SESSION A

ENERGY AND NATURAL RESOURCES

1. From an Asian regional perspective, will complex energy disputes be more common in Asia in the next five to ten years? If so how to cultivate Asia’s own practitioners in the field as an alternative/supplement to traditional UK/US international law firm players?

2. Is there something to be said from the perspective of legitimacy of the arbitral process for arbitrations involving substantial natural resources to be seated locally, with local arbitrators and local counsel?

3. Do we need a new generation of arbitrators for large and complex oil and gas arbitrations? What are the requisite skills and characteristics?

4. Should certain types of disputes be determined by an expert rather than arbitrators? Are gas price reviews an example of such disputes?

5. In a gas price dispute, the buyer nominates as arbitrator the retired CEO of a gas company in a neighbour country. The person is not a lawyer or experienced arbitrator. Can this be a good idea?

6. Why aren’t more engineers being appointed as arbitrator in energy disputes?

7. Is there an optimal skill set on a Tribunal hearing a complex energy dispute? Is an optimal mix 3 lawyers? Or is it, say, one lawyer, someone with applicable industry expertise and an economist/damages expert?

8. Can the nominee be challenged successfully on the grounds that he knows too much about the business, or that his pension is dependent on his old employer doing well in the gas business?

9. Development and production agreements between an investor and a State often provide that the investor can recover capital and operational costs by deducting such costs before profits. The determination of the operational costs in particular often requires special knowledge about the specific sectors (e.g. oil production). Should for know-how, cost and time efficiency reasons such costs be determined by a panel of (accounting) experts? If yes, can the competent tribunal review the panel’s findings and what is the standard of review?

10. Large scale energy construction projects will frequently give rise to numerous different disputes relating to different portions of the work. Which is preferable: a mega-arbitration or dealing with distinct claims separately?
11. The scale, cost and complexity of very large energy projects, combined with political instability in some regions of the world where natural resources are located, seems a recipe for disputes with potentially huge financial consequences. Is it time to look beyond traditional damages models in such situations?

12. What is the most difficult part of presenting a case requiring the valuation of energy asset? Is this reflected when selecting arbitrators?

13. How does a Tribunal go about assessing damages for premature breach of a long-term Production Sharing Agreement when the respondent declines to take any part in the proceedings?

14. Is a single test of disproportionality for assessment of FET in complex Energy arbitrations a positive development?

15. Recently Lady Justice Gloster (Vice President English Court of Appeal) suggested “there is no place” for serving judges to act as “wingpersons” in arbitrations; while at the same time endorsing serving judges acting as chairpersons or as sole arbitrators. What does this tell us about: (a) the appointment of wingpersons; or (b) the role of serving judges in arbitrations generally; or (c) the need to amend the process of appointing 3 member tribunals?

16. Is there any magic in energy and natural resources arbitrations? Isn’t it all about choosing the right institution, seat, tribunal and experts and an acceptable place for hearings?

17. In the foreword to GAR’s Guide to Energy Arbitrations Andrew Clarke of ExxonMobil comments that the willingness of Arbitrators to accede to extended document disclosure requests is burying the process in indiscriminate evidence. He also comments on inappropriate first procedural orders. What are the solutions?

18. The UNIDROIT Principles of International Commercial Contracts 2016 (which evolved since 1994) now offer a very impressive wealth (211 articles) of harmonized and/or unified rules/principles.

- In contractual energy disputes, in particular between an investor and a State, the applicable law chosen by the parties can be complex as both parties want to have their own principles applied. Have tribunals referred to or even applied the UNIDROIT Principles in commercial energy disputes in such situations?

- What about in treaty based energy disputes between an investor and a host state? Although the UNIDROIT Principles are said to be principles for "commercial contracts", in the Preamble they mention Article 42(1) of the ICSID Convention which refer the Tribunal "rules of international law". Any experience in this area?

19. Assume that in an arbitration over the breach of a significant contract for the sale of energy, the supply contract provides for large payments, in addition to the purchase price, by the buyer to an unknown charity in the seller’s country and to a third party for consultancy services. These payments and the third parties are not mentioned anywhere in the statements of case and defence. The sums are small in relation to the value of the contract, but would be significant in most contexts. Should the arbitrators pass over these aspects of the contract in silence?

20. In a long-term gas supply contract that provides for a revision of the price in case of major changes in economic circumstances, does a tribunal have the power to adopt, at the request of a party, a completely new pricing formula, or is it limited to tweaking one or more individual values in the original pricing formula? If the tribunal does not wish to order the requested complete replacement of the existing formula, can it order changes that it finds reasonable, taking into account any changes in the market that it finds relevant?
21. Are price reviews suited to arbitration? Put differently, should there be a special arbitration process that is mandatory for price reviews? What would be the features of that process?

22. About one-quarter of total treaty and commercial arbitration cases relate to energy and natural resources and there is significant volatility, so:
   a) What are the new challenges in arbitrating gas pricing disputes?
   b) Are ‘investment’ and ‘commercial’ arbitrations involving natural resources and state entities that different?
   c) Do we need a new valuation methodology for natural resources in energy arbitrations?

With the prevailing volatility and unforeseeability of pricing:
   d) What are the limits and scope of ‘price opener’ clauses?
   e) What role can ‘imprévision’ play in the context of energy arbitrations?

23. Environmental, human rights or “CSE”-type issues generally in energy and other natural resource disputes
   - To what extent are these issues becoming actual issues in dispute (ie, to be decided)?
   - What specific questions tend to arise?
   - What specific mechanisms (if any) have tribunals or parties imposed to address such questions?
   - Other observations on the interaction between such issues and the commercial and/or treaty issues traditionally at play in such cases?

24. Is it time for much more foresight to be directed at the drafting stage of agreements for complex energy transactions to the Procedural/jurisdictional possibilities of multiple parties to be taken into account and to provide for consolidation? How to achieve this?

25. Do energy companies face more hurdles than most in agreeing a mutually satisfactory arbitration agreement with local counterparties?

26. Do stabilisation clauses really work in practice?

27. Should tribunals be much more willing to appoint their own experts in technically complex energy arbitrations?

28. Should experts, particularly those who habitually are appointed by the same parties and/or habitually asked to support the same analysis or position, have to make disclosure of potential conflicts of interest against a traffic light or similar type of system in the same way as arbitrators?

29. Hot tubbing of experts in energy cases - what has been participants’ experience of this (as compared to traditional cross-examination)? Has it failed, or has it never really be properly tried?

30. What are the three most pressing issues, in the practical sense, for practitioners most experienced in the field these days?

31. What effect will the ECJ Decision in Achmea have on Energy Charter Treaty cases?
32. Is it ever appropriate for the tribunal to suggest to the parties that they discuss settlement or attempt mediation — or in fact ask them to do either of those things? Would it be acceptable to ask parties at any point in the arbitral process if they have attempted mediation in the past?

33. Will expedited procedural rules proliferate and will fast track arbitrations become the norm? Any challenges?

34. When should a tribunal insist that witnesses provide in-person evidence-in-chief rather than accepting an affidavit from them and turning over to the opposing counsel for cross-examination?

35. Would an arbitrator ever have an obligation to assist a party who is being poorly represented by counsel at a hearing (in the same way a judge might sometimes go out of his/her way to assist an unrepresented or badly represented party in a trial)?

36. Why do so many common law counsel still prefer a pleadings sequence to memorials?

37. Should paperless arbitration be mandatory?
   - Should there be a page-limit on awards?
   - Should there be cost-budgeting/cost-monitoring by tribunals?
   - How should arbitration adapt, to take into account block-chain technology?

38. SIAC has introduced a Rule (29) permitting the early dismissal of a claim or defence that is manifestly without merit or manifestly outside the jurisdiction of the tribunal.

39. Do delegates have any experience of this Rule in practice? Is such a Rule really necessary? Is LCIA thinking of introducing such a rule?

40. What are delegates’ views about Gary Born’s proposal for a protocol for consolidation of arbitral institutions rules?

41. Should institutions be allowed to overrule party autonomy to promote efficiency? In particular, in the appointment of sole arbitrators rather than 3 person tribunals?

42. Are rules on summary dismissal necessary or are these an institutional marketing tool?

43. Do tribunals make sufficient use of their power to cap or limit legal and other arbitral costs? What are the practical problems involved in doing so?

44. When does the pursuit of efficiency run the risk of undermining due process?

45. Pre-reading of the arbitration papers by the Panel: how to ensure that it is really being done, and that the Parties know accurately what members of the panel have actually pre-read.
46. How does one best make an assessment as to whether bifurcation of proceedings is likely to enhance the efficiency of the proceedings rather than potentially being the cause of further delay of the process (eg if there is a challenge to the partial award dealing with the bifurcated issue)? What are the key factors to consider when making this assessment?

47. Bifurcation of the damages phase has gone out of favour as taking too long and costing too much, but is this really true? And at what cost in terms of the quality of the damages award?

48. What categories of costs would or would not be awarded in international arbitration:
   - Costs for conducting mock arbitrations?
   - Contingency success fees?
   - Third party funding costs?
   - Costs incurred in fending parallel proceedings?
   - In-house counsel and internal management costs?

49. Is the ‘costs follow the event’ a truly international principle of general application?

50. What are the criteria for assessing ‘reasonableness’ of claimed costs?

51. Do arbitral tribunals pay attention to the questions of what law governs the awarding of costs in international arbitration?

52. Do we really need two rounds of written submissions before a hearing on the merits?

53. How can the Tribunal ensure that experts engage on the same issues?