their procedural orders to regulate this. Is this a problem? Should it fall to arbitral institutions to prescribe rules for this?

20. What is the delegates’ experience of reducing costs of document production?
21. Should s 67 of the Arbitration Act 1996 be amended to limit the scope of new evidence that can be adduced when bringing a jurisdictional appeal of a Tribunal’s award?

22. Do document requests and document production actually contribute to the resolution of disputes or just increase costs?

23. Practice and procedure:

   Should we dispense with, or radically curtail the scope of, document production in international arbitration?

24. What advice do you have on responding to an extensive and clearly onerous set of document production requests from the other side (e.g., one that involves more than a hundred requests and stretches over several hundred pages)? Are there any preliminary steps that can be taken to force the other side to slim down their requests (e.g., by way of an application for interim relief)? Are there any actual, real-life examples of such? Additionally, would such preliminary steps be allowed, in circumstances where Redfern Schedules are typically exchanged between the parties only (i.e., not cc’ing the tribunal) and the tribunal does not get involved until the end of the document production process (i.e., once the parties have had a chance to object to each other’s requests, and also to reply to any objections made by the other side)?

25. Should arbitrators be more open-minded when it comes to the need for direct or re-direct examination of witnesses and experts? Or, Tribunals are regularly resistant to any more than a short amount of direct or re-direct examination. Is the balance correctly struck between written and oral evidence in commercial arbitration?

26. In the litigation context, many jurisdictions provide for clear positive obligations on counsel to advise their clients on their disclosure and document preservation obligations, and some of these obligations can be set out in a very detailed and prescriptive manner (for instance setting out an obligation to instruct all employees of the client to produce electronic copies of their relevant active files). While Tribunals might be able to give directions on the preservation of evidence (see eg Arbitration Act 1996, s 38(6)), and while Art. 12 of the IBA Guidelines on Party Representation provides for a general obligation to inform the client of the need to preserve documents, should we be more proactive and specific about what these obligations entail, particularly to ensure that the parties are all on the same page when it comes to responding to document production requests?

Practice and procedure - the conduct of the proceedings

27. Is it acceptable for a member of a tribunal to undertake their own research into the facts underpinning a reference, for instance by googling the parties or the subject matter of the dispute?
28. Why are arbitration awards and pleadings so long? Is it time to introduce costs sanctions for wasted time, and should arbitrators be more prepared to issue such sanctions?

29. Is arbitration becoming too standardised and formulaic? How can users, arbitrators and counsels be encouraged to adopt a more flexible approach?

30. Applications to the Courts in support of Arbitration proceedings

31. Should the Arbitration Act 1996 be amended so as to reverse the presumption of confidentiality under English common law?

32. Would switching the presumption of the confidentiality of arbitral proceedings under English law (to a presumption against) help advance the commercial common law in England?

33. The reform of the English Arbitration Act 1996 provides the perfect opportunity to reverse the presumption of confidentiality in arbitration proceedings in favour of an opt-in system.

34. Confidentiality in arbitration: matters in the public interest

35. Transparency: a constant criticism of commercial arbitration is that it lacks transparency in relation to awards. As commercial arbitration continues to expand, this criticism is becoming louder, especially from the judiciary in relation to jurisprudence and the development of law and precedent. Given the increasing popularity of arbitration, is there room to consider making commercial awards more publicly available? How would this sit with the principle of confidentiality? Could any such precedent or jurisprudence be trusted in the hands of non-state appointed arbitrators?

36. In the third annual BAILII Lecture delivered in April 2016, the then-Lord Chief Justice Lord Thomas famously argued that, because they largely take place in private, arbitration proceedings present “a serious impediment to the development of the common law by the courts in the UK, particularly, through the Commercial Courts in London”. As one way of addressing this issue, should commercial arbitration awards be published (in anonymised form) as a matter of course?

37. Emergency Arbitration – experiences?
38. Practice and procedure - the conduct of the proceedings

In *Gerald Metals SA v The Trustees of the Timis Trust and others* [2016] EWHC 2327, the Commercial Court held that the emergency arbitrator provisions contained in the LCIA Rules 2014 had the effect of restricting the scope of the court’s jurisdiction to grant freezing injunctions in support of arbitration. At the time the Arbitration Act 1996 was drafted, emergency arbitrators did not exist. Should s.44(5) of the 1996 Arbitration Act be amended to provide that emergency arbitrator provisions do not have the effect of ousting the jurisdiction of the courts?

39. Does arbitration need a summary judgment procedure as part of standard institutional rules?

40. Parties may choose to provide for summary judgment in their arbitration clauses. However, is it feasible in the absence of a standard for what must be pleaded by the party seeking summary judgment, and/or in the defence thereto?

41. What should a party representative do if he or she faces unfair or dishonest practices on the part of the opponents’ representatives where the tribunal does not seem sufficiently active or perceptive?

42. What should be the consequences of a party reducing the amount of its claims or dropping part of its claims unilaterally? What rules should apply as to whether claims can be withdrawn without prejudice?

43. Practice and procedure - the conduct of the proceedings

Where a party has failed to plead a legal principle which might support its request for relief, is it appropriate for the tribunal to draw it to the parties’ attention and invite them to comment?

44. As painful as proceedings with a tight procedural timetable can be for the lawyers involved, are such proceedings in fact better for clients?

45. Is a tribunal power of summary dismissal without any guidance as to its application worse than having no power at all?

**Orders, Awards and enforcement**

46. Arbitrating against a state – including state immunity issues in relation to bringing a claim and enforcement of arbitration awards
47. What test should the English courts apply in deciding whether to recognise a foreign judgment setting aside an arbitral award?

48. Enforcement of arbitral awards: in some jurisdictions, arbitration might not be the preferred option for dispute resolution between commercial parties as there is a perception, real or sometimes imagined, that the judiciary in particular states will not enforce arbitral awards once issued. For example – India and the decision in Raffles Design that an emergency award in a foreign seated arbitration cannot be enforced under the Arbitration & Conciliation Act; and, some African jurisdictions where the enforcement of arbitral awards is thwarted by unending challenges and appeals, which are sometimes further hindered by the willingness of courts to entertain frivolous challenges. In such circumstances:
   
   a. what can be done to improve enforcement of arbitral awards; and
   
   b. upon whom does this responsibility lie.

49. Splitting babies and trading horses - achieving principled decisions in arbitration

50. Interlocutory measures: interim orders and effective case management

51. Enforcement of arbitration seat annulled awards: any experiences on recent cases where the enforcement court sought to understand the reasons of the annulment before the foreign court (Abengoa case in Brazil)? Don’t we need more dialogue?

52. In the recent case of Maximov v OJSC Novolipetsky Mettalurgichesky Kombinat [2017] EWHC 1911 Burton J refused the enforcement of a Russian arbitral award that had been set aside at the seat on the basis that there was no “cogent evidence of bias” of the Russian court. Should English courts take a more flexible approach to the enforcement of awards set aside at the seat? Will time come for an English Pemex or even Putrabali?

53. What can be done to reduce the delay in producing arbitral awards?

54. Third party funding

54. Is there a place for third party funding in private commercial arbitration?
55. To what extent should a third party funder’s arrangement be disclosed?

56. Should the LCIA seek to regulate or give guidance on how funded claims are dealt with under LCIA arbitrations?

57. Should the disclosure of third party funding arrangements be made mandatory in international arbitration?

58. Third party funding in international arbitration

Costs

59. Arbitrators’ fees in an ad hoc arbitration – In a three-arbitrator ad hoc arbitration, how should the parties split the Tribunal’s fees and whether it would be at all acceptable for the parties to agree to pay their own arbitrators’ fees? In negotiating the arbitrator’s fees, what should the parties do in circumstances where there was initially a considerable disparity in the fees of the wing members who, having had their respective clerks speak with one another, decided that they would both charge the same higher fee?

60. Arbitrator fee caps – are they legitimate? Why, for instance, should an arbitrator be paid half as much for an ICSID arbitration as they might be for an UNCITRAL arbitration if they do the same work?

61. Arbitration and “weak parties”: how can we address the problem of parties that, even having agreed to submit future claim to arbitration, are not anymore able to financially secure their claims due to supervening financial problems? In these case, third-party funding is not always available? Could these parties access the State courts requesting a judge to indicate a different – maybe cheaper – institution?

62. Would arbitration benefit from a Woolf-like approach to costs (i.e. costs of interim applications to be borne by the losing party)?

63. Should cost budgeting be the default in arbitration, unless both parties agree to exclude it?
Trends in International Arbitration

64. Technology in international arbitration:
   a. To what extent is technology being used in arbitration - is the most significant development still the use of predictive coding in large-scale document review and production exercises or have things moved on?
   b. Should there be more widespread use of technology in international arbitration?

65. Tech start-ups have long seen the legal profession as ripe for technical innovation. How long be before arbitrators (and practitioners?!) are made redundant by algorithms and AI?

66. Does anyone trust David Davis (UK lead Brexit negotiator) to deliver coherent dispute resolution mechanisms for UK-EU agreements post-Brexit?

67. Do you think there is (or is likely to be) an increased trend in financial institutions turning to arbitration as opposed to litigation?

68. 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.

69. What will investment treaty arbitration look like in 2030? With growing BIT terminations and withdrawals (South Africa, Indonesia, India, etc), the US political atmosphere, increasing EU Commission interventions on intra-EU matters – are we seeing the beginning of the end of BITs?

70. The European Commission has been working towards the establishment of a permanent, multilateral "investment court" to replace the existing system of ISDS. That will have a direct impact on the UK, which is consulting on potential "arbitration models" for post-Brexit disputes between the UK and EU (https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf). What are your predictions? Is a move away from the current system of ISDS warranted or necessary?
The new Brazilian Act on arbitration between foreign investors and the State (July 2017) provides some interesting – not to say original – rules that I would like our colleagues to comment and especially present any other similar rules in their respective jurisdiction: (i) the private party must advance all costs, (ii) the arbitration must be in Portuguese and applying Brazilian law; (iii) all the arbitral institutions administrating these case must be previously approved and listed as “authorized” by the Brazilian Government. Any thoughts?

Over the last few years, a number of emerging market countries have sought to modernise their arbitration laws, for example India and South Africa. Will such countries ever be successful in challenging the traditional plutocracy of global arbitration hubs?

The 2016 Queen Mary Survey on TMT dispute resolution revealed a mismatch: while arbitration was the most preferred dispute resolution mechanism for TMT disputes and 92% of the stakeholders interviewed considered that it was well-suited to TMT disputes, the survey also indicated that it was less commonly used for such disputes than either litigation or mediation. What can be done to address this mismatch between the attraction of arbitration and its actual use in the TMT sector?

Have sanctions on particular States in fact impacted on the conduct of international arbitrations?

Does London need a second IDRC building?

There is a pervasive attitude in banking circles that disputes related to financial institutions are unsuitable for arbitration. In November 2016 the ICC Commission on Arbitration and ADR Task Force on Financial Institutions and International Arbitration published a report on Financial Institutions and International Arbitration, which identified a number of perceived shortcomings of arbitration from the point of view of financial institutions (such as the absence of summary disposition, lack of precedent and less straightforward access to interim relief). How do we make arbitration more attractive to users from the finance and banking sector? Has anyone been successful in convincing their financial sector clients in including arbitration clauses in their contracts? Has the uncertainty around the enforceability of English court judgments in the EU post-Brexit changed the equation?