The energy industry has always been one of the main users of LCIA arbitration. This is unsurprising given the global nature of our industry. Indeed, while Shell, the group in which I work, traces its roots back to the trading of oriental shells in the 1830s, its involvement in the energy industry arose at the very moment that the City of London Chamber of Arbitration – now the LCIA - came into being. The market for oil was limited to lighting and lubricants until, in 1886, the internal combustion engine arrived, along with the demand for petrol. Shipping of oil was challenging and expensive as barrels could leak and took up a lot of space in the hold of ships. To solve this challenge, the Samuel family commissioned a fleet of steamers to carry oil in bulk, including the SS Murex which, on 24 August 1892 (exactly three months before the inauguration of what became the LCIA) became the first oil tanker to pass through the Suez Canal. The maiden voyage of the Murex was a revolution in the transport of oil, substantially cutting the cost of oil by enormously increasing the volume that could be carried. In 1897 the Samuel family renamed their business the Shell Transport and Trading Company. During the same period, petroleum was also being produced in the East Indies, a Dutch colony, and in 1890 a company was formed to develop an oil field in Sumatra. This was to become the Royal Dutch Petroleum Company. The two companies later merged to create the Royal Dutch Shell Group.

The passage of the first oil tanker through the Suez Canal in 1892 seems to me to be a fitting metaphor for the emergence of the modern system of global trade and business that international arbitration developed to support and uphold, including through the establishment in the same year of what has become the LCIA.

So, what was it that international businesses needed to create in 1892, to support this growing world of international trade? Contemporary accounts give a flavour of the drivers: “This Chamber is to have all the virtues which the law lacks. It is to be expeditious where the law is slow, cheap where the law is costly, simple where the law is technical, a peacemaker instead of a stirrer-up of strife” (Law Quarterly Review). And as stated on the LCIA’s website (and supported by other contemporary references): “Commercial interests were also seeking the adjudication of their disputes by their own; by a tribunal precisely familiar with the area of business in which the dispute had arisen”.

Perhaps the impetus can therefore be boiled down to this: there was a need to create a system of dispute resolution that was faster and more efficient than litigation, in which the decision makers were more representative of business people and familiar with their issues than was true of bewigged judges, but that still delivered fair and impartial decisions.

In my role as global head of litigation at Shell, I spend my working life at the intersection of these two worlds of international business and international arbitration; two systems that have developed and fed off one another for the last 125 years. From this position, I offer some brief observations on whether, in 2018, international arbitration is still meeting these original goals. Is it still efficient, representative of its users, and truly impartial?
These goals are as important today as they were in 1892. Good international corporations place great emphasis on efficiency, on representative diversity, and on business ethics. These issues matter to the companies that are the major “customers” of international arbitration, and concerns around these issues in state courts remain critical drivers that prompt companies to use arbitration now, as in 1892. But while international arbitration institutions, arbitrators and practitioners have made efforts to improve in these areas, these remain key challenges where more can and must be done. They are also related: improving the performance and reputation of international arbitration in any one of these areas can have consequential benefits in the others, as set out below.

So, first, is arbitration in 2018 “expeditious where the law is slow”? The LCIA has a very good track record on efficiency, with published data on time and costs demonstrating an effective focus on management of these crucial issues. Other institutions are also making progress in this area. Efficiency is a key reason why Shell favours institutional over ad hoc arbitration. But it remains the case that the schedules of very busy arbitrators can cause excessive delays in fixing hearings and issuing awards. One solution to this should be to expand the pool of arbitrators, and this would be an additional benefit of increasing the diversity of the pool of arbitrators, discussed below, killing two birds with one stone.

A particular concern remains the delay often seen between a final hearing and the issuance of an award. Again, the LCIA has one of the better institutional records in this area and several other institutions are now also taking steps to put pressure on arbitrators to deliver awards more quickly. Justice is best served warm, and awards must be written while the tribunal’s memory of the evidence is fresh. Parties should require tribunals to schedule time together (at the hearing venue if they are not all based in the same country) immediately following the final hearing to deliberate and frame the outline of their award.

Expedition also requires boldness: arbitrators who are willing to push back on the forces that cause many arbitrations to become excessively complex, pleading-heavy, document-heavy and witness-heavy. Corporate users and other parties can play an important role here, though they usually fail to appreciate this. It is their job to make it clear to their external advisors that they want a surgical, and not a “scorched earth” approach to resolving the real, narrow issues on which the parties cannot agree. Indeed, parties can incentivize their external advisors to a similar mind-set by crafting fee arrangements that align internal and external interests towards achieving the most efficient process possible, rather than adopting traditional hourly-rate billing which motivates inefficiency. The Global Pound Conference series in 2017 comprised over 30 conferences around the world focusing on the needs of users in international disputes. For 65% of global respondents, efficiency was the key driver in the parties’ choice of dispute resolution process. Importantly, in-house lawyers were regarded as the key agents to drive the necessary change and deliver the efficient, collaborative disputes process that parties wanted. The only group of respondents that failed to reach this conclusion was in-house lawyers themselves!

That said, even where in-house lawyers are specialist, proactive litigators with a keen focus on achieving an efficient and sensibly-scaled process, their ability to push back on the forces of complexity can be frustrated if the other side (and/or its external advisors) seeks, or is relaxed about, an inefficient, expansive, excessive process. In this all-too-common situation it falls to the tribunal to take a grip and not default to (what it perceives to be) the path of least resistance. Efficiency of the process is a crucial issue beyond the narrow issue of cost: very often major projects or transactions (the value of and significance which may dwarf the issues in the arbitration) can be held up by a loosely-managed arbitral process. Ironically, the Commercial Court and the Technology & Construction Court in London often appear to be more willing to take preliminary and potentially dispositive issues than arbitral tribunals who are either unnecessarily / excessively concerned about challenges or unwilling to grapple with the issues at an early stage.

Second, what about “adjudication of their disputes by their own”? Has international arbitration remained representative of its business users, as was intended in 1892? Recent years have seen a welcome focus on one area where arbitration has been in danger of falling out of touch, namely diversity and particularly (though not exclusively) gender diversity. The Equal Representation in Arbitration Pledge, which Shell supports, is a very welcome initiative. The LCIA has itself done some excellent work to increase the number of women being appointed: 24% of all appointments in LCIA arbitrations in 2017 were of female arbitrators, the highest of any arbitral institution that reports such figures. But there are two different stories behind this figure: a high (>40%) proportion of female appointments where the LCIA itself appoints, dragged down by a very low number of female arbitrators appointed by the parties and their legal representatives. Again, corporate users can – and should - play a useful role here: in recent years I have required all shortlists of potential arbitrators put forward by our internal and external lawyers to be gender balanced, and I would encourage other in-house counsel to do the same thing. Law firms may be inclined to “play safe” by proposing only very established names, the majority of whom are male: business users can encourage law firms to be bolder and to broaden the pool. In many developed countries a majority of newly qualified lawyers have been female for many years. The Legal Leadership Team in Shell is 40% female (four out of the ten of us). In 2018, all-male tribunals really ought to be the exception, not the rule.
Third, what about impartiality and fairness? Recent years have seen an equally welcome increase in attention to the question of ethics in international arbitration. Whatever else business people wanted in 1892, they would have taken absolute impartiality on the part of the arbitrator as a given. While an overwhelming majority of arbitrators today are clearly honest and seek to reach their decision on the merits, I find it frustrating that the world has not yet aligned around a crystal-clear consensus on the role of the party-appointed (or party-nominated) arbitrator.

In a famous speech of 1774 to the electors of Bristol, Edmund Burke explained the role of a Member of Parliament. Much of the speech could be applied to the proper role of a party-appointed arbitrator, but most importantly the following line: “You chose a member indeed; but when you have chosen him, he is not member of Bristol, but he is a member of parliament.” That really should be a universally-accepted model for arbitration: once appointed, an arbitrator should be a member of a tribunal of three entirely neutral and independent arbitrators. A party-appointed arbitrator’s duty to the party that appointed her should be identical to her duty to the other side. It is frustrating how often we still see cases in which a very different approach is taken in practice. We hear people (perhaps trying to gain appointments) referring to their duty to ensure that all aspects of the case of the party that appointed them are fully considered. They should feel the same duty to both parties. I have been shocked when partners in reputable law firms have suggested certain people as arbitrators commenting that they are “cooperative” or “compliant”. In the many arbitrations that I see every year in my role, it is surprising how often partisan behavior is observed, usually at a level where a challenge to the relevant arbitrator might be hard to establish (or at least where there would be a risk of a challenge failing, leaving an even more hostile arbitrator in place). Some leading practitioners have advocated giving up on party-appointment, and I think that tribunals appointed entirely by institutions, or via list systems, are the right outcome in many cases. But I accept that confidence in the process can be enhanced by parties having a say in the composition of the tribunal, where arbitrators demonstrate proper neutrality and “blind justice” once they have been appointed. Perhaps this is an area where arbitral institutions could be more vocal, and coordinated amongst themselves, to drive towards a commonly-accepted global approach of true, unqualified neutrality?

In the first of these 125th anniversary LCIA Perspectives, Audley Sheppard QC noted that the series would “look forward to the opportunities and challenges for the LCIA raised by issues facing international arbitration such as: legitimacy; confidence in decision making; demand for expedition; costs; gender and other forms of diversity; effective enforcement; and artificial intelligence”. I believe that by effectively meeting three of these challenges to which I have referred (confidence in the process, demand for expedition and diversity) international arbitration can significantly enhance its role in supporting major business transactions in the decades to come.

The modern system of international arbitration emerged in the 19th Century and flourished in the 20th Century because it was a process that was trusted, that was representative of the businesses it served, and that was efficient (and cost efficient). Arbitrators, arbitral institutions and practitioners must ensure that these things remain as true now as when the LCIA was founded in 1892. Let us not lose the spirit of 1892!