It is a great privilege to provide the last of these ‘Perspectives’ as we come to the end of the 125th anniversary celebrations of the LCIA. Prior contributions have provided insights into topical issues and a wonderful portrait of the LCIA as a dynamic institution, reflecting key aspects of its evolution and development from a range of viewpoints. Perhaps inevitably when celebrating an anniversary, it is tempting to look back at the achievements attained and, as we have seen, there have been many of which to be proud. Reflections of where we are today have also featured in the series, and we have been treated to a glimpse of the future amidst the current technological revolution.

For the LCIA what links its past, present and future, and provides the lifeblood of the institution, is its set of arbitration Rules. Of course the Rules are of little value without a first-class casework team to administer them, and a busy conference function to spread word of their excellence. However, its arbitration Rules are the essence – the sine qua non – of the LCIA.

Those readers who were able to attend either of this year’s Tylney Hall symposia will recall being treated to anniversary celebrations entailing stunning firework displays, late night dancing and, in a first for the LCIA, entertainment by external after dinner speakers who brought insight and levity in equal measure. We focused the discussion during our Saturday afternoon working sessions on whether there was a need for revision of the LCIA Rules in 2019, some 5 years after the introduction of the present edition. The overwhelming response was that the Rules are held in high regard and serve their purpose well, although inevitably there are some proposals for change that would benefit from further consideration.

Whilst resisting change for change’s sake, and mindful of the admonition that ‘if it ain’t broke, don’t fix it’, the aim of any review must be to ensure that the Rules are modern, efficient and fit for purpose - not just now, but in years to come. Looking back at the evolution of the current LCIA Rules provides important lessons in how that can be...
achieved. This is not the occasion for an in-depth review, but we can perhaps indulge in a brief canter through the development of the Rules into their current form.

The first iteration of the modern LCIA Rules came into force on 1st January 1981 and the 14 numbered clauses, together with model clauses and a schedule setting out the jurisdiction and powers of the arbitrator, ran to just under five and a half pages. In contrast the present Rules, with Preamble, Index and Annex, run to 26 pages. Much has changed between the 1981 Rules and the current version. We have, for example, dispensed with the need for all communications between the parties and the arbitrator to be made through the LCIA’s Registrar. Nor is the arbitrator any longer expressly empowered to “rely on his own expert knowledge or experience in any field” and to limit or exclude the right of any party to adduce expert evidence if he does so. However some things have remained strikingly consistent. Article 3 of the 1981 Rules provided that “All arbitrators (whether or not nominated by the parties) conducting an arbitration under these Rules shall be and remain at all times wholly independent and impartial and shall not act as advocates for any party.” The essence of this provision, and indeed much of the text, remains as fitting today as it was in 1981.

At least two other features of the 1981 Rules demonstrate how advanced they were for their time. First, they provided for the exchange of written witness statements prior to an oral examination at a hearing. This is something we now take for granted, but in 1981 it was far from commonplace. Indeed, it was another five years before even a discretionary power to order witness statements was introduced for proceedings in some (but not all) Divisions of the English High Court. Secondly, the 1981 Rules empowered the arbitrator to appoint advisors or experts to assist on any matter. This provision has been adapted and elaborated in each subsequent edition of the Rules and is presently to be found in Article 21. However, its inclusion in the Rules since 1981 emphasises that the LCIA’s drafters have always been ready to embrace features derived from different legal cultures where they contribute to efficient and effective arbitration, ensuring that the Rules are suitable for arbitrations under both common law and civil law systems.

The 1981 Rules were replaced on 1st January 1985 with a new edition that one commentator, Carl F. Salans, an American living in Paris and founder of the firm which bore his name (now merged into Dentons), commented would “warm the hearts of parties and lawyers who seek a rigorous arbitral process.” He described them as “an ambitious effort to design an international arbitration framework free of loopholes that plague other arbitration systems” and warned that “parties to contracts who assume that they are likely to be reluctant defendants in any arbitration might…wish to avoid these new Rules.”

Fortunately for the LCIA there did not seem to be too many such parties, because the new version of the Rules proved a great success. They ran to 20 “articles” - as each numbered clause was now termed - over eleven pages, including revised “Recommended Arbitration Clauses” for future and existing disputes and a new Schedule of Costs. The 1985 Rules introduced features which were innovative and which remain features of LCIA arbitration today. For example, the first article, dealing with the request for arbitration, was now followed by an article expressly permitting the Respondent to submit a response. The provisions dealing with the appointment of arbitrators were greatly expanded and included, for the first time, the express right to challenge an arbitrator “if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.”

Under the 1985 Rules the parties were free to choose the place of arbitration, but London was introduced as the default seat unless the tribunal determined another place to be more appropriate. Other now familiar features appeared, including a list of nine Additional Powers of the tribunal, specific provisions on determining jurisdiction (including imposing a time-limit for raising objections) and the introduction of a mechanism for payment of deposits on account of the costs of the arbitration. Importantly the Rules introduced a new ‘put up or shut up’ provision such that if a party knew any requirement under the Rules

had not been complied with but proceeded with the arbitration without objection, they would be deemed to have waived the right to object.

It was 13 years before the next edition of the LCIA Rules was introduced on 1st January 1998. They built on the existing Rules but were substantially expanded, running now to 32 articles. They were updated to tackle topical issues of the day, such as appointment of the tribunal in multiparty arbitrations, confidentiality and preventing a recalcitrant arbitrator from thwarting the proceedings by refusing to participate. The Rules were also brought into conformity with recent arbitration legislation, in particular the Arbitration Act 1996 which had entered into force a year previously. The tribunal’s general duties were amended to reflect the requirement for the tribunal (i) to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent, and (ii) to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay or expense, so as to provide a fair and efficient means for the resolution of the parties’ dispute. The language used in the LCIA Rules was lifted almost verbatim from the 1996 Act, which had itself been the product of much hard work and a broad consultation exercise. There was little point reinventing the wheel. Again, however, the opportunity for innovation was seized and no provision better reflects this in my view than the expedited formation of the tribunal in what was then article 9. This has become a distinguishing and defining feature of LCIA arbitration. It reflected the LCIA’s recognition that in some cases the need for fast, effective relief was such that it could not await the normal process for constitution of the tribunal. Combined with tribunal powers to grant interim and conservatory measures under Article 25, the LCIA Rules now provided an explicit mechanism for tackling cases requiring urgent relief. Other mechanisms addressing this need have followed, including of course the appointment of an emergency arbitrator which was first introduced by the ICDR several years later in 2006 and appears in the current LCIA Rules at Article 9B. In 1998, however, expedited formation of the tribunal was a game-changer.

The 1998 edition of the Rules again stood the test of time, but they too were revised and replaced by the current version which came into force on 1st October 2014. Reflecting the globalisation of the world economy, the arbitration landscape had gone through great changes in the intervening period. The size, variety and complexity of disputes, the diversity of parties involved and the range of legal cultures of the counsel conducting them, had transformed international arbitration. Whether it was a result of the evolution of mega-arbitrations or simply an escalation in lawyer tactics, the number of arbitrations involving huge disclosure exercises, massive pleadings and lengthy hearings had multiplied and even appeared to infect much smaller cases. This was met with a backlash that is still being felt today, with ever-increasing demands for arbitrators and institutions to take control, proactively manage proceedings, and sanction against excesses.

The 2014 LCIA Rules, still comprising 32 Articles (but with sub-divisions of Article 9), introduced a number of important changes aimed in part at least to meet these concerns. Notably articles 9A, 9B and 9C preserved the expedited formation of the tribunal, but added an emergency arbitrator mechanism and provision for the expedited appointment of replacement arbitrators. A requirement for tribunals to set aside adequate time for deliberations and to notify both this and the timetable for producing the award were added. The revised Rules also introduced the online filing of requests for arbitration, as well as powers to consolidate arbitrations and a requirement for arbitrators to declare their availability to deal with the case, among many other changes. A key innovation was the introduction of Annex A to the Rules, providing guidelines on the standards of behaviour expected from parties’ legal representatives. It was a bold addition but one which reflects the values of the LCIA and its concern to ensure not just that arbitrations are conducted so far as possible in a constructive and appropriate manner, but also that parties’ counsel know the standards that are expected of them in LCIA arbitrations.

The manner in which the Rules have evolved has therefore been a progressive exercise, with each edition of the Rules building on what has gone before. Given the successful application of the Rules over several decades, wholesale changes are not only unnecessary but potentially hugely damaging. History
shows us that the LCIA need not be shy about introducing innovative provisions if they enhance the process or help meet the demands of users. That is not to say the LCIA should adopt every latest fad, but changes should be based on pragmatism and take account of practical experience with the Rules in the arbitration market place.

This brings us to the present day. The challenges that arbitration now faces are in many respects similar to those with which it has been grappling for many years, but with an additional set of demands delivered by a technological revolution. These include cybersecurity and the question of how, in an era where email is the communication of choice in many arbitrations, hardware, software and data can be protected from attack by malignant forces. The demanding regulatory regime imposed by the EU’s General Data Protection Regulation (GDPR), with its extra-territorial effect, is another minefield. Many would applaud its aims but the practical implementation of GDPR causes alarm for many as they struggle to comprehend both the nature of the obligations imposed upon them and the practical steps necessary to fulfil the requirements of this far reaching but rather opaque law. These are pressing issues not just for the LCIA but for all arbitrators, counsel and parties involved in international arbitration. They are subjects of intense interest within the international arbitration community, and the LCIA is endeavouring to respond, for example by establishing a working group to draft guidelines listing issues for arbitrators to consider in relation to the GDPR.

Against this backdrop now seems an appropriate time for a review of the LCIA Rules to consider whether they provide the right balance of tools to allow both LCIA tribunals and the institution to address the challenges of arbitration, now and in the years to come. We shall look at areas where law and practice have moved on, to see if changes are needed. We shall look at whether guidance given by the LCIA, for example with regard to the use of tribunal secretaries, should become part of the Rules themselves. We shall look at whether the tribunal has all the powers it needs to conduct the most efficient and cost-effective arbitrations, whether we can do more to ensure tribunals perform at optimum levels and whether more can be done to help parties resolve their disputes. We shall consider all the views and comments expressed during our Tylney discussions and in follow up communications, and we welcome further input from others who have not yet had the opportunity to contribute their experiences. There will be no changes just for the sake of it and no unnecessary meddling, but the LCIA has achieved great success since the first Rules of 1981, and indeed in the last 125 years, by responding dynamically to the needs of the arbitration community, albeit in a careful and measured way. This seems to me to be an excellent blueprint for the next 125 years.