Topics for Discussion – YIAG May Tylney Hall Symposium 2018

A. The Tribunal, the parties and institutions

1. What more can be done to prevent the appointment of an unsuitable arbitrator?

2. Should tribunals be less reluctant to expressly draw adverse inferences? How can this be achieved? Passive tribunals: what should parties do (if anything) about them?

3. Should there be sanctions for arbitrators that do not comply with their disclosure obligations?

4. If we establish arbitrators panels – like the ones proposed by TTIP – with permanent members, similar to the ECJ, are we still talking about arbitration? Is this just semantics? Which is the importance of the right to freely appoint an arbitrator to the core definition of arbitration?

5. What are the delegates experiences on cases where arbitrators really sanctioned parties for their procedural behaviours?

Arbitration and Advocacy in London from an American perspective: to barrister or not to barrister?

6. If an ad hoc arbitration clause in an agreement between parties from various jurisdictions does not stipulate a place of arbitration, which court is addressed to appoint an arbitrator? Arbitration acts of both jurisdictions may authorize domestic courts to assist with setting up the arbitration (e.g. the German and Dutch arbitration acts both allow their courts to be addressed to appoint an arbitrator even if an applicable arbitration act is not established).

7. Where the seat of arbitration has not been agreed upon, should the decision-making body entrusted with determining the seat under the rules be allowed to turn down one of the seats suggested by the parties for the sole reason of the high risk of annulment of the forthcoming award at that seat?

8. Following the LCIA’s publication of updated guidance notes relating to the use of tribunal secretaries in October 2017, which expressly separates the tribunal secretary from performing any decision-making function, are any further steps necessary or recommended on the part of the parties or tribunal to minimise the risk of a tribunal secretary influencing the decision-making of a sole arbitrator and are any special actions recommended in such circumstances?
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B. Ethics, transparency, diversity

9. Should the arbitrators be released from disclosing (some of) the circumstances capable of giving rise to justifiable doubts as to their impartiality or independence, where the existence of such circumstances is public knowledge?

10. Service providers specialising in document management and production play an increasingly important role in international arbitration, and their costs are sometimes comparable to those of legal teams’. Is there a need for more transparency and awareness in this area and rankings similar to the legal ones?

11. Should an arbitrator make a disclosure at the end of an arbitration after receipt of cost submissions if an arbitrator then first learns (from reviewing the specifications of the invoices submitted) that a lawyer is involved which the arbitrator is affiliated with through an arbitration organization? There are several sub-questions:
   a) Up to what moment in an arbitration has the arbitrator an obligation to make disclosures?
   b) Is affiliation through an arbitration association necessary to disclose (should we make a distinctions between being a regular member and being a board member: IBA Green List item 4.3.1 does not seem to take this distinction into account)?
   c) Should the lawyer involved, who is obviously aware of its involvement, not make a disclosure itself, earlier on in the arbitration (if the circumstance is considered worth disclosing)?

12. Are we showing older practitioners the way in terms of arbitrator diversity? Or are we guilty of falling victim to the inertia and the old adage “nobody ever got fired for buying IBM” and appointing the same old people?

13. Does anyone have experience of acting with third party funding on behalf of a Respondent (for example, the funder recovers a premium based on the claim value which has not succeeded?)

Do the same considerations about disclosure, privilege, recoverability of costs apply?

14. Is third party funding in international arbitration best regulated through hard law (whether at a national or multilateral level) or soft law instruments?
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15. Arbitrators as witnesses in related or subsequent proceedings: Experiences? Particular problems encountered?

What are the experiences, if any, concerning the legal concept of "Gerichtsnotorietät", i.e. facts already known to the arbitrator in international arbitration?

16. My interest is whether you have already made such experience where you were sitting as an arbitrator and had knowledge of pertinent facts from another arbitration, or where you were confronted with a statement from an arbitrator, which disclosed having knowledge of further facts relevant to the case?

C. Protection of confidentiality in international arbitration

17. Given the fact that many disputes referred to arbitration concern sensitive information, which, if made public, could have a detrimental effect or be exploited to a commercial advantage, arbitration proceedings, evidence and draft awards are closely guarded. However, they are likely to be increasingly targeted by hackers and cyberattacks. This has led to the International Council for Commercial Arbitration, New York City Bar and International Institute for Conflict Prevention and Resolution producing a Draft Cybersecurity Protocol for International Arbitration. The consultative draft includes "General Cybersecurity Practices" (Schedule C) setting out examples of specific steps which could be taken to minimise risk and ensure data security. In light of this approach, is there scope for wider agreement on principles for ensuring cybersecurity across different arbitration institutions, or should this be left to the parties to agree an approach proportionate to the sensitivity or extent of the data in each case?

18. What, practically, can a tribunal do about an assertion that a document cannot be produced because of a duty of confidentiality owed to a third party?

19. Should the Arbitration Act 1996 be amended so as to reverse the presumption of confidentiality under English common law?

D. Procedure and evidence

20. How do you usually deal with the difficulties around privilege when advising and acting for a client based in one jurisdiction in an arbitration seated in a different place, where the other party is based in a third jurisdiction and the lawyers may practice in yet another?
21. Should there be a presumption against extensive document production?

22. Is arbitration currently suitable for low value disputes and, if it is not, should it be?

23. Is the LCIA likely to update its rules concerning single requests for arbitration (especially in light of the recent judgment in A v B [2017] EWHC 3417 (Comm))?

24. Although the standard is to have witnesses cross-examined during a hearing after one or two rounds of written submissions and have a document discovery round after at least one full round of written submissions, would there not be arguments to schedule these types of evidence gathering measures even before a first round of written submissions? This may be efficient if evidence gathering outside and in advance of the arbitration is impossible or complicated or if a party can only determine if it should pursue its claims after an evidence gathering phase is concluded (which, in the case of not gathering sufficient additional evidence, may lead to withdrawing claims and saving time and cost for the parties involved). It may also exclude a second round of written submissions.

25. Should an arbitral tribunal be actively involved in shaping the document production process from the outset, both when the procedural timetable is first established and also when document requests are first made? In ICC arbitrations, does the list of issues in the Terms of Reference allow the tribunal to have a firmer handle on the document production process later on? Does the Redfern Schedule format encourage arbitral tribunals to "split the baby" without being fully on top of the issues?

26. Summary determination

(a) Is there a real and significant difference between summary determination (for example under SIAC Rule 29.1a) and resolution of a claim by identification and determination of a preliminary issue or issues?
(b) If the Tribunal is cautious and wants to issue an enforceable award, will summary determination which results in an award in favour of a claim ever be truly “summary” if the Respondent does not want it to be?
27. Is there a concern among EU countries that defendants will try to invoke the recent Achmea judgment to challenge the jurisdiction of tribunals from the outset, aiming to end arbitration proceedings at an early stage?

Is there a risk that swathes of arbitration judgments may now be repealed off the back off the Achmea judgment due to non-compliance with EU law?

What impact will the Achmea judgment have on the attractiveness of countries such as the Netherlands and Luxembourg which offer favourable protection for investors through numerous BITs with other EU countries?

E. Experts in arbitration proceedings

28. In light of increased support for transparency and openness in commercial arbitration, should experts be praised/criticised in arbitral awards as they now are in Court Judgments?

29. How should the transparency v confidentiality issue in International Arbitration also be applied to Expert Witnesses?

If during cross-examination an expert is shown to have made an error in their report, should they amend their report and/or should the post-hearing submission be adjusted?

30. A number of recent, high profile, cases have seen significant variances between the quantification of damages put forward by experts in arbitrations. What are peoples' experience(s) of the reason for this, Tribunals' reactions to this and, critically, what can be done to address this (or does it even need to be addressed)?

31. Ships in the night - how can we avoid the depressing experience of expert reports which pay very little attention (if any) to the other party's report or case?

32. Various solutions have been put forward as to how Tribunals may address a situation whereby two credible experts present widely different damages quantifications. In practice, how often do people see this being effectively dealt with and how is it dealt with? Do processes such as joint expert statements/hot-tubbing work well? Given such divergences in quantum, how often do people see Tribunals having to go down their own route (i.e. not selecting one expert or another, but some form of amalgamation of the damages evidence) in reaching a decision on quantum?
33. It has been suggested that processes such as up-front agreement on expert instructions between parties and the simultaneous exchange of expert evidence may help to make arbitral proceedings more efficient. What are peoples’ thoughts/experience on such processes?

34. If a consulting/advisory expert engagement evolves into an independent expert witness engagement, can and should the expert be the same individual, or are they no longer able to maintain a suitable level of independence?

35. It is currently widely accepted in international arbitration that an expert engaged by a party should remain independent and impartial. This rule is reproduced in many rules and guidelines. Is it a time for change? Should experts be permitted to become fully functional members of parties’ teams and, eventually, act as parties’ advocates?

36. Under the IBA rules (and other sets of procedural guidelines), experts must be independent from the parties and their legal advisors. What does 'independent' mean in this context - and from what must expert evidence be independent? Legal advisers typically review and comment on draft reports prepared by party-appointed experts before they are submitted, so expert evidence can rarely said to have been produced entirely independently of the legal team. Indeed, expert evidence may be of limited assistance to the Tribunal if it has been prepared in a vacuum.

F. Awards, challenges to awards, enforcement, court decisions regarding arbitration

37. Institutions are increasingly obliging parties to apply to arbitral tribunals rather than state courts for interim or conservatory measures, provided the relief is of a sort that can be granted by the arbitral tribunal (see for example Rule 22.2 of the LCIA rules). Whereas applications for interim relief in state courts will usually be determined by reference to specific tests for interim relief (albeit often at the discretion of the judge), many of the institutional rules do not lay down any specific criteria for the grant of interim relief (with the notable exception of Article 36(3) of the UNCITRAL rules). Should institutions also be laying down a test/criteria that an application for interim relief must satisfy, in order to provide clarity to parties on the likelihood of an application being granted? Or is it better for arbitral tribunals to retain the flexibility to approach different applications in different ways?

38. In December 2017 the Russian Supreme Court refused to recognise an arbitral award on the grounds that the legal representative of one of the parties was on the list of recommended arbitrators of the arbitral institution in question (Case No. 2-3969/2016). Does the inclusion of a party’s legal representative on an institution’s list of arbitrators compromise the independence and impartiality of arbitral proceedings in which that representative then acts as counsel, and, if not, are such decisions concerning in the context of enforcing arbitral awards overseas?
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39. With respect to disclosures by a prospective arbitrator, in light of the Court of Appeal’s decision in Halliburton Company v Chubb Bermuda Insurance Ltd [2018] EWCA Civ 817, is there any practical difference between the objective, English law standard (i.e. whether a fair-minded and informed observer would conclude there was a real possibility of bias) or the subjective standards contained in arbitral rules such as the IBA Guidelines or the LCIA Rules?

40. Is the practical impact of the recent Court of Appeal decision in Halliburton Company v Chubb Bermuda Insurance that parties (such as Insurers in Bermuda form arbitrations) can appoint the same arbitrators in multiple references concerning overlapping subject matter, where there is only one common party, and get away with concealing their previous involvement to the other party? Are the IBA Guidelines too ineffective?

41. What is the practical impact of the recent Halliburton CA case in relation to tribunal's duty of disclosure under the IBA Guidelines, and how does it affect the meaning of "apparent bias"?

   Is there a way around confidentiality obligations in parallel arbitration proceedings when there is a direct overlap between the underlying issues in dispute?

   What to do in practice where the Tribunal shows bias against a party, including on process, as well as ineffectiveness?

42. Does the approach of the English courts to arbitrators’ duties put at risk London’s reputation as a seat of arbitration (particularly given that, as in Halliburton Company v Chubb Bermuda Insurance Ltd [2018] EWCA Civ 817, “legitimate concerns” regarding arbitrator conduct are insufficient to justify court intervention)?

43. G. Investment disputes

   What are participants’ experience in the Belt and Road investment space, in particular the dispute resolution mechanisms being explored by clients?

44. In investment treaty expropriation disputes, claimants generally ask for the market value of their investment or for ‘full compensation’ as referred to in customary international law, which is often taken to be equivalent to the market value of the investment. However, Tribunals often make awards of damages by reference to the wasted costs of the investment. Valuers would typically say that invested cost can be a poor guide to market value. While there are good reasons why Tribunals may want to make awards of damages by reference to wasted costs (e.g. lack of certainty as to the market value of the expropriated asset), can they be compatible with references in customary international law to market value?
45. What specific changes would need to be incorporated into an "Investment Court System" (ICS), as advocated by the EU and reflected in a number of recent trade agreements, in order to meaningfully address the problems with the existing system of investor state dispute settlement (ISDS)?

H. Prospects for the future

46. The CPR has introduced what it calls the “Young Lawyer” rule: “In order to support the development of the next generation of lawyers, the Tribunal, in its discretion, may encourage lead counsel to permit more junior lawyers with significantly less arbitration experience than lead counsel to examine witnesses at the hearing and present argument. The Tribunal, in its discretion, may permit experienced counsel to provide assistance or support, where appropriate, to a lawyer with significantly less experience during the examination of witnesses or argument.”

Is the "Young Lawyer" rule recently introduced by the US-based CPR revised Rules for Non-Administered Arbitration of Domestic and International Disputes, something which would ever be considered by other institutions outside of the US?

47. What are the experiences of YIAG members of their involvement in the oral advocacy at hearings? None? Token roles? Significant aspects of the case? Is advocacy experience being properly fostered and developed through this involvement?

48. Is arbitration becoming too standardised and formulaic? How can users, arbitrators and counsel be encouraged to adopt a more flexible approach?

49. Experiences and feelings on London as place of arbitration after Brexit – can English law be a savior (if we need one...)?

Achmea I: are arbitrators the guardian of any legal order apart from the one in the contract....?
Achmea II: is this good or bad for UK-after-Brexit?

50. Med-arb is proving to be popular with clients, especially Chinese clients. It can be an effective means of resolving disputes but the idea that arbitrators “change hats” to become mediators can sit very uncomfortably with lawyers. Is there space for a med-arb protocol akin to the SIAC-SIMC Arb-Med-Arb protocol in London practice?
There are many complaints in the arbitration community about the 'elite club' and arbitrators being 'pale, male and stale'. Given these perennial criticisms, coupled with age of Blockchain, Bitcoin and TrumpCoin(!), isn't it time that parties more frequently consider appointing non-lawyers to sit on tribunals?

At the end of last year the LCIA celebrated its 125th birthday. What are your reflections on the past 125 years and what do you think we should try to achieve in the next?

During the most recent round of discussions at the UNCITRAL in April 2018, many States expressed strong discontent with respect to the ISDS system in its current form. Is ISDS a sinking ship? What specific changes to the system may we expect in the coming years? What does it mean for lawyers?

Towards the end of 2017 the Law Commission confirmed it was looking at the question of amending the Arbitration Act to include a summary judgment style procedure. The Commission could not achieve cross-government support in time to include this in its 13th programme of law reform, but is hopeful it will be included as work progresses. The decision to try and proceed on this subject came out of the Commission’s 2016 consultation on whether, and if so in what areas, to include reform of the Arbitration Act in its 13th programme. The question is: has the Commission (and the international arbitration world in London) missed a golden opportunity to reform an act which is over 20 years old? Is the Arbitration Act still fit for purpose?