SESSION 1 - ARBITRATORS: APPOINTMENTS, DISCLOSURE AND CHALLENGES

1. When seeking to agree with a co-arbitrator the nomination of a chair, a frequent objection to the proposal of an otherwise excellent candidate is “but I don’t know him/her”. How do you get over that particular brick wall?

2. 1. To what extent should arbitrators nominated by the parties take the lead in selecting the chairperson?

2. If the parties disagree about the choice of chairperson, should the nominated arbitrators leave it to the appointing body (LCIA, ICC, AAA etc) or should they take an independent decision, which is bound to dismay one party and may dismay both parties?

3. In the event counsel are replaced in an arbitration to what extent should the client/party have the ability to re-nominate their selected arbitrator? Never? Or at what stage of the proceedings should any re-nomination be allowed?

4. What top three qualities counsel should consider when nominating/appointing arbitrators?

5. Other than negative factors (i.e. not of nationality of parties) what factors go (and should go) into the choice of presiding arbitrator? Presumably residing at the seat (for economy reasons); familiarity with governing law but is there any ‘rule’ with international parties not to have the presiding arbitrator as the same nationality as one of the party appointees?

6. Some arbitral institutions (in addition to the ICDR) are now offering a list procedure for the selection of sole arbitrators and chairs in situations where the parties cannot agree in a timely fashion. What experience do others have with this process? Is this an option that the LCIA offers?

7. Are we taking arbitrators’ availability seriously? Have institutions ever declined to appoint an arbitrator due to ‘unavailability’ exclusively on the basis of the information contained in the completed institutional forms?

8. Is the policy of maintaining the same hourly charging rates for arbitrators for the last few years without any known prospect of a future increase and calculating discounts on the maximum hourly rates on the basis of complexity counter-productive or still valid? In particular (a) does it deter suitable candidates on the basis that the hourly rate is no longer representative, even on a reduced basis, of general charging rates of arbitral institutions or otherwise? (b) Is the determination of complexity at the outset of a case appropriate in any event?

9. The fair and reasonable charging of fees by arbitrators. Excessive hours and how to respond?
10. Can a criminal ruling against an arbitrator bar his/her appointment in a subsequent and totally different case?

11. A partner in the arbitration practice of an international law firm retires from the partnership to sit full-time as an arbitrator. How much time should s/he allow to elapse before accepting nominations/appointments from his/her former colleagues?

12. Conflicts / the appearance of bias: are we doing enough prospectively to identify conflict issues? Too often the issues are addressed retrospectively after an award and at the instigation of a losing party – shouldn’t we do more to reduce these risks by being proactive?

13. In the light of recent decisions of the English courts, do the IBA Guidelines on conflicts of interest provide reliable day-to-day guidance for disclosure and conflicts of interest in London-seated arbitrations?

14. In Haliburton v Chubb [2018] 1 WLR 3361, the Court of Appeal considered two main issues viz.

(1) When should an arbitrator make disclosure of circumstances which may give rise to justifiable doubts as to his impartiality?
(2) What are the consequences of failing to make disclosure of circumstances which should have been disclosed?

Was the CA (i) right on the law; and (ii) right on the facts in that case?

15. Pending the Supreme Court decision in Haliburton, what does this conference hope for in terms of guidance as to arbitrator conflicts and disclosure? Will the approach be influenced by promotion of the UK as an arbitral centre and if so, in what direction?

16. Should arbitral institutions impose limits on the number of arbitral appointments any individual may hold under their auspices in a given period (e.g. per year)?

17. Is it time for institutional rules and arbitration laws to impose diversity (in its broadest sense) in the constitution of arbitral tribunals?

18. How can there be more diversity?
19. How could it be ensured that prospective arbitrators from ethnic and other minorities (e.g. the LGBT+ community) and from under-represented nationalities are fairly considered for appointments by parties and institutions?

20. Only 6% of party-appointed arbitrators in LCIA matters in 2018 were women – a very small number, a decline from 2017 and a much lower level than last reported in ICC matters (41%). Why?

21. There are different kinds of diversity: sex; race; nationality; and so on. Do we have priorities among them? Does international arbitration differ from general society in this regard—are there categories that are important in general but not as important in arbitration, or vice versa? Do the answers change when we are talking about diversity among arbitrators and diversity among other participants (advocates, experts, etc)?

22. Should institutions like the LCIA do more to train / promote arbitrators from African and other developing countries?

23. As we strive to improve diversity among arbitrators, should equal or different importance be attached to age, ethnicity, and gender diversity?

24. The LCIA’s gender statistics show improvement year on year. But they also demonstrate that the progress is being driven by the LCIA and, to a lesser extent, co-arbitrators. In 2017 only 6% of arbitrators selected by the parties in LCIA arbitrations were female. How can this be reconciled with the number of law firms and practitioners that have signed up to the ERA pledge, and what more can and should be done?

25. If you could make one suggestion that would have the biggest impact on improving ethnic diversity in party appointments, what would it be?

26. Party appointed arbitrators usually ask the parties to rank the selection of the Chair (in a three person panel) from a list of nominees. Should the party appointed arbitrators be required to consider diversity in the list of nominees (i.e: If the two party appointees are male, should the list of nominees for Chair be only female to ensure a diverse panel?).

27. I see quite a few arbitration agreements that provide for appointment of the same tribunal or for consolidation in case of a subsequent related dispute, including where this potentially involves different parties. These potentially have the effect of allowing one party to impose its preferred tribunal on the other parties. How are these dealt with in practice?
28. By whose standards should issues of conflicts of interests and apparent bias be judged in disputes involving parties or arbitrators from different cultures or legal traditions?

29. Is it legitimate to raise commercial confidentiality as a ground to resist appointment of an arbitrator? (e.g., arbitrator’s firm acts for a commercial competitor of one of the parties)

30. The arbitrator and sector knowledge.

31. What is the optimal career path to becoming an arbitrator?

32. Has disclosure expanded in litigation to something approaching standard disclosure?

33. What is the best way to deal with spurious arbitrator challenges, in terms of reactions by (opposing) counsel, the Tribunal, and the institution?
34. What factors should an arbitral tribunal consider if a party opposes a request to produce documents by referring to the GDPR and potential sanctions that may be imposed against such party if it produces the requested documents?

35. Has the choice of London as a seat of arbitration been adversely affected by the GDPR?

36. Can arbitrators avoid any GDPR obligations by passing any such obligations to the parties/counsel in PO No.1?

37. Practical guidance on avoiding sanctions pitfalls.

38. Disputes involving the application of sanctions may present a number of challenges for arbitrators. These range from the legal complexities relating to the applicable law or the possibility to raise a force majeure exception, the English common law doctrine of frustration or hardship under civil law and the enforcement of arbitral awards, to the practical and logistical difficulties regarding the payment of arbitrators’ fees.

In view of the above, can an arbitral tribunal raise the matter of sanctions proprio motu - even if it has not been raised by the parties - or would the tribunal be exceeding its powers if the question is addressed without leave from the parties?

39. Can the non-administration of arbitral proceedings involving sanctioned entities be considered ‘denial of justice’? What liability do institutions have if (i) they administer such cases, and (ii) they decline to administer such cases?

40. Do sanctions qualify as: (i) lois de police (overriding mandatory norms)? (ii) principles of public policy? (iii) force majeure events before arbitral tribunals?

41. What is the applicable burden and standard of proof when addressing allegations of fraud and corruption? Naturally this will depend in part on applicable law, but are there any general principles?

42. Can a party object to/challenge the appointment of an arbitrator on the basis that the arbitrator does not have a reasonably secure email account?
43. Often the law applicable to an issue in an arbitration is not the law practiced by counsel for either side or by any of the arbitrators. Is such law best presented to the tribunal by counsel, or by an expert witness?

44. How flexible can/should a tribunal be in allowing new evidence to be admitted following service of the principal pleadings? It may be better to avoid the risk of new evidence with the rejoinder submission, but is there a line to be drawn to prevent drip-feeding of ‘newly discovered’ evidence?

45. Can arbitrators broaden the scope of work of a party appointed experts?

46. Can arbitrators rely on unsubstantiated expert opinions?

47. Encouraging party-appointed experts to meet and agree. Is it money and time well spent when experts should each be able to identify areas of agreement based on their reports?

48. Expert instructions. Are parties and tribunals paying sufficient attention to experts’ instructions, including how they evolve in the course of proceedings?

49. The CIarb Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration provides that the experts meet before they issue their reports. According to the explanation in the foreword, the CIarb Protocol only expand upon the IBA Rules on the Taking of Evidence and this "pre-meeting" is said to be the only difference to the IBA Rules. For example, in construction arbitration typical pivotal issues for delay analysis are the determination of the base time schedule and the methodology to apply. Do the delay experts today meet and try to agree on these issues before issuing their reports? What happens if they cannot agree? Should the arbitral tribunal considered rendering "directions" or even an interim award?

50. How to handle arbitrators who think they are experts? This is a variation on the problem of arbitrators doing their own research. It often occurs in the context of calculating damages, where the arbitrators simply reject the evidence presented and choose another basis seemingly on personal experience, albeit after having solicited the parties’ view and input. Is this appropriate? How can a party discourage these temptations?

51. As Redfern Schedules now frequently run into hundreds of pages, the question arises whether the table format has outlived its usefulness. Is it suited to serious engagement with the issues that arise in relation to contested requests? What alternatives are there? Would the unwieldiness be reduced by removing the column for “tribunal decision” such that the Tribunal’s decisions are embodied in a procedural order that attaches the Redfern Schedule containing the parties’ positions?
52. Can creative involvement of damages experts be a useful tool in enhancing an arbitral tribunal’s consideration of damages? If so, what tools work well in your practical experience?

53. At what point is (a) an expert or (b) an expert’s firm ruled ‘off side’ for an appointment by the Respondent if they have previously been approached by the Claimant (or vice versa). Is there an expectation of confidentiality relating to approaches for expert appointments?

54. Is there a common understanding among arbitrators and counsel of the nature of expert independence in IA? Should there be more sanctions against those who fail to meet the applicable standard?

55. Hybrid forms of organizing expert evidence (as opposed to party vs tribunal appointed), e.g. Sachs Protocol or party appointed experts under the exclusive instructions of the tribunal (for all or part of their work)

56. How can (and should) tribunals ensure that experts stick to providing assistance on expert matters, rather than trying to ‘solve’ the case - factual issues and all?

57. Is expert conferencing (hot-tubbing) useful and decisive?

58. If it is not appropriate to "hot tub" counsel, why is it appropriate to "hot tub" experts?

59. An alternative to oral closing arguments – “hot-tubbing” the lawyers?

60. Is there a disconnect between the often very lengthy reports produced by experts and the time available for presentations and cross-examination on those reports. Should reports get shorter, or cross-examination longer?

61. Recent experience of proactive case management adding value to the contribution of party appointed experts?

62. Has expert evidence become ubiquitous? Are parties/tribunals guilty of not considering carefully enough whether they can make out their case on factual evidence alone?
63. The documents production phase of an arbitration has become very time-consuming and hard to manage for tribunals. While there is general agreement that common law style discovery has no place in international arbitration, parties file increasingly lengthy and broad requests and excessive time and costs are devoted by all to this exercise.

How can document production be better managed? Should the tribunal provide clear directives as to the way the requests should be drafted? Or would this risk exposing the final award to challenges for public policy violations (i.e. if the tribunal tries to limit documents production or conversely allows forms of production closer to discovery)?

64. Do the “Prague Rules” constitute a real alternative (to the IBA Rules on the Taking of Evidence and existing practice in international arbitration) or do they simply reflect a protest vote? If the latter, is that useful?

65. Do we expect to see the Prague Rules widely adopted?

66. What will be the role of the Prague Rules?

67. Many arbitrations in London are conducted in the 21st century along lines that would have been familiar to the 19th century judge conducting a jury trial. Can we improve on this? Do the Prague Rules offer any potential to do so?

68. The (so-called) “Prague Rules” on the Efficient Conduct of Proceedings in Arbitration. Do they make any positive contribution, or are they (i) largely redundant and (ii) unhelpfully dismissive of document production and cross-examination?

69. What are the differences in approach to cross-examination between civil and common law arbitrators and practitioners?
   - Should cross-examination be tailored to the civil or common law backgrounds of the arbitral tribunal?
   - How will the Prague Rules affect the use of cross-examination?
   - Is “American-style” (confrontational) cross-examination productive? What about barrister challenges?
   - What is the proper balance between leading and open-ended questions?

70. Prague Rules: It may be difficult for parties to adopt it entirely, but should those from a common law background cherry pick the best bits?
What is the purpose of cross-examination in international arbitration?

- To explain or clarify the contents of record documents?
- To fill in gaps in the documentary record? (Where gaps are identified, can that lead to additional document disclosures, even in the midst of the evidentiary hearing?)
- To expose contradictions between the witness statement and record documents?
- To extract admissions from opposing witnesses?
- To tarnish the credibility of opposing witnesses, e.g., through impeachment or exposing their bias?

Should cross-examination be limited in length or scope?

- To what extent should arbitrators limit or otherwise control cross-examination?
- Should arbitrators limit their questioning of witnesses to issues raised by the cross examination?
- Should cross-examination be strictly limited to the scope of the witness statement?
- Should the cross-examiner be permitted explore contradictions between statements of different witnesses?
- Should cross-examiners have more latitude with expert witnesses?

Sometimes, a Party will raise an argument that the other Party has failed to disclose some documents, the production of which the Tribunal has ordered. What should the Tribunal do?

How are the results of cross-examination considered in the award?

- If cross-examination is influential, how is that reflected in the award?
- If the award does not cite witness testimony, does this mean the cross-examination was disregarded?
- Do civil and common law arbitrators differ in the weight they accord cross-examination?
- If a witness is not cross-examined on part of his witness statement, what weight is accorded to that part in assessing the evidence (i.e., is it considered to be unrebutted and therefore accepted as true)?
- If no points are scored on cross-examination, do arbitrators fall back on the documentary record?
- Is the documentary record accorded greater weight than cross-examination in any event?
- Should arbitrators express judgments about the credibility of particular witnesses based upon the cross-examination?
- How are credibility determinations weighed in fashioning the award?

Once liability and other material assumptions underlying the quantum computations by experts have become clearer in the course of the arbitration, it often makes sense for the tribunal to ask quantum experts to provided updated expert reports based on the views of the tribunal as to those issues. Must the tribunal formulate those views in the form of a partial or interim award or can the tribunal provide guidance as to its views orally or by order? What steps can the tribunal then take to avoid a full bifurcated process for damages in those circumstances; e.g., is it feasible to seek only updated expert reports and no counsel submissions, to seek a documents-only process (updated expert reports and counsel written submissions) rather than providing for renewed examination of the experts as to their updated reports, and etc? If one side wants a more extensive process involving witness examination and counsel argument, can the tribunal deny that approach in favor of a more streamlined approach without materially increasing the risk the resulting award is vacated?
76. What is fair game for cross-examination? More particularly, should questioning be limited to the issues which have been pleaded?

77. Witness evidence in arbitration: pros and cons. Why suppress it?

78. Witness examination differences in continental and Anglo-Saxon practices in substance and in style.

79. In order to save time and costs, is it time to revisit witness statements?

80. Is a hearing necessary whenever the sides submit fact witness statements that differ on facts that are material to a dispositive motion, or can arbitrators rule on the dispositive motion without the need for a hearing after forming views as to the credibility of the conflicting positions taken in the witness statements based on other information in the record or their own judgment? Can arbitrators employ in an arbitral proceeding an approach similar to “no real prospect of succeeding” test from the English courts or the “no genuine dispute as to any material fact” test from the US Federal courts in such circumstances?

81. An ICC Commission task force and the Commercial Court Working Group are both reviewing the role, and flaws, of written witness evidence. Is it time for a fresh approach?

82. Nightmare representation: Arbitrators occasionally have to wade through cases where one party is at a disadvantage because of the lack of qualifications and know-how of their appointed representatives. Should institutions get involved in this delicate matter? If so, when and how? What should tribunals do – if anything - when one party is clearly all at sea, procedurally and/or substantively?

83. Have we yet managed to create a level playing field in arbitrations involving practitioners from different jurisdictions who are bound by different professional obligations? Is this a problem and, if so, what more can be done?

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

85. A party commences arbitration proceedings against a respondent who fails to respond to the Request for Arbitration. The parties have previously corresponded by email. Is it sufficient for the Tribunal, once appointed, to use the existing email address for service of notices or should it endeavour to use a registered office (or, in the case of an individual, a residential or business) postal address?
86. Is Arbitration becoming too tedious and process and procedure oriented?

87. How popular have "midstream conferences" ("Kaplan Opening") become? Positive or negative experiences? Should their introduction in the procedural time table become the standard? When is the best moment to held them?

88. Which procedural innovations have been tried recently, and how successful have they been? Which innovations have been proposed by parties but not adopted by tribunals?

89. Are "Memorials" better than English-style pleadings or vice versa? If the parties agree one rather than the other, is it open for the Tribunal to override the wishes of the parties - and (if so minded) should the Tribunal do so?

90. It is perhaps surprising that despite decades of debate around procedural norms and convergence between legal traditions on a pretty spectacular scale in some areas, there is one basic question where views are still polarized in London seat arbitrations. Come PO1, do we want pleadings or Memorials? Many would argue for transparency, even if costs are as a result front-loaded; others say Memorials encourage prolixity and repetition. What’s the answer?

91. Can arbitrators rely on ‘artificial intelligence’ and software programmes to establish facts and summarize, review and identify documents? Do they have a duty to inform the parties?

92. The more complex a case gets, the more it needs a comprehensive presentation and ways to make the arbitral tribunal understand what the issues are. New technologies such as augmented reality are more and more commonly used and allow parties to illustrate complex aspects of their case in a simple, visual manner. The potential use of these new technologies comes at a cost: the parties need financial resources to afford them and technical know-how to implement them, giving rise to concerns about due process and equal treatment. What should an arbitral tribunal consider before allowing the use of such innovative technologies?

93. To what extent, if any, can ‘illegally’ obtained evidence be ‘admissible’ as evidence in arbitration?

94. Should illegally obtained evidence be excluded in international arbitration and, if so, in what circumstances?
95. Should the LCIA follow other arbitral institutions in adding a rule specifically providing for the expedited conduct of an arbitration?

96. Several arbitral institutions have introduced rules or guidance that expressly provide for summary determinations by the arbitral tribunal, usually to a standard of “manifestly” unsustainable or without legal merit. Was the introduction necessary? Is it helpful? Has it been used in practice?

97. Third-party funding of a claim has inspired applications by parties opposing the claim to seek security for costs. LCIA Rule 25.2 provides:

“The Arbitral Tribunal shall have the power upon the application of a party, after giving all other parties a reasonable opportunity to respond to such application, to order any claiming or cross-claiming party to provide or procure security for Legal Costs and Arbitration Costs by way of deposit or bank guarantee or in any other manner and upon such terms as the Arbitral Tribunal considers appropriate in the circumstances. Such terms may include the provision by that other party of a cross-indemnity, itself secured in such manner as the Arbitral Tribunal considers appropriate, for any costs and losses incurred by such claimant or cross-claimant in complying with the Arbitral Tribunal’s order. Any amount payable under such cross-indemnity and any consequential relief may be decided by the Arbitral Tribunal by one or more awards in the arbitration. In the event that a claiming or cross-claiming party does not comply with any order to provide security, the Arbitral Tribunal may stay that party’s claims or cross-claims or dismiss them by an award.” (Emphasis added.)

Presumably, the evolution of third-party funding has encouraged applications under Rule 25.2? Is that presumption correct? How has Rule 25.2 been applied in practice? What standards have been applied by tribunals in applying Rule 25.2? And if there has been no experiences under Rule 25.2 that can be discussed, what standards should be applied?

98. The United Nations Commission on International Trade Law Working Group II is evaluating addition of amendment to the UNCITRAL rules to allow for expedited arbitration. Expedited arbitration is provided for in the ICC Rules (for amounts in controversy that are US $2 million or lower), the SIAC Rules ($6 million or about US$4.4 million), the ICDR Rules (US $250,000), and HKIAC Rules (currently HKD $25,000,000 or about US $3.2 million).

It seems likely that expedited arbitration rules will be added to the UNCITRAL Rules. What should the amount threshold be? Should the LCIA develop expedited arbitration rules? If so what amount threshold should be utilized? Should parties be allowed to opt out of expedited arbitration rules (whether under potential UNCITRAL or potential LCIA Rules)? If the arbitration clause requires three arbitrators, should the potential UNCITRAL or potential LCIA rules supersede that provision in favor of one arbitrator (consistent with the notion that expedited arbitration should be cheaper and faster where the amount in controversy is “small” – relatively).

99. Have the LCIA “General Guidelines for the Parties’ Legal Representatives” resulted in any determinations that a party’s legal representative have failed to comply with the guidelines, and if so, what has been the consequence?
100. What should be the sanction for breach of Article 18.3 LCIA Rules where a party has appointed additional counsel and seeks retrospective permission? What enquiries should be made before consent is given in such a case?

101. How prevalent are partial awards under Article 24.5 of the LCIA Rules in respect of a party’s failure to pay its share of the deposit on account of costs? Article 24.5 is permissive. What considerations should the tribunal apply in considering whether or not to issue such an award?

102. There is a trend among major arbitral institutions to include summary determination procedures in their rules to prevent a party to advance a meritless claim or defence through a full arbitration. The LCIA has an expedited process, but as yet no express provision for early determination. As an arbitral institution based in a jurisdiction that has championed summary judgment, is this something the LCIA should address as a priority?

103. Article 15.10 of the Rules requires a multi-member tribunal to set aside time for deliberation as soon as possible after the final submission and to notify the parties of the time it has set aside. Is this generally complied with? Do users and arbitrators perceive that the rule assists in any of these ways: getting awards finished sooner; ensuring adequate time is actually available and taken for deliberation; giving parties the impression that the tribunal is acting promptly?

104. I was wondering if any thought has been given to a fast-track procedure for arbitration, given that the length of time it takes to get through full proceedings sometimes approaches something close to a litigation timetable?

105. More and more often, one of the parties to an arbitration (usually the respondent) asks the tribunal to bifurcate the proceedings, sometimes to consider objections to jurisdiction first, sometimes to delay considering quantum until liability has been established, sometimes for other reasons. Often it is argued that bifurcation promotes economy and efficiency, because it may be unnecessary to consider liability if the tribunal finds it lacks jurisdiction, and it may be unnecessary to consider quantum if the tribunal finds no liability. On the other hand, bifurcation lengthens the proceeding overall, and can add significant cost, if the arbitration goes all the way to a determination of quantum. What is the best way to establish whether bifurcation of a particular arbitration will or will not save time and cost?

106. Is it time to consider new criteria for ‘consolidation’ of arbitration proceedings?

107. Do we still need to discuss ways to achieve better time and cost efficiency in international arbitration or have we made enough progress?
108. Has the arbitration community learned all that it can from court litigation processes, in terms of improving time and cost efficiency? Should we - for example - adopt strict case budgeting like the English courts have? And, is an equivalent to English court Part 36 offers an obvious omission from the parties’ armory in arbitration?

109. At long last institutions are doing more to improve speed and efficiency, and there are some signs of success. However, many arbitrators remain generally unwilling to act to stem tactical behavior from lawyers and parties that has the effect of prolonging proceedings and increasing their cost for fear of later judicial challenge, notwithstanding the general willingness of the courts to uphold reasonable arbitral decisions. How do we stiffen arbitrators’ spines?

110. In allocating costs, to what extent are tribunals (or should tribunals be) factoring in issues other than who must pay damages to whom at the end, such as:
   • The conduct of the parties, and in particular, whether their conduct led to increased costs or other inefficiencies;
   • An assessment of relative success on the various issues in dispute and the extent to which the issues on which a party was successful/unsuccessful contributed to the costs?

111. Is there a practice in compounding interest?

112. Are there situations, where the behaviour of the parties before the start of the arbitration should be taken into account in the cost decision?

113. Why do arbitrators generally prefer to reserve all costs for final awards?

114. Third party funding – are orders for security for costs increasingly the answer? And if not, why not?

115. Are different tribunals sitting in related arbitration’s allowed to coordinate their decisions? If so, should they and how?

116. Defective notices in multiple arbitrations - in light of the recent A v B decision, how should parties and Tribunals react?

117. Is it correct that an LCIA Request for Arbitration must, to be valid, encompass a dispute arising under only one arbitration agreement (see A v B [2017] EWHC 3417 (Comm))? If so, does the same principle apply in all arbitration?
118. Is there more to come following Gerald Metals on the interplay between emergency arbitrator procedures and courts, and is the status quo acceptable?

119. How much scrutiny is there really in terms of arbitrators determining (i) whether a party should receive their costs (ii) what level of the requested costs should be received?
SESSION 4 - ORDERS, AWARDS AND ENFORCEMENTS IN THE CONTEXT OF GLOBAL DEVELOPMENTS

120. The Singapore Ministry of Law has recently launched a public consultation on reforming the Singapore Arbitration Act to allow parties to appeal on questions of law. Has England got the balance right in relation to appeals on questions of law or is it losing ground to other jurisdictions which do not allow appeals on points of law?

121. Is it time to publish arbitral awards in full? Will that promote legitimacy and lead to more predictability and better reasoning of awards?

122. Is it time to reconsider the scope and application of the traditional notion of ‘res judicata’?

123. Could/should a judgment by a court of competent jurisdiction at the seat of the arbitration (“supervisory court”) that rejects a setting aside application give rise to an estoppel in enforcement proceedings under Article V of the New York Convention of 1958 so that the award debtor is precluded from re-litigating issues on which he was unsuccessful before the supervisory court? Should/does the answer depend on the type of issue that the award debtor wishes to re-litigate, e.g. is there a difference between issues of jurisdiction, issues of public policy, and issues of procedure? And should/could a judgment given in enforcement proceedings under Article V of the New York Convention of 1958 give rise to an issue estoppel in enforcement proceedings in another jurisdiction? If so, in what circumstances?

124. In the context of the ISDS reform, Prof Van den Berg and Judge Charles Brower have debates on whether dissenting opinions are so serious as to raise the concerns for neutrality of party-appointed arbitrators. Dissenting opinions do not seem to be a prevalent issue in commercial arbitration. Is it because commercial arbitration is confidential?

125. How do you rate the quality of the awards you see? Of course we should always explain our reasoning, but are our explanations too long or too short? There may be reasons for flexibility- in urgent of small cases shorter may be better. Would you like more or less legal or factual analysis? Are there sections we should deal with differently- the procedural history, damages? Can you tell from the Award whether the tribunal had a secretary?

126. ICC awards made from 1 January 2019 may be published. The Secretariat will inform parties at the time of notification of awards, that the award may be published in its entirety no less than two years after notification. Parties are able to agree to publication in a shorter or longer time period. This brings in an "opt-out" rather than an "opt-in". How do users view this, can it work in the LCIA environment (confidentiality – article 30)? Is an opt-out publication regime inevitable? Is it desirable?

127. Some arbitral institutions are planning to publish awards. How will this change the arbitral process? Having led the way with the publication of challenge decisions, should the LCIA consider joining the trend to publish awards?
128. Is there a significant problem with delayed awards, and if so what should be done about it? Is the ICC’s “carrot and stick” approach in respect of arbitrator’s fees part of the answer?

129. The orders of an arbitral tribunal are, essentially, unenforceable. Should tribunals be more ready to issue interim awards?

130. Interim relief: How to obtain fast and how to effectively enforce them globally across jurisdictions?

131. Can arbitrators grant interim relief that has been previously rejected by national courts?

132. Are arbitrators more restrictive in granting interim relief compared to national courts?

133. The value of CIArb disciplinary proceedings in maintaining the legitimacy of commercial arbitration (The CIArb v B, C and D [2019] EWHC 460 (Comm))

134. On April 23, in Inprotsa v. Del Monte, the US Court of Appeals with federal jurisdiction over Florida, Georgia, and Alabama (the 11th Circuit) reaffirmed a position that it has held for more than 20 years: that the New York Convention "provide[s] the exclusive grounds" under US law "for vacating an [arbitral] award subject to the Convention." In so ruling, the Court found that the US Supreme Court’s 2014 decision in BG Group v. Argentina did not overrule this holding. Did the US Court of Appeals simply get it wrong? Regardless, what are the ramifications? For example, is Florida materially "more friendly" than other US jurisdictions to parties seeking to enforce international awards arising from or concerning disputes in Latin America?

135. Is the US Supreme Court’s 5-4 decision two weeks ago in Lamps Plus v. Varela ground-breaking or wholly unremarkable?

136. What is best practice in relation to the conduct of undefended arbitrations against non state parties in order to reduce the prospects of challenges to enforcement?

Are there any additional matters to bear in mind in arbitrations against a state entity?

137. To what extent should arbitrators give weight to court judgments rendered during the course arbitration proceedings in relation to:

(i) The invalidity, inoperability, interpretation and/or scope of the arbitration agreement?
(ii) The issues in dispute and relief sought by the parties in the context of the arbitration proceedings?
(iii) The setting aside of partial awards rendered in the context of the arbitration proceedings
When confronted by a defaulting party, how should a tribunal balance its duty to ensure an enforceable award/test the evidence vs fairness to the participating party. Tribunals often seem to favor the former over the latter, particularly in the case of defaulting States. Is this appropriate or warranted?

Should/do arbitrators have the power to strike out with costs claims and defences that are clearly hopeless/have no reasonable prospect of success? If so, how can we ensure that any award is not vulnerable to a challenge at the seat or to being refused enforcement under Article V of the New York Convention of 1958 for breach of the losing party’s right to present its case?

London International Disputes Week is now one of over 70 City or Country Arbitration/Disputes event. Is there any point?

Monitoring the rule of law: is enough being done to encourage the robust application and upholding of the law in a world where nationalism and fundamentalism seem to be on the rise? Have symposium attendees had any recent experiences of politics trumping the correct legal outcome? What more could be done?

The significance of the law of the contract.

Are arbitral tribunals expected to apply the governing law in exactly the same way that a local court would apply that law?

Is a zero-impact arbitration possible? Should arbitrators, institutions and parties be thinking about the environmental impact of arbitrations and acting to reduce/eliminate flights, hard copy bundles, even the level of air conditioning in hearing rooms.

Is arbitration an appropriate way to deal with business and human rights disputes?

Should the LCIA adopt more Asian party friendly practices such as the option for med-arb?

Is electronic signature of an award sufficient for enforcement purposes?

What are today’s “best practices” for deliberations and for the drafting of awards?
149. Why are arbitrators very reserved when considering claims for moral damages?

150. Should there be more scrutiny of awards by all arbitral institutions?

151. What will be the impact of Brexit on London as a seat of arbitration, and on LCIA as an arbitration institution? How has this changed, if at all, in the light of the recent mess/uncertainty regarding Brexit?

152. Impact of Brexit - much play has been made of how little commercial arbitration will be affected by Brexit even a hard Brexit but is this true as we see the impact on arbitral process of EU regulation such as GDPR?