1. How to deal with privacy of the proceedings and confidentiality of awards against the need of more transparency and predictability to make informed choices in arbitrator apportionments and panel conformation.

2. Should there be more non-lawyers on tribunals?

3. Transparency

   Given the growing criticism on arbitration, and given the trend towards more transparency in investor-State arbitration, one can ask whether more transparency is needed also in commercial arbitration:
   - Is it useful that arbitrators make a disclosure on the cases in which they are sitting as arbitrators (institutions, lawyers, co-arbitrators, and/or parties, applicable law)?
   - What are the purposes of publishing arbitrators’ profiles including information on how they handle cases?
   - Should more awards be published, anonymously?
   - Should there be more statistical data on the outcome of commercial arbitrations?

4. The role of arbitral tribunal secretaries: mere administrative tasks or 4th arbitrator?

5. Growth in the use of commercial arbitration, both in the number of Latin American parties and as seat.

6. Streamlined arbitrations. Are they really a good idea or a claimant's "own goal"?

7. Growth in the use of emergency arbitration: advantages vs. court-ordered measures in Latin America.

8. Emergency arbitrators: is it a case of be careful what you wish for?
9. What is the experience of delegates in the results of
   (1) emergency arbitrations,
   (2) expedited proceedings and
   (3) summary proceedings?

10. Is there a need for a summary procedure/ early dismissal of claims and defences in institutional rules? Is such a
    procedure a risk or improvement for the arbitral process?

11. Should Tribunals determining preliminary issues in bifurcated proceedings, as a rule, issue the decision on the
    interim issue (such as jurisdiction) with reasons to follow so that the subsequent phase of the proceedings and get
    underway without unnecessary delay.

12. Should the arbitral tribunal be proactive in respect of the efficiency of the proceedings? If so, to what extent?

13. Are summary proceedings really a solution for the issue of cost and delay in arbitration proceedings? Do the
    delegates have any experience in summary proceedings, and what is their opinion of this experience?

14. Case management techniques and due process: how should measures to improve the cost efficiency of arbitration
    be implemented when faced with litigious parties?

15. Should arbitral rules encourage Tribunals to apportion costs relating to procedural applications as they go in order
    to discourage parties from advancing unmeritorious applications, and if so, would that be effective or would it
    create more problems than it solves?

16. The Hong Kong International Arbitration Centre (HKIAC) has released an updated report on the average costs and
    duration of an HKIAC arbitral proceeding. The data covers 62 arbitrations administered by the HKIAC in which a final
    award was issued between 1 November 2013 and 21 December 2017. With reference to costs, of the 62
    arbitrations, the arbitral tribunal was paid by an hourly rate in 56 proceedings and paid by reference to an ad
    valorem fee scale in the remaining six. Does this suggest that, given a choice and all else being equal, parties would
    overwhelmingly choose hourly rates?

17. It is generally admitted that arbitration practitioners may plead before a tribunal without being admitted to a bar,
    implying that some practitioners are not bound by specific ethical rules (applicable to lawyers). It is also admitted
    that lawyers from different bars are not bound by the same ethical rules - and that there may be some
    consequential differences between ethical rules. Should arbitration practitioners consider creating a global
    arbitration ethics council, with a unified ethical code for arbitration practitioners?
18. In Kim v. Uzbekistan, the tribunal noted that one of the claimant's misconduct (taking photographs during his witness testimony, posting pictures on social media with offensive and threatening language), although apologized for later on, both diminished the probative value of the testimony and should be factored in the final allocations of costs. As arbitration agreements become boilerplate agreements, and investment arbitration is more publicized, should arbitration rules consider specific rules on parties' and counsels' conducts?

19. Should a tribunal sanction counsel - and if so, how - when it is conducting itself misleadingly (e.g. in cross-examination, citing a public press article that is not submitted as evidence in the arbitration)?

20. Do people agree with CCTV of hearings being available to anyone online as is now sometimes happening?

21. English barristers cannot coach witnesses - other lawyers sometimes can and do. Fair?

22. A tribunal ordered that an expert report submitted with a respondent’s rejoinder be admitted into the record (over the claimant’s objections that the report is late and should have been filed at the counter-memorial stage), but also ordered that the parties refrain from referring to the report at the hearing. The tribunal stated that if, following the hearing, the claimant chose not to file a report in response, the expert report would be taken “at face value”.

Following the hearing, the claimant communicated to the tribunal that it did not intend to submit a report in response. Respondent is aggrieved at having been prevented from incorporating the expert report into its arguments and cross examination of other experts at the hearing. At the same time, it has the report on the record and a statement by the tribunal that that report will be taken “at face value.” What does the phrase “at face value” mean in this context? Have you ever seen a case where an expert report was allowed into the record, but the parties were prevented from commenting on it at the hearing? Is there in fact any prejudice to respondent? If so, what solutions might be considered to remedy any such prejudice (note, the claimant is not requesting an opportunity to cross examine the author of the report)?

23. The Reflexive Via Media Approach

Some (many?) arbitrators adopt a via media approach to decide issues presented to them. This approach is most commonly used in the determination and calculation of damages (the so-called practice of splitting the baby), but it is also applied to other merits issues and to procedural issues. Some arbitrators expressly acknowledge taking this approach (e.g., the old North American Dredging Company Case decided by the U.S.-Mexico Claims Commission); others adopt it sub silentio; others may not even be conscious that they are adopting it. Few arbitrators bother to justify this approach, legally or philosophically, or to acknowledge published criticisms. Regardless of the question of justification, what are the consequences of a general adoption of this approach? Does it lead litigants to exaggerate claims and defences and to adopt extreme “anchoring” to counter the automatic discounting that results from a reflexive via media approach? Do such exaggeration and extreme “anchoring” reinforce the via media approach, thus creating a vicious circle? Is that circle “vicious” in terms of efficiency or in other terms? What are the psychological and economic motivations for arbitrators to adopt a via media approach? Are arbitrators who adopt this approach consciously or unconsciously trying to make both sides happy (or less unhappy) to induce them to continue resorting to arbitration to settle disputes? Is the via media a mechanism to protect the system?
24. Negative Inference is often remembered as a remedy to the lack of cooperation by parties in arbitration. However, tribunals seem reluctant to consider that the mere refusal to submit documents should automatically shift the burden of proof. Is negative inference a barking dog that never bites?

25. The Need for International Rules on Legal Privilege.

The IBA Rules on Taking Evidence in International Arbitration were conceived as a compromise between civil-law systems, which typically allow for a very limited obligation of one party to exhibit documents to the other, and common-law systems, which typically allow for broader (and in the case of the US, very broad) discovery. The systems that allow for broad discovery typically control the breadth and intrusiveness of the requests through various restrictions, including relevance, materiality, and privilege. The systems that allow for very limited discovery correspondingly tend to have fewer and more limited restrictions, in particular a much more limited scope for privilege. In applying the IBA Rules on Taking Evidence, do tribunals always respect the balance that the Rules were intended to achieve between the two traditions? Do litigants increasingly engage in U.S.-style discovery requests and do tribunals increasingly allow and enforce such requests? If a tribunal allows and enforces U.S.-style discovery requests, should it also adopt U.S.-style privilege restrictions? If a tribunal refers questions of privilege to local law, which may provide for no privilege or a very narrow one, is that approach compatible with simultaneously permitting broad discovery? Is it time to adopt international standards for privilege, especially legal privilege, instead of referring to local law, which may have nothing to do with the expectation of the parties involved in requesting and giving the advice in question?

26. How should arbitrators decide on points of law if the parties’ submissions are unclear or contain significant omissions? To what extent should the risk of a challenge of an award due to a “surprise effect” be balanced with the need for a thorough reasoning on the law?

27. Can counsel contribute to the making of the arbitral award? How?

28. Appellate review in arbitration is deemed by the arbitral community as an anathema, under the argument that parties should conform to an award issued by a tribunal chosen by themselves, whether or not they consider it correct in fact or in law. Despite that, as a rule the losing party ends up frustrated with the award. The possibility of an appeal on points of law to an appellate arbitral tribunal provided by the arbitral institution could not be an effective response to a dissatisfied party, and actually increase the zeal of the arbitral tribunal to issue a proper award, as it would be subject to review?

29. Does the arbitrators' obligation to render enforceable awards (included in many institutional and domestic procedural rules/laws) affect their power (or lack thereof) to investigate the facts of a case independently of the parties?

30. Different styles and underlying reasons for a dissent. The impact of dissenting opinions in the conduct of arbitration proceedings and its implication on costs.

31. Quantum is often treated as unimportant and left to last. Would tribunals appreciate training in this? Few of our cases are about boundaries or children so it really is important.
32. In December 2017, PwC updated its International Arbitration damages research.

In essence, the PwC Research draws a correlation between the value of damages calculated by parties’ experts and the value of damages actually awarded by tribunals. Some interesting conclusions are:

(i) Tribunals awarded on average 36% of the value of damages calculated by claimants’ experts.
(ii) Respondents’ experts on average assess a claim at 12% of the value calculated by claimants’ experts.
(iii) In situations where respondents’ positions move closer to the claim value calculated by claimants’ experts, the tribunal’s award does the same.

Does point (i) above suggest that claimants have been inflating their claims, with the view of anchoring tribunals on amounts higher than the actual amount of damages? Does point (iii) above suggest that respondents have an incentive to depart from the value of damages put forward by claimants?

It turns out that tribunals have been asked to consider values with a delta of 88% between claimants and respondents’ experts’ damages calculations.

In LCIA arbitrations, how tribunals can discourage parties from deploying anchoring strategies? Is the power (broad discretion) re the allocations of costs provided in articles 28.3 and 28.4 of the LCIA rules an effective case management toll for that purpose?

33. Should there be an express rule governing the process on security for costs?

- Are there procedural requirements to be respected before a decision on security for costs is taken: organizing a hearing for oral arguments, hearing of witnesses, production of documents?
- Does the arbitrator have to take certain initiatives before answering the question?
- Are there criteria to be taken into account for deciding on a request for security for costs?

34. How relevant is, in practice, the presence of an after-the-event (ATE) insurance to a tribunal's decision on security for costs?

35. The issue of impecuniosity in arbitration.

Case-law and arbitral awards dealing with advance on costs, guarantees, requests for reimbursements and/or for security on costs. The work is still in progress, but I’ve already reached the following conclusions: (i) some arbitration rules (such as the LCIA) have more adequate/complete provisions on the matter than others; and (ii) there is a growing tendency to judicialize the matter, either by requesting courts to order the defaulting party to pay the costs of the arbitration, or to consider the arbitration clause waived (or inoperable) by virtue of the conduct of one of the parties in resisting to effect payment of its share of the advance on costs. The legality of such claims have been challenged on various grounds and courts are diverging on the outcome.

36. Third Party funding: has this trend reached Latin America?
37. This year’s Vis Moot problem addresses potential conflicts of interest and resulting arbitrator challenges based on involvement of third party funders in multiple cases with the same arbitrator or arbitrators. To what degree is this a real issue and, if truly a matter of concern, how should it be addressed, first, by the tribunal regarding disclosures and, second, by the institution in the event of a challenge?

38. What are the limits of intrusion of third party funding in arbitration: conflicts of interest; confidentiality; etc?

39. How should tribunals deal with costs regarding both any upload in a costs award for a prevailing party being funded and for assessment of costs against a directly funder where the claim is unsuccessful? In particular, should tribunals ever consider awarding all or a significant part of the funder’s take where the funder was necessary for the claimant to bring the case, and should tribunals require a claimant to post security for costs in a funded case or, alternatively, require a funder to execute an undertaking to pay costs?

40. Third-Party Funding

   Should there be disclosure of the fact that one of the parties is being funded by a third party?
   - Is it necessary in order to check conflicts of interest for the arbitrator’s independence or is this not relevant?
   - Is it necessary in view of a possible request for security for costs?
   - Should the content of the agreement be disclosed?

41. When one claimant in a two-claimant case is declared bankrupt during a pending ICSID arbitration, what steps/issues does the arbitral tribunal need to consider to preserve the integrity of the proceedings (taking into account, for example, that any damages which might be awarded to that claimant must be paid directly to the bankruptcy estate of that claimant, in accordance with the mandatory bankruptcy laws of its home country, and that ICSID awards are “self-executing”). What if the joint claimants (bankrupt company and principal shareholder) have not specified which claims belong to which claimant? What if there is a third party funding arrangement in place which presumably provides that the funder is to receive a percentage of any damages awarded to (both) claimants before the proceeds are paid to claimants? The concern, of course, is that the ICSID award/funding agreement should not be used to circumvent the rights and priorities of the bankrupt claimant’s creditors in its home country.