Topics for Discussion – YIAG May Tylney Hall Symposium 2019

Issues of Jurisdiction and Arbitrability

1. In light of the High Court’s decision in GPF GP S.à.r.l. v The Republic of Poland [2018] EWHC 409 (Comm), should domestic courts apply a different standard of review when determining whether to set aside an arbitral award that declines jurisdiction? Is the possibility of setting aside such awards compatible with the kompetenz-kompetenz principle?

2. Is there a risk that the hostility shown towards ISDS arbitral tribunals deciding on issues that have an important public element may spill over to commercial arbitral tribunals, for instance, by making key sectors like energy or telecommunications unarbitrable or restricting the possibility of State-owned enterprises submitting their disputes to arbitration?

The Tribunal, The Parties and The Institution

3. Should we be encouraging parties to choose SIAC or HKIAC arbitration even if the seat of arbitration will not be in Singapore or Hong Kong?

4. Administered arbitration: a help or a hindrance to efficient dispute resolution?

5. More often than not, arbitrators are reasonable with respect to their costs. Occasionally however they are not and often in those situations parties perceive that there might be a disadvantage to them if they dispute certain costs or are seen to push back. In order to assist parties in such circumstances, would it be acceptable for arbitral bodies to agree a protocol of reasonable costs for arbitrators so that parties might use that as a benchmark in negotiations? Would this make any difference?

6. Ex parte communication with a party’s nominated arbitrator regarding the selection of a chair – can it be justified?

7. Should the LCIA implement stricter regulations with regards to the length of time for an award to be delivered? If so, what would be the appropriate benchmark to avoid hasty decision-making?

8. Should there be financial penalties (in the form of reduced fees) for tribunals which fail to deliver awards within a reasonable time?

9. How can parties ensure the efficiency of particular institutions? For example, can compensatory fines be imposed on institutions if decisions are not taken within a reasonable time?
10. Halliburton Company v Chubb Bermuda Insurance Ltd and others [2018] EWCA Civ 817 is currently the leading English case on arbitrator impartiality and the duty of disclosure. One of the three arbitrators, “M” was appointed by Chubb in arbitration proceedings between Chubb and Halliburton. M was subsequently appointed in arbitral proceedings arising from the same set of facts between Chubb and Transocean but did not disclose this to Halliburton. The Court of Appeal held that as a matter of good practice and as a matter of law, M should have made a disclosure to Halliburton at the time of his appointment in the other arbitrations. However, notwithstanding this failure to disclose, a fair-minded and informed observer would not have considered there was a real possibility that M was biased. Halliburton’s appeal was dismissed. The Supreme Court granted permission to appeal. It has been reported a number of arbitral institutions intend to intervene in the appeal. What position will they advance?

11. Is there a need to democratise the knowledge regarding to arbitrators? If so, what is the best approach that should be explored?

12. Should parties have the option to give feedback on arbitrators? If so, should this feedback be made public or given only to the arbitrator in question?

13. In selecting arbitrators, lawyers and clients sometimes consider it "safer" to choose well-known arbitrators out of a concern that someone less experienced may not carry enough weight on the tribunal, but this can then make it difficult to move away from the same pool of names and appoint someone more junior who may in fact have more subject matter expertise. Is this a legitimate concern to have in making appointments and, if not, how do we break down this perception? How can we ensure we are not simply making assumptions and get a more informed view of the dynamic on tribunals?

14. What more can be done to encourage parties themselves to appoint younger or first-time arbitrators?

15. One of the main limiting factors to improving diversity in arbitration is that it is a top-down effort often led by the institution. Is enough being done to improve access to legal education in order to improve diversity from a grass-roots level?

Practice and Procedure

16. What methods have YIAG members seen used effectively by parties, tribunals and/or institutions to improve the efficiency of the proceedings?

17. Are page limits on submissions and witness statements a good idea?

18. What procedural measures are most appropriate to adopt in a case where there is a non-participating party?

19. If the respondent refuses to participate in an arbitration, what should the Tribunal do about quantum? Rely on the Claimant’s case or use a Tribunal appointed expert?
20. How willing should Tribunals be to re-open the record after the merits hearing has concluded and post-hearing briefs have been submitted, and in what circumstances should they do so?

21. Are the emergency arbitrator provisions working?

22. Should it be the default that the successful party recovers its costs?

23. Interim orders for costs of failed (or wrongly defended) interim applications – good idea or not?

24. Should tribunals be required, early in the proceedings, to identify and hear preliminary issues dispositive of the case? What should the parties' role be in identifying such issues?

25. Should Tribunals be more open to use of preliminary issue determinations where there is the potential to fast-track resolution of a dispute?

26. Is there more scope for employing summary dismissal procedures in international arbitration, following the example of SIAC and the ICC? Or do existing expedited procedures do the job well enough, and do the risks that summary dismissal procedures pose to enforcement outweigh the benefits? If such summary dismissal procedures are more widely adopted, are there materially different considerations for investment vs. commercial arbitration?

27. Has anyone ever gotten into a debate about whether to adopt a pleadings or memorial-style approach to the procedural timetable? Is it just a matter of preference, or are there real pros and cons of each?

28. Who should have the last word? Should London tribunals follow the approach used in English courts, whereby the Claimant has a right of reply, but there is no further submission from the Respondent? (This question assumes there is no counterclaim.)

29. What is the optimal timing for witness statements: With statements of case or later?

30. Will the Prague Rules become the new normal?

31. Delegates don’t have to adopt or fully embrace/ agree with the new Prague Rules, but what can delegates learn from these rules in order to improve their practice and procedure in all international arbitration (even those conducted under the IBA Rules)?

Questions of Evidence

32. What are delegates’ views on the likely impact of the Prague Rules on accepted methods of disclosure in International Arbitration.
33. Should disclosure move in the direction of CPR PD 51U disclosure pilot scheme?

34. Should parties and tribunals give more consideration at the outset as to whether a case can be fairly decided without document production?

35. To what extent do delegates consider proving a fraud claim (and, in particular, obtaining documents in support of such a claim) to be a more difficult process in an international commercial arbitration than bringing an equivalent claim under their relevant domestic Court litigation? Do delegates think the prevalence of the IBA Rules and Redfern Schedules (with regards to requests for provision of documents) plays a part in the above discussion and if so how.

36. What is the delegates’ experience with the Tribunal giving instructions to party-appointed experts during the course of the proceedings and/or ordering them to submit joint expert reports?

37. To what extent is it, in the delegates’ view, necessary or helpful to submit legal expert testimony on the law applicable to the dispute in addition to the parties’ submissions? In particular, do delegates consider it necessary or helpful to hear oral testimony from legal experts in addition to their reports?

38. What are delegates’ experiences of adducing expert evidence vs making submissions (whether through local counsel or otherwise) when dealing with questions of foreign law?

39. Both, the recent Prague Rules and the latest CIArb Guidelines for Witness Conferencing, appear to encourage the tribunal to consider how best to use expert witnesses in arbitration. Is this a sign of (growing) recognition of the importance of expert evidence in deciding complex issues?

40. The CIArb Guidelines for Witness Conferencing refer to the full spectrum of procedures that can be used to unlock the value of expert evidence for the tribunal, ranging from single and joint presentations, to joint statements and schedules. What are the users’ personal experiences as far as the cost effectiveness of such procedures?

41. Law firms often approach, hold discussions and share confidential documents with several experts, before choosing one. Would you appoint an expert who previously discussed the details of the case with the other side but was not appointed? At what point in the discussions does the expert become conflicted? Can law firms use this as a tactic to limit the other side’s choice of experts, and how should this problem be managed?

42. Is it ever right to criticise the expert for accepting an instruction? (e.g. if this instruction is inherently biased, to the point of being incompatible with the expert’s duty to the Court/Tribunal). If so, how far does the expert’s duty to challenge or test instructions go?

Orders, Awards and Enforcement

43. Given recent developments such as the agreement between the PRC and Hong Kong on interim measures (which will allow interim awards of Hong Kong arbitral institutions such as HKIAC to be enforced for the first time in the PRC), are other seats / institutions falling behind on enforcement options where a party to an arbitration is located in the PRC?
44. In ArcelorMittal USA LLC v Essar Steel Limited and others [2019] EWHC 724 (Comm), the Commercial Court ordered continuation of a Worldwide Freezing Order, Norwich Parmacal Orders and a search order in English proceedings brought by ArcelorMittal USA (a Delaware company) to enforce an ICC award. ArcelorMittal USA obtained the US $1.5 billion ICC award against Essar Steel. Essar Steel refused to pay the award and enforcement efforts elsewhere proved futile. It commenced proceedings in England to enforce the ICC award and successfully sought the above interim injunctive relief. This was notwithstanding that the ICC award was a foreign award, Essar Steel was a foreign company, and there was no evidence of assets in England. This reinforces England as an international arbitration friendly forum in a (soon-to-be) post-Brexit world. Will we see more users turn to England as a result?

45. In the wake of Achmea, will the UK become a hotbed for enforcement of intra-EU BIT awards after Brexit?

46. Is the summary dismissal procedure for section 68 applications to the Commercial Court working effectively? Or does Midnight Marine Ltd v Thomas Miller Speciality Underwriting Agency Ltd [2018] EWHC 3431 (Comm) illustrate that more robust and radical procedures should be adopted, such as those suggested in that judgment by Males LJ (e.g. 30 minute hearing only)?

47. Is the summary dismissal of challenges on paper under English law effective as a check mechanism? If not, what can it be replaced by?

48. Should challenges to awards pursuant to s 67 of the Arbitration Act 1996 be heard de novo?

49. Should award debtors bringing proceedings pursuant to s 67 of the Arbitration Act 1996 be required, immediately upon filing their claim, to pay into court the amount due under the award being challenged?

50. Is the new ICC guideline on the opt-out system of publication of awards indicative of the future of commercial arbitration? Is it desirable?

51. Should there be a move towards transparency and the default publication of arbitration awards?

Technology

52. How can we better use AI and other legal tech to make the process of arbitration more efficient?

53. How can parties and tribunals use technology more effectively to make arbitrations run more efficiently and cheaply?

54. Is artificial intelligence an opportunity to improve decision-making in arbitration or is it a threat to arbitrators' independent thinking?
55. The majority of correspondence with respect to international arbitration is electronic. As a consequence of this, increased security measures need to be taken in order to keep information confidential and safe. Emailing tribunal members at their Hotmail accounts carries with it certain risks which might not be acceptable to the parties involved in an arbitration. ICCA has drafted a cybersecurity protocol in conjunction with NYC Bar and CPR which attempts to deal with certain risks. One idea expressed in this draft protocol is that, in the case of institution governed arbitrations, the institution might host a secure extranet through which all party and tribunal correspondence must pass and documents filed. This seems a very simple and efficient solution however is this something that the institution should be responsible for? – i.e. is it appropriate for the institution to bear the burden of that risk?

Other

56. A year on from the decision in Achmea, does anyone have experience of how tribunals have addressed questions of EU law in commercial arbitration?

57. Section 45 of the Arbitration Act 1996 provides that the parties may apply to the English court to “determine any question of law arising in the course of the proceedings”. S45 does not appear to have been used that much by parties.

- Is s45 an under-used provision?
- Should we be encouraging clients to utilise the section more? S45 could save time and costs if there is a particular legal question that could be answered while the arbitration proceeds on other issues. It could also be of use where the arbitrators appointed have been appointed for particular specialist expertise eg insurance rather than legal issues.
- Could it also result in less appeals being made under section 69?

58. Commercial arbitration is commonly regarded as being confidential. This is often one of the reasons users choose arbitration or at least it is perceived as an advantage over court litigation. However, which law triggers the implied term of confidentiality? Is it / should it be the law of the seat or the law governing the arbitration agreement?

59. Are financial institutions becoming more receptive to arbitration?

60. The 2018 LCIA Casework Report reveals a shift away from English law and English seated arbitrations. The Report records a 9% reduction in disputes governed by English law, and a 6% reduction in the number of disputes seated in England and Wales. What factors might have motivated this shift? Is it Brexit? Is it the attractions of other jurisdictions? Or something else?

61. Has anyone seen any disputes yet in which Brexit is a relevant factor?

63. Is the creation of a multilateral investment court a good idea?

64. *Do tribunals “split the baby” too much?*

65. Is it high time to embark on a codification of transnational principles of privilege?

66. Does the split profession have any place in arbitration?