1. In a series of three arbitrations arising from the same transaction, but from different contracts and with different parties (however, parties belonging to the same group of companies), of which the first two have been adjudicated by the same panel, would you consider it inappropriate to nominate the same arbitrator for the third arbitration?

2. How do we rid international arbitration of the fact or perception (and which is it) of cosy clubs of backscratching fellows in specialisms and centres, appointing one another by “Buggins Turn”? (with apologies to Admiral Lord Fisher who famously wrote about naval appointments: – “Going by seniority saves so much trouble – “Buggins Turn” has been our ruin and will be disastrous hereafter”)

3. In March this year, the Paris Court the Cassation set aside an award where one party challenged a co-arbitrator in setting aside proceedings: the Court considered it as proven that the co-arbitrator had not disclosed the fact that his firm represented an affiliate of one of the parties while the arbitration was ongoing (CA Paris, Pôle 1, Chambre 1, 27 mars 2018, n°16/09386). The court did not undertake an analysis as to why this circumstance could have influenced the arbitrator’s assessment of the case before him. Right or wrong?

4. Under typical arbitrator challenge procedure, the other arbitrators decide whether or not to uphold a challenge. Should arbitral institutions move away from this model? Should third parties be deputized to perform the reviewing function? Does providing reasons (as the LCIA and SCC do) promote fairness?

5. Has the advent of arbitrator databases and increased transparency in arbitrator information affected the role that institutions play in the selection and appointment process? The AAA has recently introduced several initiatives. What are the experiences of others?

6. Interviews with prospective candidates for appointment as arbitrator seem to be becoming increasingly popular. Parties are, of course, free to select arbitrators of their own choosing but those arbitrators have to be, and be seen to be, independent and impartial. Is there a danger that these interviews might give rise to a risk of bias or perceived bias and what can or should be done to guard against a challenge from the other party to the arbitrator’s impartiality and independence? Should arbitrators disclose the fact that such an interview has taken place as a matter of course?

7. To what extent, if any, is it appropriate for a party-appointed arbitrator to have discussions with a party about his or her suitability for appointment in relation to a particular dispute prior to appointment (for example about experience and qualifications)? If it is ever appropriate, what are the boundaries of such discussions and should the fact that such discussions have taken place be disclosed to the other parties?

8. The situation that counsel for a party in an ongoing arbitration appoints one of the arbitrators in a new arbitration is not explicitly mentioned in the IBA Guidelines’ colour lists (although it may be argued to be covered by the general rules). Should appointment by counsel of an arbitrator in two pending arbitrations be considered as an orange list situation?
9. Bearing in mind that the IBA Guidelines on Conflicts of Interest are not binding, what is the better approach when one of the parties is a member of a group with which the arbitrator’s firm has a relationship? Despite the clear wording of the IBA Guidelines, does that fact constitute by itself a source of a conflict of interest (see for instance the recent decision of the Paris Court of Appeal (n°16/09386 of 27.03.2018))? If not, what are the circumstances which should be taken into account?

10. Most jurisdictions are in the process of introducing UBO (ultimate beneficial ownership) registers. When these registers are in place, will prospective arbitrators be expected as a matter of good practice to run their conflict checks and to make disclosures, if appropriate, against all the names that appear in these UBO registers in relation to the parties? Should they regularly check these registers for possible updates?

11. How do we view at present the tension between a party’s right to be represented by a legal representative of their choice and the growing concern about English barristers’ chambers housing both advocates and arbitrators? Or, has the position set in the 1999 Lakers Airways case changed making it more difficult to have tribunal members and advocates from the same chambers?

12. I have set up my own arbitration boutique this year. I am no longer confronted with “hard conflicts” (colleagues somewhere in the world having done work for one of the parties or an affiliate) but now have to deal with the “finer norms.”

   e.g., if you are nominated by a former colleague who was an associate with you in a law firm 15 years ago?

   Is function important? (partner, associate)

   What is the importance of social relationships at the time?

   Does the passing of time play a role? The ICC Rules have no more time-limits, but in real life it does seem to have an impact.

   It struck me as odd that pursuant Article 3.3.6 of the IBA Rules the fact that “A close personal friendship exists between an arbitrator and a counsel of a party” is only on the Orange list.

   Wouldn’t a close personal friendship be a reason to decline?

13. To what extent do national courts in different jurisdictions take the IBA Guidelines on Conflicts of Interest into account when ruling on challenges?

14. How should a tribunal deal with allegations of conflict of interest regarding an arbitrator when no formal challenge is raised?

15. Are the IBA Guidelines on Conflicts of Interest in International Arbitration really useful? Or are they just traffic lights on the highway to hell?

16. Where is the line between failure to disclose relevant information and TMI?
17. I wonder if as a result of concerns about later challenges or, even later, issues being raised on enforcement, there is a tendency amongst some arbitrators to make unnecessary declarations that then lead to strategic objections which delay matters and could have been avoided.

18. Is there an increasing tendency for arbitrators to disclose "everything but the kitchen sink" and far beyond what could be reasonably consider a conflict of interest? Do arbitrators therefore need more guidance and robust support to allay their fears of the result of non-disclosure when such "oversharing" can unnecessarily result in their non-appointment?

19. What can we do - or should we do if anything - to prevent excessive disclosure of matters that could allegedly potentially give rise to doubt as to one's impartiality and independence?

20. UK GPs are always sceptical and even cynical about information they get from patients. For example if one says he does not drink, they will write down 3-5 units of alcohol per week. If she says she drinks socially they may write down 20-22 units. Should arbitral institutions take the same view in relation to disclosure of arbitrators in relation to conflicts and availability? Most importantly, how many cases can an arbitrator have at the same time? 6, 12, 24? Should institutions ask more questions?

21. To what extent, if at all, should arbitrators' disclosure obligations extend to disclosing previous appointments to decide disputes on the same topic?

22. How different is LCIA Court's policy in terms of disclosures and challenges vis a vis other Courts (ICC, SIAC...)?

23. Is the reality that some (or many or even most) arbitral institutions apply two different standards for disqualification depending on the stage of the arbitration?

   Is the pro-disclosure principle often exploited by parties for the purposes of challenging arbitrators and are the arbitral institutions robust enough in the way they handle such challenges?

24. Has not the time come for a single arbitrator disclosure code across all the main international arbitration institutions and a unified body to resolve challenges?

25. Media connections, such as an arbitrator’s LinkedIn connections
26. For lawyers practicing with law firms, however organized (e.g. national or international law firms), adequate disclosure is often burdensome and may even be hazardous. Conflict checks of firm records can reflect every conceivable type of “hit” or, inadvertently, no “hit” at all because of on-going corporate client developments, none of which may bear directly on the real area of concern: is the arbitrator independent and impartial? When considering a challenge based on relationships with parties, should courts or arbitral institutions:

Consider disregarding membership in a partnership being understood and applied in a “unified” way so that no personal knowledge or involvement in acting for or advising a party may be taken into account?

Consider whether confidentiality “walls” are adequate reassurance measures?

Where challenges are made after the award, be obliged to take into account not only the putatively offending relationship, but also the actual conduct/behaviour of the arbitrator in the course of the arbitration?

Put defined limits on conflict search requests, such as a three or five year rule, size of financial consideration (a de minimus amount of fees).

27. The ICC is publishing more and more data about its efforts to promote gender equality and diversity: how can the LCIA shows it is also working on the same path?

28. There is, I believe, general agreement that international arbitration, for both arbitration counsel and arbitrators, lacks diversity – gender, racial, and geographic. What more (if anything) should the LCIA do to improve/enhance/increase diversity in international arbitration? For example, should there be internal policies or procedures for appointments by the LCIA requiring appointment of gender, racial, and/or geographically diverse arbitrators when possible? Should there be an internal policy prohibiting appointment of the same arbitrator by the LCIA more than once a year? Should the LCIA provide some incentive (reduced fees perhaps) for parties that appoint diverse arbitrators or that utilize diverse counsel?

29. How successful has the ERA Pledge been in increasing the proportion of female arbitrators appointed?

30. Lucy Greenwood’s latest article on the issue of arbitrator diversity contains two comparisons between diversity and inclusion: “diversity is being invited to the party, inclusion is being asked to dance” and “diversity is being added to lists, inclusion is getting appointed”. Are we destined to remain wallflowers forever?

31. What has the LCIA done to promote equality and diversity in the appointment of Arbitrators both internally and externally; and in particular to avoid unconscious bias; and what plans does it have for the future to improve gender diversity in the appointment process?
32. Based on my experience as a General Counsel and in-house counsel for a number of multinational companies, I wonder if you agree that it is beneficial, in order to underline a tribunal’s commercial competence, to appoint former General Counsels/in-house counsels, more often, as the industrial expert arbitrator within an arbitration tribunal consisting of three arbitrators? Even if I am biased, I can, from my own experience as General Counsel and in-house counsel, see a clear advantage if one of the arbitrators have an in-house counsel background when handling inflamed relation or other sensitive issues in e.g. cases regarding cross-border joint ventures or other cooperation, business development agreements, long term projects as well as M&A issues.

In order to be recommended as an arbitrator by an arbitration institution as LCIA or a party/law firm, the crucial prerequisite seem to be that such person, who is interested in taking on an appointment, have both a good track record and reputation. If you are new in the game and do not have a law firm that can promote you, how should a newcomer go about to get the chance to commenced and build up a career and become renowned as a skilled and reputable arbitrator?

33. Should appointments of non-lawyers (e.g. experts) be more common? What are the advantages and disadvantages of non-lawyer arbitrators? Do non-lawyer arbitrators help reduce “group-think” and enrich the panel’s decision-making?

34. Should there be more non-lawyers on LCIA Tribunals as often happens in specialist fields (e.g. shipping disputes)?

35. Does the recent decision of the English Court of Appeal in Halliburton Company v Chubb on an arbitrator’s duty of disclosure and apparent bias strike the right balance?

Is the (apparently) ever-increasing number of retired judges sitting as arbitrators to be encouraged? Should there be a retirement age?

36. Does the Court of Appeal’s decision in Halliburton Company v Chubb Bermuda Insurance Ltd & others indicate that English law is inconsistent with international best practice in relation to disclosure? To what extent do the LCIA Rules address this?

37. In the light of the Court of Appeal decision in Halliburton v Chubb should the LCIA introduce rules which specifically mandate compliance with the IBA rules on conflicts and require specific disclosure of numbers of appointments by parties and lawyers involved in the arbitration rather than just relying on the vague test of justifiable doubts as to that arbitrator’s impartiality or independence?

38. Will the decision in Halliburton v Chubb erode confidence in the fairness and impartiality of London arbitration?
39. In relation to the issue of whether repeat appointments of a party appointed arbitrator gives rise to apparent bias, has (a) the principle of party autonomy in being able to choose arbitrators and (b) pragmatism where the appointment relates to a specialist or niche area in which there are a limited number of arbitrators allowed the rules which would apply to a judge in litigation to be relaxed to too great an extent (e.g. by holding there is no duty of inquiry in relation to disclosure: Halliburton v Chubb, CA April 2018) and undermined the trust which should exist in relation to the impartiality of all members of an tribunal? In relation to the principle of party autonomy, is there not an argument that given that arbitrators often decide the law as well as the facts without being subject to appellate review that one should be more scrupulous regarding arbitrators than judges (cf. the US Supreme Court in Commonwealth Coatings)? In relation to the problem of specialist/niche subject areas, the example of the International Cotton Association in limiting repeat appointments because of concerns over impartiality and delay in reaching awards where there are repeat concurrent appointments shows that a different approach can be taken (which survived challenge by an arbitrator in Aldcroft v International Cotton Association). Could not the pool of available arbitrators where knowledge of specialist areas is desirable be widened by means of advertisement of need and provision of training?

40. Is now the time for arbitral institutions to give the parties their written reasons for appointing any particular arbitrator? If not, why? If so, would it be the thin end of the wedge, providing a party with something concrete with which to object and delay?

41. In what circumstances, if any, should an arbitral institution make disclosures regarding:
   
   (i) the level of prior use of their services by a particular party to an arbitration; or
   (ii) the appointment history of a particular arbitrator?

42. Is the LCIA considering granting its Court the power to scrutinize awards?

43. Tribalism, the World Cup and arbitrator appointments - can an argument still be made for dispensing with the nationality restrictions on Chairs and Sole Arbitrators?

44. How much should one scrutinise the relationship between arbitrators and law firms that appoint them? How much social interaction is acceptable? Should arbitrators accept to speak at events organised by the firm? Should they accept sponsorships for events organised by their academic institutions? Are the best arbitrators hermits or citizens of the world?

45. In what circumstances should a party nominated arbitrator consult with the appointing party concerning the name of the Chairman and what is the most appropriate method of doing so?

46. What happens if a party nominated arbitrator resigns during the course of the reference on the instructions of the nominating party?

47. In what circumstances should a party nominated arbitrator consult with the appointing party concerning the name of the Chairman and what is the most appropriate method of doing so?
48. After 8 years of debate, why do parties, practitioners and arbitrators still overwhelmingly favour the unilateral appointment of party-nominated (wing) arbitrators for three-member tribunals?

Where two party-nominated arbitrators are required to select the Chair, what is the best process to adopt? How much interaction should the party-nominated arbitrators have with the party that (respectively) nominated them?

49. Is there a way to keep the good without the bad and ugly of party-nomination of co-arbitrators?

50. Party involvement in appointment of the chair by two party appointed arbitrators.

51. Would you accept appointment, if the arbitration agreement required that the arbitrator be a Christian?

52. Has not the time come for a single arbitrator disclosure code across all the main international arbitration institutions and a unified body to resolve challenges?

53. Has not the time come for a single arbitrator disclosure code across all the main international arbitration institutions and a unified body to resolve challenges?

54. The LCIA has recently published guidance for arbitrators on tribunal secretaries to clarify the LCIA approach and ensure that the tribunal secretary is not the “fourth member” of the tribunal and arbitral tribunals do not relinquish their decision making powers and responsibilities to the arbitration’s secretary. But what about the people working for them? Should arbitrators disclose the name, background and potential conflicts of the people working for them in an arbitration, such as research or arbitral assistants? Should we extend the arbitrator’s conflict rules to the persons working for them?
SESSION 2 - MANAGING BAD BEHAVIOUR IN ARBITRATION

55. Arbitration and smart contracts, do we need model arbitration clauses for block chain technology and smart contracts? Does arbitration need a seat if the award is auto-executed through the code?

56. Arbitration and artificial intelligence: will robots make better arbitrators?

57. What will be the impact of Artificial Intelligence (AI) on arbitration? At the moment, AI builds greater efficiency and accuracy into the legal system with capabilities that include natural language processing (NLP). A highly secure distributed ledger feature, known as block chain, can transfer information or property without third parties (such as a bank), and this has had an impact on contract law, with the development of smart contracts. It has an impact on enforcement of those smart contracts. It can have a very significant influence on how judges use predictive justice tools. Questions of confidentiality, due process, etc. also arise.

58. What types of technologies can be applied to arbitration, and in what ways can they be useful?

What challenges arise when a block chain-based system or another technology is applied to the arbitration process?

Would robots one day, maybe 10 years from now, be able to do an arbitrator’s job better than the arbitrator?

59. What to do with an arbitrator that keeps leaking information to one party/counsel?

60. Internal workings of the Tribunal

I rarely encounter serious bad conduct issues within a Tribunal, but it does occasionally happen and is not easy to manage in my view;

i) at the appointment of a chairperson stage - the other co-Arbitrator says he is ‘instructed’ not to engage and then (having apparently been persuaded that we are supposed to be independent and have a duty to try to agree a chair) proposes a choice of two of his non-lawyer mates from college who have no arbitration experience and rejects anyone I propose as ‘unsuitable’ even when they meet some narrow criteria suggested by him!

ii) During the arbitration one Arbitrator contributes very little but allegedly spends far more time than the other tribunal members;

iii) bias in favour of the appointing party.

What to do in each of these instances?

61. What should a wing arbitrator do, if it becomes apparent that the chairperson appointed by an institution (not the LCIA) is too busy or lacks the experience to conduct the arbitration in an efficient and effective manner?
62. How do you deal with a co-arbitrator who during the hearing starts to aggressively cross-examine a witness (called by the other side than the side that appointed the co-arbitrator) before counsel has even had a chance to step in? Within the Arbitral Tribunal we had of course agreed that we would question only after counsel for both sides had had an opportunity for questioning.

How to best deal with a co-arbitrator who as a rule will render a dissenting opinion supporting the party who appoints him? Bring a draft award to the deliberations and have he/she comment? Or deliberate openly? How to manage the risk of leaks to the parties?

63. Using the PO1 to address bad behaviour in advance, e.g. as regards costs allocation, extension of deadlines, decorum/behaviour during hearings.

How to best address and resolve issues of bad behaviour among and between the members of the arbitral tribunal.

64. As counsel, how do you deal with bad behaviour of an arbitrator (e.g. obvious lack of preparation, bad case-management, partisan behaviour), especially if challenging that arbitrator is not an option?

65. Can creative involvement of experts be a useful tool in managing behaviour? For example:

Hot-tubbing, in which the questioning is largely conducted by the arbitrators, and in which the experts are invited to ask each other questions or respond to comments.

Early expert hearings conducted early in the process (as recommended by The Sedona Conference for complex patent disputes. See “The Sedona Conference Commentary on Case Management of Patent Damages and Remedies Issues: Section on Patent Damages Hearings”). Can implementing an early hearing regarding key issues and involving each party’s expert in that hearing (perhaps using hot-tubbing and perhaps preceded by a page-limited key-topic report), assist in focusing the process on topics that matter most? If this technique is used, should the expert input be binding or non-binding? If non-binding, is the information gained from this process useful for case management?

Initial contentions (similar to those recommended by The Sedona Conference for patent damages. See “The Sedona Conference Commentary on Case Management of Patent Damages and Remedies Issues: Proposed Model Local Rule for Damages Contentions”). Can requiring concise initial contentions with adequate substance assist in focusing information and case management needs?

Expert Agreements. Can requiring that experts jointly develop a list of agreed topics, and a list of remaining topics about which they disagree, assist in focusing attentions on those matters that are actually disputed?

66. Experts as neutrals. Can the involvement of one or more experts as neutrals assist in managing behaviour? For example, can an expert neutral effectively minimize ambiguous information and assist in crystalizing key information?

What concerns exist regarding use of these or similar techniques?
67. Should arbitrators be more firm with parties who insist on time extensions or consistently use what appear to be delay tactics, given that, as far as is possible to ascertain, since the English Arbitration Act 1996 came into force, not a single award has been set aside on the basis that an arbitrator/tribunal was too firm on a party?

68. Can and should the LCIA lead the way in cutting down on experts’ evidence?

69. Are tribunals/parties facing increasingly expansive requests for document disclosure (100 page plus Redfern)? Are arbitrators dealing with such requests properly? Are there practical options to bring discipline to such misuse?

70. Document production: What is the best option for an arbitral tribunal that is faced with a party’s statement that the documents requested to be produced by the other party do not exist, although it would seem rather unlikely, in the circumstances, that no such document exists and is within reach of the party that is requested to produce?

71. How should a Tribunal use its inherent authority to draw adverse inferences from a party’s unjustified non-compliance with an order to produce information? Is the test the same in commercial arbitrations and investor–state arbitrations?

How should a Tribunal deal with a state party to an investor–state arbitration invoking cabinet privilege over documents that appear to be relevant and material to the issues in dispute?

72. There are few cases these days where arbitrators are not faced with due process threats by parties asserting that they will be denied a reasonable opportunity to make their case if the tribunal fails to agree to their requests. Are arbitrators being cowed by such assertions? Should a tribunal make a point of discussing this issue at the first meeting and make clear what it expects and what it doesn’t?

73. In recent experience are arbitrators tough enough on badly behaved parties who adopt guerrilla tactics, such as ordering adverse costs awards, or are they exhibiting the much criticised due process paranoia?

74. Are tribunals sufficiently comfortable imposing costs sanctions – such that, in situations of bad behaviour, ‘costs may follow conduct’? (Note, in this regard, A. 28.4 of the LCIA Rules.)

75. What, in the mind of the Tribunal, differentiates between permissible tactics and bad behaviour requiring some form of sanction? How is the imbalance of, say, late disclosure of critical material most fairly to be addressed if the consequence of allowing time to address such late material is to defer final resolution of the matter in a way which may benefit the misbehaving party?
76. One form of "bad behaviour" by Respondents is to submit counter-claims (notwithstanding the cost risks involved) that have no real merit but raise considerable time and a cost.

A recent decision rendered by the Swiss Federal Supreme Court (Decision 4A_505/2017 dated 4 July 2018) brought to light how a tribunal had dealt with counterclaims: with a procedural order it directed the tribunal appointed expert not to analyse the counter-claims although this was anticipated in the original scope of the expert determination. Seized with a request for setting aside for violation of the right to be heard, the Supreme Court held that the arbitral tribunal was entitled to apply a so-called anticipatory assessment of evidence and administer the evidence (including the expert determination) based on such assessment. This included the possibility to reduce the scope of the expert’s assessment if the tribunal had reached a legal conclusion based on all the evidence on file that the analysis by the expert on the counterclaims was obsolete.

Is this possible also in other jurisdictions? If yes, is this a useful tool to reduce time and cost in situations of inflated counterclaims?

77. Challenging an arbitrator typically entails a suspension of the proceedings. As a result, a party may use a challenge as part of its ‘guerrilla’ arsenal to derail an arbitration. Is it a good idea to do away with the suspension of arbitral proceedings, as in the new draft ICSID rules, to avoid such disruption? It has become a common practice for parties to lodge challenges, sometimes repeatedly. Yet there are seldom reports of challenges ultimately found meritorious. Should arbitral institutions adopt a type of “NFL coach challenge” rule whereby a party is sanctioned if it loses a challenge? If so, what sort of sanction?

78. How the Tribunals are dealing and/or should deal with the so-called evidence submitted late/ without sufficient supporting documentation (for example, on the eve of a hearing). Even if these materials are excluded – would not the arbitrators’ minds be tainted anyway? Or should the other side be given an opportunity to respond which may lead to delays?

79. LCIA Rules Article 18, the guidelines about conduct, and wayward legal representatives. I would be interested to learn whether this has, so far, proved to be either a deterrent, or a weapon that has actually been used, and in either case whether it has actually worked. (I confess to remaining sceptical that this is the best way forward in this particular aspect of case management.)

80. Please tell us whether and how the specific and famous (art. 18) provision of the LCIA on the party’s representatives?

81. At the disclosure stage, both parties may disclose a large volume of documents. It is sometimes the case that one party’ documents are without clear index, necessary explanation or irrelevant to the subject matter, putting a great burden on the other party to organise the documents. The less organised party may even include the documents that they omitted to submit as evidence previously and thus wanted to take advantage of the disclosure to rectify. Although applications can be made to the tribunal to intervene, it is often the case that the tribunal will allow new evidence and leave the disclosure issues to the parties to resolve by themselves. Theoretically, bad or improper behaviour can be punished by a costs order at the end of proceeding. But at that time the impact of such behaviour will appear to be limited. I’m wondering whether it would be of benefit to have a mechanism to encourage the tribunal to intervene at the point when bad behaviour takes place, either by an interim costs order or by a procedural order, so that there is a prohibitive effect for the parties who take careless approach, either deliberately or by lack of experience.
82. Relevant document destruction while the arbitration is pending; cursory searches for documents and meagre productions; broad document demands; witness rehearsing; multiple postponements; futile arbitrator challenges; surprises just before or during the hearing; bullying opposing counsel; Goliath crushing David... should such behaviour by counsel be managed by arbitrators?

If English or New York law controls, is it “bad behaviour” by counsel to fail to bring to the arbitrators’ attention a binding precedent or a document that is adverse to the client’s interests?

If parties agree that excessive (in the arbitrators’ view) pre-hearing disclosure should be allowed, and the arbitrator cannot persuade the parties otherwise, must the arbitrator allow the excess?

83. Is it really the Tribunal’s role to “manage” “bad” behaviour? Can bad behaviour be managed? What constitutes bad behaviour? Does the Tribunal risk its impartiality by attempting to manage/punish what it considers to be bad behaviour?

84. How to deal with disruptive parties, i.e. parties that formally take part in the proceedings but are uncooperative and constantly file applications for matters that we could simply settle directly with the other side? What if the reasons is lack of experience? Should arbitrators educate parties? Or ask institutions to educate parties? What if the reasons behind disruptions is tactical and the desire to challenge the arbitrators and the process? How slowly should the tribunal proceed?

85. Behaviour in public courts is generally better than in private arbitration. Can the participants (and Tribunal!) Be warned that bad behaviour may be made public at the direction of the Institution?

86. How can Tribunals and the Court tackle respondents with dilatory tactics? How do you draw the line between bad faith and legitimate defenses the repetition/scheme in the procedural behavior, the nature of the request, the silence, and the quality of an argument?

87. Serial ranting by counsel in emails

Sanctions (adverse inference; cost shifting; death penalty) for violation of orders

88. How should an experienced wing deal with an inexperienced and often disorganised chair? How much intervention is acceptable and when can helpful interventions be deemed challengeable?
89. Would arbitration be more attractive to users if there would be great collaboration between counsel on opposite sides?

Background: The Global Pound Conference Series report (May 2018) states that a significant majority of corporate clients see combative ‘litigators’ as the biggest obstacle to resolving commercial disputes – while corporate clients want greater collaboration between legal advisers on opposite sides, their lawyers steadfastly claim that their role is to advocate aggressively for their side.

How should (a) arbitrators, (b) arbitration counsel, and (c) institutions respond to this information?

Some of the Report’s Other Stats:
More than 60% of businesspeople and in-house lawyers want external counsel to take adopt less traditional approaches by being more collaborative during disputes.

70% of respondents say that private practice lawyers are the main obstacles to change in commercial dispute resolution – dispute resolution teams are criticised for turning to the "same old processes" of often costly litigation or arbitration.

In-house legal departments are seen as the most likely engines of change to the litigation process, with 42% of respondents saying that general counsel have "the potential to be most influential in bringing about change in commercial dispute resolution practice", while 70% say that external lawyers were "likely to be the most resistant to change".

90. Conflict of interest: Is it a good idea to oblige the parties at the outset of the proceedings to advise the arbitral tribunal of any changes in their ownership?

91. There is some doubt that arbitrators may award costs on an indemnity basis. Assuming they have the power, bad behaviour of a party or its counsel may be a relevant factor in the exercise of their discretion. Another factor may be a failed fraud claim.

92. At the disclosure stage, both parties may disclose a large volume of documents. It is sometimes the case that one party’s documents are without clear index, necessary explanation or irrelevant to the subject matter, putting a great burden on the other party to organise the documents. The less organised party may even include the documents that they omitted to submit as evidence previously and thus wanted to take advantage of the disclosure to rectify. Although applications can be made to the tribunal to intervene, it is often the case that the tribunal will allow new evidence and leave the disclosure issues to the parties to resolve by themselves. Theoretically, bad or improper behaviour can be punished by a costs order at the end of proceeding. But at that time the impact of such behaviour will appear to be limited. I’m wondering whether it would be of benefit to have a mechanism to encourage the tribunal to intervene at the point when bad behaviour takes place, either by an interim costs order or by a procedural order, so that there is a prohibitive effect for the parties who take careless approach, either deliberately or by lack of experience.

93. Could there be a more futile notion? – expecting arbitrators to control bad behaviour by imposing costs sanctions and biting the hands that feed them!

94. How often do Tribunals really make interim costs awards as a result of frivolous applications, breaches of the agreement to arbitrate, etc.?
95. Interim cost orders to sanction “bad behaviour” of a party (unreasonable document production requests, submission of misleading evidence, baseless application for interim relief, etc.): is it used often enough?

96. Do you consider the submission of very extensive and repetitive briefs as “bad behaviour” and if so, how do you suggest to manage it without violation of the right to be heard?

97. Parties are sometimes – more or less intentionally – disloyal with the arbitral tribunal’s orders for document production, either disregarding the timetable for the disclosure (so as to give the receiving party less time for analysis) or unilaterally redefining the scope of the order. Apart from adverse inference, which many tribunals would hesitate to use otherwise in very clear cases, what remedies and tools could be used?

Is there room to use bifurcation and separate awards to a greater extent, as a means to clear the case from claims and/or objections that are likely made to obstruct or complicate the case, with no genuine belief on the part of the party making them that they will succeed? Could such bifurcated issues be dealt with in an expedited manner, perhaps on documents only? (Compare the 2017 SCC Rules’ provisions on summary proceedings.)

98. What benefits would come from adopting a rule that permits a tribunal to dismiss meritless claims at an early stage in the proceedings? Such a rule has potential for abuse, by a party seeking to delay the outcome of the entire proceeding or seeking some strategic benefit. How could such tactics be policed by a tribunal?

99. Does anyone have practical experience of SIAC Rule 29 which allows for the early dismissal of a claim or defence that is manifestly outside the jurisdiction of the tribunal? Should other institutions adopt a similar rule?

100. Is an arbitral tribunal properly discharging its duty to the parties when it encourages settlement at the cost of expediency of resolution? Is the answer different depending upon the stage of the proceedings? (In a recent arbitration, a tribunal held off on issuing the award for many months, after having held the evidentiary hearing, while urging the parties repeatedly to settle their differences.)

101. Do we need more ethical guidelines or sanctions to contain what some see as a “drift”, if any? Or is there already too much out there?

102. Should the LCIA introduce a mechanism for adjusting arbitrator fees (up or down) to reflect timeliness in the conduct of the arbitration and delivery of the award?

103. Art 28 LCIA Rules stipulates that when rendering its decision on costs, the tribunal may inter alia take into account the parties’ conduct in the arbitration. How should the tribunal deal with the costs of unsolicited statements (or the costs of replying to such statements, for that matter)?
104. Where Counsel for a party without any proper evidential basis, (a) pleads fraud and/or (b) cross-examines a witness alleging fraud, should a Tribunal generally make an adverse costs order on the issue?

If asked to assess costs, should the Tribunal disallow Counsel’s fees?

If not so asked, or in any event, should it express a view in the award as to whether Counsel should recover their fees?

Should the LCIA publish redacted awards and comments of this nature?

105. How should a tribunal approach a request by counsel for an award covering the payment of a success fee? If an award is made, is it likely to be enforceable?

A party’s internal legal, management and other costs can sometimes be much greater than its legal costs of the arbitration. Claims for ‘management time’ seem to be becoming increasingly common. How should a tribunal approach a request for compensation for such costs? Can they include costs which were incurred before the commencement of the proceedings?

106. Are institutions doing enough to monitor slow and inefficient arbitrators and should they take more action for very late awards, such as reducing fees, delisting or refusing to appoint them again?

107. Most courts have the authority, explicit or implicit, to impose sanctions, both monetary and procedural, on a party that engages in bad or dilatory or contumacious behaviour. Should the LCIA Rules explicitly provide that the arbitrator(s) may impose sanctions, either monetary or procedural or both, at any stage of the proceedings to punish such conduct (beyond taking such conduct into account in any final costs award)? Should there be a means by which parties can bring such behaviour to the attention of the arbitrator(s) and request some sanction?

108. Does the EU’s GDPR create truly serious issues for arbitrators? What are some of the practical steps that can be taken?

109. Please provide input on the consultation draft Cybersecurity Protocol recently issued by the Working Group on Cybersecurity in International Arbitration formed by ICCA, CPR, and the New York City Bar Association. The draft protocol can be accessed here.

The draft Protocol is intended to provide a framework for case participants in Individual arbitration matters to assess cybersecurity risk and determine what cybersecurity measures may be reasonable in the circumstances of a specific arbitration. As the draft Protocol specifically recognizes that cybersecurity is a shared responsibility of all participants in the process, the Working Group believes that its final work product will be most effective and useful if it reflects the considered views of all interested constituencies.

110. How about publishing guidelines for arbitrators and counsel on data protection (GDPR) in arbitration?
111. What, if any, are the panel's concerns about the use of the GDPR by parties and counsel to justify limiting or refusing disclosure of certain material? How will anyone know whether the justification is real or manufactured?

112. How (if at all) have people changed their practices as arbitrators in light of GDPR?

113. Should the rules set out what, if anything, a tribunal is to do in order to ensure compliance with the General Data Protection Regulation? Other than preserving confidentiality, which a tribunal must do in any event, is there actually anything new since GDPR that a tribunal should do?

114. What are the best practices in providing information for arbitrator listings in arbitrator directories? Directory publishers typically seek information regarding matters an arbitrator has heard, including subject matter and the amount involved, as well as information regarding parties and counsel. Many reach out to counsel to seek their views regarding the arbitrator's performance in matters in which counsel has appeared. Since most matters are confidential, is it acceptable to provide a general description of the parties and issues and provide names of outside counsel? Should different considerations apply where a matter still is pending? Should the arbitrator seek permission from counsel or parties before supplying any information or advice counsel that its name has been provided to a directory publisher? Some have the view that it is acceptable to submit the names of counsel to the directory publisher, but preferable that the arbitrator not contact counsel in respect to the possible listing.

115. Despite all the recent discussion about seeking efficiency in arbitrations, there are many parties, often respondents, who have no desire for efficiency and in fact, for many reasons, would rather delay the proceeding as much as possible. What steps can a tribunal take to ensure the process moves along at an appropriate pace without incurring the risk of having an award challenged for lack of due process?

116. Are people seeing innovative techniques used in arbitrations (for efficiency; cost reduction; promoting consensual resolutions) that they find useful and that others here could consider?

117. Are there any good reasons why the LCIA Rules should not only permit but also encourage Tribunals to dispose of central issues, for example liability, on a summary basis in appropriate cases?

Should the LCIA publish redacted awards of this nature?

118. Do arbitral institutions such as the ICC and LCIA which have a role in managing arbitrations have a role to play in policing the conduct of parties to arbitration?

119. Should arbitral institutions seek to increase transparency as regards the arbitrator selection process where institutions, rather than parties, appoint arbitrators/tribunals? Should this take the form of an arbitrator selection framework (i.e. guidelines prepared by each institution clarifying those factors which should/must be considered before an arbitrator is appointed), or a common set of guidelines adopted across all major institutions or, alternatively, a set of guiding principles similar to the IBA Rules on the Taking of Evidence?
120. Are Tribunals too reluctant to make interim cost orders (e.g. after rejecting a meritless application) as a way of sanctioning, and thereby potentially deterring, bad behaviour?

121. How frequently in practice will a tribunal make an interim costs award?

122. The 2014 Rules appear to have introduced (in Art 25) an inadvertent change that prevents a party, once the tribunal has been constituted, from applying to the court for urgent interim relief on an ex parte basis, without first getting the tribunal’s permission beforehand (which would need to be obtained on notice to the other party), even if the circumstances are mega-urgent, e.g. a worldwide freezing order needed at 3am on a Monday morning London time to stop the movement of money in a Singapore bank account. Shouldn’t an amendment be reintroduced to make clear that in cases of extreme urgency a party may apply to a state court for relief provided that it notifies the tribunal and other party immediately thereafter?

123. Could international arbitration benefit from a more robust, creative and expansive approach to interim relief?
   Background: Some courts are evolving how and when they will issue interlocutory/preliminary injunctions. Are arbitral tribunals too readily applying court-like tests and parameters for such injunctions?
   Would a more robust, creative and expansive approach to interim relief in the nature of interlocutory injunctions enhance what arbitration offers to users, reduce the overall time and costs of arbitral proceedings, reduce problems of enforcement, and lead (in some cases) to earlier consensual resolutions?

124. What does article 25.3 mean for the ability to seek interim relief from courts post formation? Post the 2014 rules is it proscribed without both exceptional circumstances and the tribunal’s permission? If that is the case then does this require running the interim application twice potentially under more than 1 set of laws?

125. What sanctions can a tribunal effectively order in order to make a non-compliant party think twice?

126. One of the most frequently cited tools available to arbitrators for managing bad behaviour in arbitration is the use of orders on costs, yet anecdotal evidence suggests arbitrators may be reluctant to consider making costs orders during the course of proceedings, instead dealing with it only at the end (and then often rather summarily). While this may ultimately penalise bad behaviour, it does not necessarily discourage such behaviour during the proceedings, and a costs award at the end may not always sufficiently compensate the innocent party. Can and should costs orders be used more frequently and what are the challenges involved in doing so?

127. One of the tools for managing "bad" behaviour in the course of an arbitration is an award of costs. Where such an award is made, should it be made as a partial final award, as an order, or something else? Should enforcement be explicitly postponed until the time of the final award?

128. What happens if a party nominated arbitrator resigns during the course of the reference on the instructions of the nominating party?
129. Only 10% of procedural challenges were successful, while 41% of conflict challenges succeeded either completely or in part. This rate of success is (according to commentary) consistent with the decisions of the English courts in proceedings of the same nature. Should more be done to discourage parties from bringing such challenges, particularly when they are merely used as a delaying tactic, and/or should parties be made aware that arbitrators/tribunals have a broad discretion to adopt a robust approach in the face of uncooperative parties?

130. Can the Procedural Order no.1 and the attached timetable, if properly used, be considered as an essential tool for preventing and addressing bad behaviour and guerrilla tactics?

131. “Bad Behaviour” Such conduct is inimical to arbitration. But, to be worthy of sanction, either in terms of reprimands or costs assessments, such conduct should be beyond the ordinary intensity of advocacy or even a momentary outburst. Direct ad hominem attacks on the integrity of witnesses or legal representatives must be managed appropriately. Guidance in this regard should not encourage irritable arbitrators to inhibit robust advocacy. However, persistently rude, disruptive or unruly behaviour must be “called out”. So, for example, when ever is it ever appropriate for a party to react to an unfavourable ruling by “protesting”, or “commenting upon” or, in effect, re-arguing disputed matters (sometimes with lengthy uninvited written objections and ostentatious reservations of rights)?

Some of the tools available to tribunals to deal with these matters include oral admonitions, written admonitions, reminders of costs implications for untoward actions and other similar remarks. If none of these appear to be availing, then tribunals may consider actually imposing a costs award, regardless of the ultimate disposition of the case, or, rarely, limiting written submissions to those expressly contemplated by the procedural timetable unless leave has been explicitly given beforehand. Setting up detailed potential grounds for later set-aside motions should be discouraged.

132. What sanctions can or should be applied to a party who engages in persistent guerrilla tactics during the course of an arbitration, such as, for example, making none of the advance payments on costs required; filing its statement of case late; refusing to sign the terms of reference; failing without any proper excuse to comply with procedural time limits etc.? The making of an adverse costs order at the end of the proceedings would seem unlikely to have the effect of compelling compliance during the course of the arbitration. Can a tribunal make an interim cost award in those circumstances and on what basis might it do so?

What sanctions can or should be applied in response to bullying and intimidatory tactics being adopted by one party counsel when cross-examining witnesses?

133. Will arbitrators become more willing to make summary determinations of claims?

134. Has the time come to allow for summary dismissal of entirely unmeritorious points? 100 page power-point openings should be banned (with wasted costs ordered against counsel)

135. How can we better use technology to make the process of arbitration more efficient?

137. To provide time/cost efficiencies but ensure quality, should we provide parties an Advisory Tribunal Option, whereby the Tribunal is appointed but the Presiding Arbitrator/Chair conducts the entire proceeding, from prehearing to issuance of the award, relying on the wings only as needed for advice on particular issues as they arise? Or are there variations that would similarly provide efficiencies and satisfy party goals?

138. There has been much talk about the need for increased “transparency” in international commercial arbitration but what do users really mean and do they really want it?

139. How proactive should the Tribunal be when faced with a non-co-operating party?

140. Should institutional rules impose greater sanctions for counsel in arbitration to assist in preventing bad behaviour by their clients? In particular, given obvious difficulties with enforcement, is there a way in which tribunals could be empowered to make adverse costs orders against counsel as a way of discouraging counsel to run plainly unmeritorious or improper arguments, as can happen in court litigation?

141. How can a claimant, unhappy about some aspects of the Tribunal’s conduct of the proceedings, show its non-satisfaction without antagonizing the tribunal?

142. When and how can a claimant turn into a party with a “bad behavior”?

143. To what extent should a Tribunal be aware of possible cultural characteristics and influences when assessing matters such as the behaviour of a party to the arbitration or the weight and credibility to be given to the evidence of a witness? Is it ever appropriate for a party to lead evidence of such characteristics and influences and, if so, in what circumstances?

144. Is it time we questioned the relevance, or at least the importance, of witness statements?
145. Should there be more use of live direct evidence (evidence in chief) rather than as much reliance on witness statements as usually occurs?

Background:
  a. The judge in charge of the English Commercial Court, Justice Popplewell, reported in March 2018 that there is a fairly widespread feeling that the tools for evidence in chief in the English Commercial Court are not doing the trick, and not even saving costs, let alone getting "best evidence". He said that good evidence in chief is very compelling and often best evidence. It is felt to be unfair on good witnesses that all they can do is put in their statement, and then face cross examination; there is no opportunity for them to tell their story live.

The Commercial Court Users’ Group agreed that this is a real problem and endorsed the creation of a working party to consider the problems and the possible solutions or improvements, such as the extent to which some limited examination in chief could be provided for. The possibility of a menu option was floated. The idea was not to go backwards towards blanket oral examination in chief, which would involve longer hearings and potential increase and front loading of costs.

Lord Clarke, June 2017: “Some judges, of whom I was one, like to hear the critical parts of the evidence from the witness so as to be sure what the evidence of the witness really is. There is a regrettable tendency for witness statements to reflect, not so much what the witness would say if asked non-leading questions, but what the solicitor wants him to say and some witnesses are willing to sign statements which include such passages.”

146. What do delegates think of the proposed Prague Rules on the taking of evidence?

147. Given post hearing written submissions are increasingly common, should we eliminate a round of written submissions before the hearing?

148. Where is the line between insuring that issues are properly addressed and raising matters that help a party who has missed an issue? I recently had a case where my client terminated a contract for non-performance. All the evidence related to the adequacy of the performance of the equipment supplied. There was no dispute that if the equipment failed to meet standard then the termination was appropriate. The arbitrator appointed by the other side argued that the deficiency of the equipment was not material and raised the issue of wrongful termination of contract. The parties in post-hearing submissions were asked to brief the issues of materiality of the defect and wrongful termination, as these arguments were never raised in any prior pleading. Did the Tribunal cross the line?

149. What can/should a co-arbitrator do in order to speed up the constitution of the tribunal? What if the co-arbitrators are to select the tribunal’s president and they cannot find common ground, or they do but the parties cannot? What if the president is to be selected by the institution and the process is too slow?

150. Is arbitration really cheaper than litigation? Costs in some cases are colossal even if there is no right of appeal.
SESSION 3 - THE LCIA RULES

151. Aren’t all arbitration rules now essentially the same?

152. Why are all of the guidelines set forth in the Annex to the LCIA Rules just negative suggestions? (i.e., “A legal representative should not... [Do this or that!]”) Why not set forth affirmative requirements? (e.g., “A legal representative shall encourage reasonable efforts to find and produce documents ordered to be produced by the Tribunal, and, in any event, shall describe accurately to the Tribunal what efforts were made.”)

Should the LCIA add to its Rules a provision akin to AAA Commercial Rule 33: “The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.”?

153. Is the default procedure for written statements in Article 15 of the Rules too prescriptive? Would it not be better just to leave the timetable and documents to be filed for agreement by the parties and/or direction of the tribunal?

154. Should all international arbitral institutions including the LCIA adopt the ICSID style of listing the names of all legal representatives on the cover sheet of the Award?

155. Given that almost all communications in LCIA arbitrations are dealt with over email, including the submission of pleadings and exhibits, and given the increased risks around the hacking of email accounts and other electronic devices, do the LCIA Rules need to deal expressly with issues of cybersecurity that need to be put in place in each arbitration. Should the LCIA go further still and require documents, submissions, exhibits, etc. to be uploaded onto a secure site (perhaps managed by the LCIA) to avoid dissemination over potentially less secure email accounts?

156. Cybersecurity: should the rules make provision for cybersecurity measures?

Discovery/Disclosure and ethics: should the rules require the parties to agree, or the tribunal to determine, the applicable ethical rules on matters such as document disclosure.

157. Should the LCIA introduce a default time limit for the production of an award (e.g. 3 months after final submissions, whether written or oral), which could be extended by agreement of both parties, or by the LCIA in appropriate circumstances?

158. Several other arbitration institutions are investigating or even proceeding with e-Arbitration. I am personally involved in two such efforts, where we are investigating how an arbitration procedure can be conducted entirely online. What are the plans of the LCIA regarding e-Arbitration?

159. The LCIA has procedures for both the expedited formation of a tribunal and for the appointment of an emergency arbitrator. What have been the experiences of delegates when using those procedures whether as party representative or arbitrator? In light of those experiences, are there changes to the procedures which might be considered?
160. The LCIA Arbitration Rules presently contain no provisions explicitly relating to expedited arbitration. Many other leading arbitral institutions have adopted such rules. While the UNCITRAL Model Arbitration Law and Rules do not presently contain any provisions dealing with expedited arbitration procedures, UNCITRAL’s Working Group II has recommended to the UNCITRAL Commission that expedited arbitration procedures be “given priority” in the future work of the Group, and several countries submitted proposals this summer to the Commission that Working Group II take up expedited arbitration as its next topic. It seems likely that UNCITRAL will consider amendments to the Model Law and Arbitration Rules for expedited arbitration. Should the LCIA therefore consider adding provisions relating to expedited arbitration to its Rules, and if so, what should those Rules be?

161. Does the LCIA consider that it is now appropriate to introduce some form of expedited procedure for cases on an opt-in or opt-out basis, assessed by reference to the claim value? If not, why not? If so, how can it be differentiated from the other expedited offerings which have been introduced by competing institutions, in terms of tribunal composition, time frames, and prescriptive procedural approaches such as dispensing with hearings or page-limited submissions?

162. Expedited proceedings: should the LCIA Rules have them?

163. Does the panel consider that in the case of Gerard Metals the English court conflated the court test of "urgency" under s44 of the Arbitration Act with the tests under Article 9A and 9B of the LCIA Rules? Would clarifying the intention of the LCIA Rules would make any difference to the court’s analysis or is it ultimately it is for the courts to decide how arbitral rules and the court’s powers work together?

164. Anecdotal evidence suggests that parties are excluding the LCIA Rules emergency arbitrator provisions in order to preserve the ability to seek interim relief from the English court following Gerald Metals SA v The Trustees of the Timis Trust and others. What, if any, amendment could be made to the LCIA Rules to avoid parties having to do this?

165. In the case of A v B the English court held that the LCIA Rules 2014 do not permit a party to commence a single arbitration in respect of disputes under multiple contracts. Rather parties instead need to issue multiple separate Requests for Arbitration and then seek to have the separate arbitrations consolidated. In the light of this decision, should Article 1(1) be revised to bring the LCIA Rules in line with other institutions?

166. In 2017, the Singapore International Arbitration Centre (SIAC) issued a proposal for the cross-consolidation of arbitral proceedings conducted under different arbitration rules. Currently, there is no mechanism providing for consolidation of arbitral proceeding (save perhaps with the agreement of all the parties). Under the SIAC proposal, leading arbitration institutions would adopt and incorporate into their respective rules a consolidated protocol which sets out the framework for the review of consolidation applications and set out the criteria to determine which institutions will administer consolidated proceedings. The SIAC said it would welcome comments from other institutions. Is the LCIA looking at this proposal and considering whether to implement it with SIAC and other institutions?
167. Is SIAC’s proposal for cross-institutional consolidation going too far from the appropriate roles of institutions and from party autonomy?

Background: SIAC’s proposal was founded on the premise that the lack of any existing mechanism for “cross-institution” consolidation of arbitrations subject to different institutional arbitration rules substantially limits the types of disputes that can be consolidated. In turn, this prevents related disputes, which otherwise meet the criteria for consolidation, from being heard together and thus limits the ability of arbitration to reach its full potential as a dispute resolution mechanism to serve the needs of users.

It proposed the adoption of a consolidation protocol by leading arbitral institutions, providing for the cross-institution consolidation of arbitrations, where such proceedings otherwise satisfy the criteria for consolidation. The protocol could be adopted by institutions and incorporated into their arbitration rules for administering consolidated arbitrations. It would set out a new, standalone mechanism for addressing the timing of consolidation applications, the appropriate decision-maker (i.e. institution(s) or tribunal) and the applicable criteria to determine when arbitral proceedings are sufficiently related to warrant cross-institution consolidation. A joint committee appointed from members of the Courts or Boards of the concerned arbitral institutions would be mandated to decide the applications, with a specific committee being appointed for each application.

Once consolidated, the proceedings would be administered only by one institution applying its own arbitration rules. The institutions can agree on objective criteria to determine which institution should administer the consolidated dispute, such as the number of disputes subject to the different rules or the time of commencement of the first proceeding. The consolidation protocol would not change the current requirement that the arbitration agreements designate the same seat.

168. Should the LCIA rules make provision for cross-institutional consolidation (of the SIAC proposal)?

169. Should institutions and/or tribunals play a bigger role in cost management? Should or could the LCIA consider adopting something similar to the AAA's introduction of AFAs for arbitration costs in certain arbitrations?

Article 26 of the DIS Rules (Encouraging Amicable Settlements) provides that: "Unless any party objects thereto, the arbitral tribunal shall, at every stage of the arbitration, seek to encourage an amicable settlement of the dispute or of individual disputed issues". In terms of the arbitrator’s role in resolving a dispute, has DIS got it right? Is the DIS approach reflective of corporate attitudes towards dispute resolution and should the LCIA be providing something similar?

170. Would there be any possibility to include in the LCIA rules the opportunity for the parties to challenge the tribunal’s fees and costs? Or alternatively, the rules for the arbitration institution to take proactive roles to sufficiently scrutinize the number of hours specified by the arbitrators.

The proposed amendments to the ICSID rules adopt a “go green” objective as to electronic filing. Currently, most tribunals will require the filing both electronically and in hard copies. Is it really necessary to require hard copies since ultimately all the submissions will be organised and compiled into hearing bundles. The ICSID’s new approach seems to be more cost-effective and environmental-friendly.

171. How will the LCIA defend the pull of Asian centres?
172. Can the costs of an LCIA arbitration be a deterrent for claimants unwilling or unable to bear them? What about respondents (States) with limited means? Are there many State-related arbitrations under the LCIA Rules?

173. Will the LCIA Rules be revised to address specific procedures for ‘early dismissal’, comparable to Rule 29 of the SIAC Rules and Article 39 of the SCC Rules; or, are the general case management powers under Article 14 of the LCIA Rules already considered to be sufficient? If the latter, will the LCIA be providing any kind of guidance thereon, comparable to the ICC’s Practice Note of October 2017 addressing Article 22 of the ICC Rules?

174. The latest LCIA reports mention a number of requests for mediation and or for other forms of alternative dispute resolution. Do these requests ever result into full-blown mediations cases or other ADR cases such as expert determination? If so, how many of such cases have resulted in settlements or final decisions?

How frequently does the LCIA select/appoint the Mediators and or Expert Determiners following such requests?

How can arbitrator members of the LCIA who perhaps are also qualified as mediators/other adr practitioners make themselves known to the LCIA to be considered for such appointments?

175. Considering the success that mediation have had, especially in the Anglo-American regions, when it comes to resolving disputes and still, in most cases, preserving a future business relationship, I would like to know what can be and is done to improve and promote the use of mediation as an integrated dispute resolution process in a contract? Would it not be a good complement to solve minor disputes, by appointing a designated mediator already in the contract and to stipulate that the parties meet up with that mediator e.g. once every six months to resolve minor disputes and thereby be able to identify and handle major disputes by arbitration in the end of the contract?

176. Is it ever appropriate for a tribunal to suggest to the parties that they should attempt mediation, or even to ask them if they have considered it (or indeed whether they have already attempted it)?

177. Has the LCIA Note for the Parties become a document very often relied upon? How is it actually supplementing today the Rules?

178. Should the LCIA rules be revised to provide for the scrutiny of awards?

179. Would there be any possibility to include in the LCIA rules the opportunity for the parties to challenge the tribunal’s fees and costs? Or alternatively, the rules for the arbitration institution to take proactive roles to sufficiently scrutinize the number of hours specified by the arbitrators.

180. Is there a case for giving the LCIA Court or the Registrar the power to deem claims/counterclaims withdrawn for non-payment of deposits (and in particular preliminary deposits usually directed on the constitution of the tribunal)?
181. Why the LCIA Rules are only published in English and Russian on the LCIA Homepage?

182. Assuming we agree that Multiparty or Multi-contract arbitrations can be a constructive method of resolving complex disputes, do we believe that the provisions of article 22 of the LCIA Rules 2014 are sufficient and can bring about the desired outcome?

183. Is there already a need to update the 2014 Rules? To include TPF, summary/early dismissal decisions...?

184. Has the LCIA considered requesting feedback from parties at the end of an Arbitration (perhaps prior to the Final Award) and monitoring same; both as a learning tool for Arbitrators and a tool for statistical analysis?

185. Should the LCIA establish a pro bono arbitration policy, under which counsel and arbitrators may volunteer free of charge to provide the advocacy and decision-making services where both parties to a dispute are otherwise unable to afford the process?

186. How does a party to an arbitration reference conducted under the LCIA 2014 Rules ascertain that its legal representative(s) have agreed to comply with the general guidelines annexed to the Rules as a condition for such representation following Article 18.5 of the LCIA Rules?

Also how can the arbitral tribunal be satisfied that the legal representatives of both parties will abide with these guidelines?

Is this issue best considered by the Arbitral Tribunal as a matter to be raised at a preliminary meeting and subsequently included in Procedural Order No 1?

Has the LCIA considered any complaints against legal representatives who have been found to be in violation of the guidelines further to Article 18.6 and where sanctions as prescribed have been ordered against such Legal Representatives?

If yes, will the LCIA consider publishing such cases for purposes of guidance, information and enlightenment?

187. A number of institutions have provision in their rules for summary dismissal of claims. Should the LCIA introduce a similar specific provision rather than simply relying on the Tribunal’s ability to identify and determine preliminary issues? If so, what should the test be for summary dismissal?

188. Should the LCIA follow the example of SIAC, the SCC and ICSID in adopting an express power for early summary dismissal of claims and/or defences putting to rest the argument of whether this is already inherent in article 14.4(ii) of the LCIA Rules? If so, in what circumstances and applying what threshold, bearing in mind the difference in approaches taken by the other institutions above? What does natural justice or due process require in this regard? And should the tribunal have a power to summarily dismiss of its own motion as well as on the application of the parties or would that be a step too far?
189. Should the LCIA introduce some kind of summary judgment-like procedure such as that in Art 39 of the SCC Arbitration Rules? Would this lead to improved efficiency? Would it undermine the enforceability of the final award?

190. Should the LCIA rules be revised to encourage parties and tribunals to make better use of technology (electronic filings, video conferencing and virtual hearing rooms)?

191. Should the LCIA rules be revised to provide for the scrutiny of awards?

192. Should the LCIA rules require any third party funding for an arbitration to be disclosed?

SESSION 4 - ORDERS AWARDS AND ENFORCEMENT IN THE CONTEXT OF GLOBAL DEVELOPMENTS

193. The 1996 Act was introduced the same year as the trusty Volvo V70. After 20 years, the V70 has finally been phased out, and replaced by a new and improved model (the XC90). Isn't it time for the Act to be overhauled before the wheels fall off? Or is it - as some would say - the most perfect piece of legislation ever produced anywhere in the world? (Views of Americans, and anyone involved in drafting the Act, do not count.)

194. Is an award that is subject to an application to correct under art 27 capable of being enforced in court or does the award creditor need to await the corrected award?
195. If an award creditor turns their award into a court judgment does the award still exist to be enforced or are you required only to enforce the court judgment? Does it make a difference if the judgment is from the courts of the seat?

196. Should differences in hourly rates charged by respective counsel be taken into account by the Tribunal in awarding costs? If each side’s lawyers spent about the same amount of time, should the costs of the more expensive lawyers hailing from a more expensive jurisdiction or region than the other side’s lawyers’ be reduced?

197. Awards set aside at the seat for invalidity of the agreement to arbitrate: should a court in a place other than the seat of the arbitration nonetheless enforce, on the basis that, like the parrot in the infamous Monty Python sketch, the award is not dead, but merely resting, or possibly stunned?

198. There is rising legal and political opposition to bilateral investment treaties. Intra-EU claims are restricted by ACHMEA, whilst (particularly in the US) there are frequent attacks on the concept of investment arbitration being decided by arbitrators rather than by courts (and indeed juries). Are Tribunals sufficiently accountable? What is the future?

199. Should a Tribunal be influenced by a binding court decision on jurisdiction?

200. Has the revision of the Brussels Insolvency Regulation resolved the questions raised in Elektrim vs Vivendi? In other words: Is an arbitral tribunal bound to apply Art. 7(2) lit f and Art 18 to determine whether it has jurisdiction in spite of the insolvency proceedings?

201. Whether arbitration clause extends to insolvency claims or whether the claims brought by the liquidator in insolvency proceeding are arbitrable?

202. California’s recent approval of new legislation that explicitly allows attorneys who are licensed in another U.S. state or in a foreign jurisdiction to represent parties in international commercial arbitration. The new law will come into effect on Jan. 1, 2019. Will the new law will have any immediate impact on the willingness of participants in international arbitration to choose California as a situs for arbitration? Are other steps need to encourage the development of international arbitration in California?

203. Increasingly in China, we are seeing enforcement of judgments on a quid pro quo basis by courts—e.g. California enforces a Jiangsu Province court order and then Jiangsu Province recognizes a California judgment. We are currently seeking to enforce a UK judgment in Chinese courts. Additionally, we have more international courts being established to handle cross border disputes. Is this a threat to the future of international arbitration?

204. China’s Belt and Road initiative: does this ambitious foreign policy, which envisages massive infrastructure projects in nearly 70 countries underwritten by China, signal the increase of influence/prominence of the Chinese and, more widely, Asian arbitration institutions? Are the Chinese institutions ready for it? Will this increase in the sphere of influence be at the expense of the existing (and more established) institutions in Europe and/or Asia? How likely is it that the disputes will be litigated instead and, if so, in which forum?
205. In terms of the shareholders’ disputes involving the investor’s right to exercise its put option and its claim for damages, whether the tribunal should make it clear in the award that the investor should cooperate in the transfer of the shares back to the company/founding shareholder when it has been awarded the damages sought, particularly if the other side did not participate in the proceeding or did not raise the counterclaim for transfer of shares even if they participated. This also concerns the award on the share transfer in a wider context at the request of one party. As the share transfer often involves the cooperation of two parties, whether the tribunal should take the initiative to order the recipient of the shares to cooperate. It can happen sometimes that the recipient party does not cooperate even if it requests the transfer in the first place.

206. Are common law courts too weak post award? Civil law courts appear very willing to grant attachments of assets post award, while common law courts still require satisfaction of the mareva criteria before the execution process has run its (often painfully protracted) course. Should common law jurisdictions be forced to amend their laws to provide a more civil solution?

207. Should more jurisdictions empower their courts to assist arbitral tribunals by enforcing their orders and directions (including interim measures orders)?

Background: The British Virgin Islands’ Arbitration Act provides that a court can enforce an arbitral tribunal’s orders and directions.

(1) An order or direction made, whether in or outside the Virgin Islands, in relation to arbitral proceedings by an arbitral tribunal is enforceable in the same manner as an order or direction of the Court that has the same effect, but only with the leave of the Court.

(2) Leave to enforce an order or direction made outside the Virgin Islands is not to be granted, unless the party seeking to enforce the order or direction can demonstrate that it belongs to a type or description of order or direction that may be made in the Virgin Islands in relation to arbitral proceedings by an arbitral tribunal.

(3) If leave is granted under subsection (1), the Court may enter judgment in terms of the order or direction.

(4) A decision made by the Court to grant or refuse to grant leave under subsection (1) is not subject to appeal.

(5) An order or direction referred to in this section includes an interim measure.

208. Public policy and finality of arbitration awards: what is the interaction between the decisions of the courts of the seat and the enforcement courts? In the much publicised enforcement campaign in the Stati v Kazakhstan dispute, Swedish courts (where the arbitration was seated) ruled that there was no fraud tainting the award, yet the English court initially still ordered a trial of the fraud issue in England where enforcement was sought. How much weight should the enforcement courts give to the findings of the court of the seat as to fraud? How much weight should the enforcement courts of one jurisdiction give to the findings of fraud by the courts of a different enforcement jurisdiction?

209. If arbitrators have concerns that the arbitration might be being used as part of a criminal activity such as money laundering, what should they do? What steps, if any, should they take to investigate those concerns?
210. Section 26(1) of the Act, coupled with Schedule 1, prohibits the parties from agreeing to extend the authority of an arbitrator into the afterlife. Does anyone have experience of such an agreement and can they offer some guidance as to how it would work in practice? I am imagining candles and an ouija board. Or maybe engaging the services of a medium. Was that the sort of mischief the DAC trying to stamp out?

211. In terms of the shareholders’ disputes involving the investor’s right to exercise its put option and its claim for damages, whether the tribunal should make it clear in the award that the investor should cooperate in the transfer of the shares back to the company/founding shareholder when it has been awarded the damages sought, particularly if the other side did not participate in the proceeding or did not raise the counterclaim for transfer of shares even if they participated. This also concerns the award on the share transfer in a wider context at the request of one party. As the share transfer often involves the cooperation of two parties, whether the tribunal should take the initiative to order the recipient of the shares to cooperate. It can happen sometimes that the recipient party does not cooperate even if it requests the transfer in the first place.

212. How important is the exact wording of the dispositive part of an award? Imagine UNCITRAL ad hoc proceedings seated in London. Parties – European (not UK). Arbitrators – from UK and USA. Enforcement sought in another EU member state. The problem faced during the enforcement is that the dispositive part of the award contains no clear order to pay.

213. Can an award, or a procedural order, be signed electronically rather than in handwriting? In the European Union, the Electronic Identification and Trust Services (eIDAS) Regulation 910/2014 provides that “a qualified electronic signature shall have the equivalent legal effect of a handwritten signature” (Art. 25(2)). This would be extremely convenient when three arbitrators are in different locations.

214. What is the impact of escalation clauses on availability of emergency arbitration proceedings? For example, does the existence of a pre-arbitration compulsory mediation provision preclude recourse to an emergency arbitrator? If not, after the emergency arbitration proceeding, must the parties mediate?

215. Do you see any trend with respect to the frequency, use and outcome of EA proceedings?

216. In recent years, many of the leading arbitration institutions – including the LCIA – have introduced emergency arbitrator proceedings, enabling the parties to obtain interim relief in urgent matters before the tribunal has been constituted. While the emergency arbitrator pursuant to Art 9B LCIA Rules may render its decision in the form of an award, she or he may also chose to decide by order. Global enforcement of interim measures – in particular if issued in the form of an order – remains uncertain and differs massively from jurisdiction to jurisdiction. How should arbitrators, parties and counsel tackle this issue?

217. What is in a name? Why should an EA order be any less enforceable than an EA award?

218. War stories. The most creative enforcement strategy (including the legal/ investigative tools) witnessed in a case over the last year.
219. Whither national courts’ review of arbitrators’ treatment of EU competition law issues following *Achmea*? Will the European Court of Justice demand that national courts take a closer “second look”? 

220. The proposed amendments to the ICSID rules adopt a “go green” objective as to electronic filing. Currently, most tribunals will require the filing both electronically and in hard copies. Is it really necessary to require hard copies since ultimately all the submissions will be organised and compiled into hearing bundles. The ICSID’s new approach seems to be more cost-effective and environmental-friendly. 

221. Enforcement of awards despite actions by certain jurisdictions to impose regimes that make it difficult or impossible to enforce awards against those jurisdictions. 

222. How does the LCIA deal with the increasingly number of cases involving parties, arbitrators and counsel from jurisdictions under sanctions (Russia, Syria, Libya, Iran...)?

223. What should be the appropriate level of substantiation of an arbitral award? When is terse too terse?

224. Anzem v Hermes - the Privy Council ruled that an arbitration clause with the word “may” in place of “shall” counted as an optional arbitration agreement (with no other factors suggesting that the parties intended for the arbitration agreement to be optional once triggered). Do the civil lawyers in the room agree that this is an odd decision and be unlikely to be followed in their legal system?

225. Recognition and enforcement of arbitral awards in the states that are not members of New York Convention (for example – Belize).

226. Is there an increasing interest among parties in having arbitral tribunal’s express preliminary views? 

   Background: Recently an experienced corporate counsel told me that he finds it valuable for an arbitral tribunal to express, early in the case, informed preliminary view on the case – that is, issues or positions which trouble the tribunal, and why, and so forth.

   Is this a common and/or growing view?

   Should this be done only if the parties first indicate that they desire such preliminary views?

   What are the limits?

227. Is privacy and confidentiality in recognition and enforcement not as important as privacy and confidentiality during the Arbitration proceedings themselves?

228. What is the better view in terms of sanction in case of a breach of a multi-tier arbitration clause?
229. Security for Costs – is it ever appropriate to issue a partial award rather than merely an order on such applications, thereby allowing a party potentially to seek recognition and enforcement ahead of the merits hearing?

230. Do the emergence of specialist arbitral institutions tied to economic sectors or industries pose a threat to the credibility of international arbitration?

231. Do you see a trend narrowing the scope of enforcement of awards against State interests?

232. How often do panel’s recourse to a hearing? To IT (videoconferencing) to save costs?

233. British Columbia recently amended its arbitration law to provide that in the context of recognition and enforcement, third party funding is not contrary to the public policy in British Columbia. Should other jurisdictions follow suit?

234. The risk of money laundering through third party funding in international arbitration.

235. Do lawyers need to have “skin in the game” in litigation funding?

236. Following Essar Oilfields Services Limited and Norscot Rig Management PVT Limited (2016) which found that a litigation funder’s costs were recoverable, has there been any effect on the third party funding market since?

237. Preferred method of dispute resolution: Will the new "international commercial courts" become a threat to international arbitration?

238. The UAE introduced a new Federal Arbitration Act in June 2018. Will this new law in a key location in the Middle East improve the enforcement of orders and awards in that region?

239. Although I sit in many other jurisdictions, my ‘home’ jurisdiction (the UAE) has finally joined the global club with an UNCITRAL Model Law based Arbitration Law effective from 16 June 2018. Will it work? (NB it does not apply to DIFC and ADGM seated arbitrations. Those separate jurisdictions already have their own excellent arbitration laws and good supervisory courts).

240. Are international arbitral awards now reliably enforceable in Dubai?

241. If arbitrators have a concern relating to their jurisdiction (e.g. they have doubts as to the validity of the arbitration agreement) but neither party has taken the point, what they should do? Should they raise the issue, ask the parties to make submissions and then determine the point, or should they just continue on the basis that each party must be taken to have impliedly consented to the process?
242. In relation to costs, would the following categories of costs be ordinarily awarded in an international arbitration:

   a. Third party funding costs;
   b. Contingent success fees;
   c. In-house counsel’s time;
   d. In-house management time.

243. After Achmea, a Brexit silver lining?

   Much ink has been spilled about the potential impact — or lack thereof — of Britain’s impending exit from the EU on its status as a leading seat and venue (or English law as a preferred governing law) for international commercial arbitration. Much has likewise been said about the significant impact of the CJEU’s recent judgment in Achmea on intra-EU investment treaties. Less attention has been paid to a potential benefit of Brexit in light of Achmea: could the UK, and its overseas territories, become a more attractive jurisdiction for foreign investors structuring their holdings to obtain investment treaty protections?

244. “Keep calm and carry on arbitrating.” As far as that is a response to Brexit, there is probably no reason to disagree with that in the short to medium terms. However, the economic effect of Brexit will not be felt for many years to come. Threats and opportunities abound for the Brits selling England as a seat and English law. But we won’t know what they will be for years to come.

245. The UK leaves the EU in March 2019. Does anyone have the slightest idea what will become of the Brussels Reg for the UK? And even if no longer bound by it, given the arbitration exception, will it really make a difference to things arbitral? And if the answer includes a suggestion that West Tankers need no longer be followed, what difference will it make if an anti-suit injunction is to be enforced elsewhere in the EU?

246. What will be the impact of Brexit on the LCIA and its rules? Of particular interest would be how the loss of free movement of services would impact the LCIA, and whether there will be any VAT or other fiscal implications?

247. Is Brexit an opportunity to strengthen global enforceability of London awards? For example, given the volume of dubious transactions now subjected to overseas arbitration, can we ensure that our awards never "wash" illegal practices and will thus be respected around the world?