A. The Tribunal, the parties and institutions

1. Putting to one side whether the Court of Appeal’s judgment in Halliburton Co v Chubb Bermuda Insurance Ltd [2018] EWCA Civ 817 is correct, has the prominence of the issue of arbitrator disclosure resulted in any noticeable changes to the conduct of individual arbitrators?

2. A discussion re the recent judgment in Halliburton Company v Chubb Bermuda Insurance Ltd and others and whether people agree with the Court of Appeal decision. Should arbitrators be able to take appointments in several arbitrations with overlapping issues and a common party?

3. Are the Achmea-related resignations from tribunals proof that issue-conflict should be taken more seriously, in particular in investment arbitration? Is the ICSID disqualification procedure (where the decision is made by the other members of the tribunal) appropriate in this regard?

4. How successful has the Pledge been in increasing female representation on Tribunals? Does more need to be done to expand the focus of diversity of arbitrators to include nationality, race or other factors?

5. The recently concluded SOAS Arbitration in Africa Survey underscores the lack of geographical/national diversity in the appointment of arbitrators, particularly those from the developing world. What (if anything) can be done to change this?

6. The 2018 SOAS Arbitration in Africa Survey was recently released. The survey examined the anecdotal belief that African arbitrators are not appointed in international arbitrations as much as European and North American arbitrators due to a lack of skill, experience, and quality training. The conclusion of the survey was that, contrary to the anecdotal belief, African arbitrators are in fact highly trained and qualified. A very high percentage of them have attained training through the CIArb or another arbitration training program and hold a qualifications with the same standards used for practitioners in North America and Europe. The question to the group is: if African arbitrators are in fact equally skilled an qualified, why is this still not translating to an increase in appointments for African arbitration practitioners in international arbitrations? What can be done to address this, if anything?

7. In light of the LCIA’s recent introduction of an online database for anonymised arbitrator challenge decisions, is this an initiative that other institutions should seek to follow, and, from the attendees’ perspective, would such an approach lead to more or less challenges in the future?
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8. Following the introduction of expedited procedures in institutional rules, is there a case for expanding the powers of tribunals to order that a formal expedited procedure should apply, for instance where the dispute appears to be simple or principally legal?

9. Does LCIA see increase of cases where parties are represented by counsels, who are not UK qualified?

10. Do the current LCIA Rules give the tribunal power to order the parties to mediate the dispute via an independent mediator? If not, should the tribunal have such power?

11. Should the LCIA start reviewing arbitration awards? Would it attract some business away from the ICC?

B. Seat of arbitration

12. Recent further amendments to the Indian Arbitration Act and its’ impact on making India a more friendly environment for arbitration in general and arbitral institutions in particular

13. Brexit – what is the likely impact on London as a seat of arbitration?

14. The Law Commission of England and Wales declined the opportunity to revise the Arbitration Act 1996 in its upcoming programme of work. Was this a mistake, particularly given the challenges posed by Brexit to London’s pre-eminence as an arbitral seat?

15. Can tribunals really make principled decisions as to the seat of arbitration when none is agreed by the parties?

C. Intermin measures

16. Do emergency arbitrators offer an effective means of obtaining interim relief, particularly relative to what might be available in litigation?
17. Emergency arbitrations appear not to be used in the western regions in comparison to the Eastern (Europe /USA cf South Asia), or is it really more to do with industry sector than region?

18. Is there a potential lacuna in the LCIA Rules, which prevents applications for interim measures on an ex parte basis not only to the Tribunal, after the commencement of an arbitration, but also to the state courts?

This is because Article 25.3 provides that, once a tribunal is formed, a party can apply to a state court for the relief which the tribunal could otherwise grant in (a) exceptional cases and (b) with the tribunal’s authorisation.

The effect of Article 25.3 is that a tribunal’s authorisation is required for an application to a state court for interim or conservatory measures "to similar effect" to those listed in Art 25.1.

In substance, a freezing order is (arguably) “to similar effect" as an order under Article 25.1(i) as it provides a means of providing security for the amount in dispute. In any event, Article 25.1 gives a tribunal broad power to order interim relief. Accordingly, the Tribunal should be asked to authorise the ex parte application to a state court for a freezing order.

However, an ex parte communications with the Tribunal (which would necessarily include a without notice application) are prohibited under the LCIA Rules and a solution is required that will preserve the ability of parties in the future to apply for urgent ex parte relief (as the LCIA Rules would surely not have precluded this), whilst allowing a tribunal to remain in control of all aspects of the procedure.

Should the LCIA publish clarification/guidance on the following issues:

- Whether applications for urgent ex parte relief fall outside the scope of the tribunal’s powers under Article 25.1, such that no authorisation is required from a tribunal for such applications to be made to a state court.
- If applications for urgent ex parte relief fall within the scope of the Tribunal's powers under Article 25.1, such that authorisation by the tribunal is required, can a request for authorisation be presented ex parte.

19. In light of recent English case law there is some concern that the emergency arbitrator rule may limit a party’s ability to approach the English court for urgent, interim relief. Is the emergency arbitrator rule now a help or a hindrance?
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20. Should arbitrators be penalised in the event that their awards are unacceptably late? Some institutions will deduct a percentage of the arbitrators’ fees, with the level of the penalty increasing with the lateness of the award – should the LCIA introduce the same rule in order to ensure confidence in the arbitral process?

D. Practice and procedure – the conduct of the proceedings

21. Early dismissal of claims or defences: a redundant provision ripe for abuse, or useful tool for parties the tribunal?

22. What is preventing institutional arbitration from developing summary judgment type procedures for not just low value cases but also high value and complex cases?

23. What tools are available to assist tribunals in understanding cultural differences relevant to the legal issues arising in international arbitration?

24. Where multiple disputes arise from the same event or factual matrix, but only one party is common to all of the resulting arbitrations, what (if any) procedures should be put in place to level the playing field and ensure that the aforementioned party does not unfairly benefit from accrued information?

25. A general discussion re third party funding in arbitration following the Queen Mary Taskforce Report. How many people are working on cases with TPF/ have considered TPF? Which sort of clients are people finding are interested? If not, why not?

26. What is the impact of the GDPR on the submission of pleadings and documents in arbitration proceedings, particularly where it may involve transmission of personal data outside of the EU (for example, to send to an arbitrator based in a non-EU Member State)? Is guidance from the institutions required to ensure that the institutions, parties, counsel and arbitrators are all aware of their obligations and duties in this regard?

27. What have/are the main issues/challenges in complying with the GDPR requirements when conducting international arbitrations?
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28. Is the onus on the parties or the Tribunal to drive the arbitration process forward? Should the Tribunal assume a more pro-active role by, for example, limiting the length of submissions or by using allocation of costs present in the majority of arbitration rules as a tool to encourage efficient behaviour and discourage unreasonable behaviour? Does a fear of a “due process” allegation hold arbitrators back from taking more control of the arbitral process?

29. Do the delegates think that the increase in global trade sanctions will have a positive or negative effect of arbitration as a means of dispute resolution?

30. Confidentiality rings in international arbitration

31. The pros and cons of memorial-style submissions as against traditional "linear" submissions

32. Memorials vs. “Common law style” pleadings: Are Memorials winning the battle, and, if so, what, if anything, should be done?

33. Is the paralysis caused by due process paranoia in recent years misguided for the following reasons:

   Most popular seats for international arbitration adopt a non-interventionist approach to arbitration and the courts in general do not uphold unmeritorious challenges. Tribunals can be confident that robust procedural decisions will almost certainly be upheld.

   If then the concern amongst arbitrators is that the courts of a likely foreign enforcing state take a particularly problematic interpretation of public policy or other defences to recognition and enforcement of awards, is this something that individual arbitration tribunals can and should be attempting to counterbalance by giving too much indulgence to recalcitrant parties before them? Alternatively, is the approach taken by the foreign court completely outside the remit of arbitrators charged with the task of resolving the dispute between the parties involved in the arbitration, and ultimately the problem of the party who has agreed to contract with a counterpart whose assets are in a jurisdiction whose courts are known to take such an approach? Is it / should it be up to arbitration tribunals to try to make their awards challenge proof to a level they might not do if recognition and enforcement were to take place in some other state with a less interventionist approach to recognition and enforcement? Does / should the limit of acceptable recalcitrance depend upon where the award will ultimately be enforced or must it always be judged to the same objective standard?
34. In a recent case, opposing counsel proposed the simultaneous exchange of briefs (e.g., exchanging the claim and counterclaim at the same time). Have others had similar experiences? While it may help the matter proceed expeditiously, are there any perceived advantages or disadvantages?

35. Many arbitration rules are sufficiently flexible to allow Tribunals to make rulings on the costs of interim or interlocutory applications before a final award is issued. Should Tribunals be encouraged to do so more often and would this make the arbitral process more efficient by discouraging unmeritorious applications?

36. Should parties be encouraged by Tribunals to discuss in advance and agree page limits for pre-hearing memorials, and will this have any appreciable impact on the cost and length of parties' written submissions?

E. Orders, awards and enforcement

37. Given that only 1 out of 112 section 68 challenges succeeded in 2015-2017, has the English Court struck the wrong balance between supporting the finality of an arbitration award and the need to maintain a basic standard of fairness (or are tribunals really that infallible)?

38. What is the jurisdictional basis for ordering costs in circumstances where the Tribunal concludes that it has no substantive jurisdiction?

39. Much has been said and written about the recognition and enforcement of annulled awards. Not much has been said about the use of such awards in subsequent arbitral proceedings. What is the legal value of an award that has been annulled at the seat on jurisdictional grounds? Does it have any legal existence or effect? For example, can it have preclusive effect or serve as an “authority” in subsequent proceedings?
40. At times, parties deliberately make their statements of claim (and their equivalents) poorly particularised for tactical purposes, e.g. to avoid putting all cards on the table and prompt the respondent to articulate its defence before putting forward a well-developed case theory.

Unlike state courts in some jurisdictions, arbitrators may be reluctant to intervene at relatively early stages of proceedings to address this. What are the instruments/tactics the respondent can resort to in such a scenario?

41. Effectiveness of public policy defences to enforcement of arbitration awards in the light of recent high court judgements.

42. What are the recent trends in enforcement of arbitral awards, which have been set aside?

43. Paragraph O8.5 of the Admiralty and Commercial Courts Guide provides for a summary paper disposal system for unmeritorious challenges to arbitration awards. Does it work properly and is it fit for purpose? It is not always straightforward to show on paper that a challenge is weak. The reference to a potential indemnity costs order where a challenge dismissed on paper is revived orally and dismissed again inevitably leads to a submission that a challenge which has survived an attempt to dismiss on paper cannot be the subject of an indemnity costs order if it is dismissed after a hearing. Should the Commercial Court align itself with the position in Hong Kong (which is likely after consultation by the Singapore Academy of Law Law Reform Committee to become the position in Singapore) whereby unsuccessful challenges are prima facie the subject of indemnity costs orders?

44. Statia v Kazakhstan [2018] EWCA Civ 1896 - Should award creditors be able to withdraw enforcement proceedings if allegations of fraud against them are raised?

45. Cost budgeting in arbitration – is it the future?

F. Issues of jurisdiction

46. Given the decision in Slovak Republic v Achmea and the subsequent Commission guidance document, should we be questioning whether tribunals in commercial arbitrations seated within Member States have jurisdiction to hear private law dispute that involve issues of the application of European law, particularly in the sphere of competition?
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47. Pathological clauses are a frequent challenge, including clauses which refer to institutions that do not exist. What are some of the current applicable legal standards in the represented jurisdictions? How does the institution handle such requests (e.g., when the name of the institution in the clause is similar)? When faced with such a clause that is nevertheless enforceable under local law, what are some of the strategies that could be employed to efficiently initiate an arbitration?

48. Implicit and/or hypothetical consent to multi-party arbitrate claims: is there an internationally accepted threshold? Should tribunals take witness evidence? To what extent is this subject to court review? I am happy to share a real life example.

G. Questions of evidence

49. Should institutional rules provide concrete rules for determining which law(s) of privilege apply to the arbitration?

50. How can two (highly qualified) party-appointed experts come to widely differing estimates of damages/quantum?

51. Tribunal-appointed experts: how frequently are they appointed in practice? Typical role / outcomes?

52. Bribery and corruption is notoriously difficult to prove as perpetrators go to great lengths to conceal their wrongdoing. Does this justify a shift, in cases involving allegations of corruption or serious illegality (and, possibly, fraud), from limited document production orders in arbitration to US or English-style disclosure orders?

53. Where a party fails to put a key point to a factual witness in cross-examination, particularly where the witness has given evidence that directly contradicts that party’s case, should the Tribunal permit that party to continue to assert factual arguments that require the tribunal to conclude that the witness lied.

54. Should there be a rule that imposes presumption of truth in all statements of case and witness evidence submitted in arbitration? If so, what should the sanction be for non-compliance?
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55. When pleading under a foreign law, are legal experts or co-counsel the best way to convince the arbitrators?

56. What is the proper timing for drawing adverse inferences? If one would not produce documents following a document production, would adverse inferences already be appropriate at that time or would other evidence taking measures first have to be taken (e.g. witness examination).

57. Is it appropriate for a tribunal to appoint an independent expert even after two pre- and two post-hearing submissions that had party expert evidence attached to them? Should such a decision not be made earlier on in the procedure and in any event no later than during or shortly after the hearing? Should cost-considerations also not play a role?

58. Without prejudice meetings of experts followed by a joint statement are increasingly a standard part of international arbitration procedure. Are meetings between the experts more effective if they take place before or after they have written their individual reports?

59. Is expert dialogue really without prejudice or do experts abuse the process - particularly when it comes to areas such as the preparation of joint expert statements - are these really prepared in isolation by the experts, or do legal teams play a role in their preparation?

60. What is people's experience of the process of simultaneous exchange of expert reports? In theory this sounds like a sensible process in order to focus the expert evidence, but in reality does this actually work or does it prevent experts from having the chance to properly consider and respond to each other's evidence?

61. Where contemporaneous documents support, for example, the value of a company, is expert evidence necessary? When faced with differing expert views on value, Tribunals will sometimes revert to relying on contemporaneous documentation instead. Where such evidence is available does quantum expert evidence add anything to the process or does it simply muddy the waters?
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H. Investor-state arbitration

62. Does the recent decision of the High Court affirming the applicability of the act of state doctrine in international arbitrations seated in London threaten the attractiveness of London as a seat for disputes involving States?

63. UNCTAD report that between 1987 and July 2017, only 59% of ISDS proceedings were decided in favour of the investor, and 41% were decided in favour of the State (http://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf). It also reported that on average the successful claimant was awarded only about 40% of the amount claimed. Given the time and resources required to deal with damages, do these figures make a strong case for bifurcation of liability and quantum in ISDS proceedings as the default position?

64. An investor’s investment was expropriated on 1 June 2008. In September 2008 the global financial crisis hit rendering, as a matter of objective fact, the investment worthless. The investor argues that fair market value, the basis for compensation under the relevant BIT, must be assessed as of 1 June 2008 without using hindsight. Does this result in an undeserved windfall for the investor and, if so, should principles of valuation in investment treaty claims be applied more flexibly to put the investor in the position they would have actually been in but for the expropriation.

65. In light of the recent Vattenfall decision where the ICSID tribunal rejected Germany’s jurisdictional objection on the basis of Achmea, how will this conflict between EU and public international spheres be reconciled and how will this conflict impact arbitral users trying to establish or object to jurisdiction in the interim?

66. Slovak Republic v Achmea BV – a judgment against international arbitration or a legitimate defence of EU Law? Discuss.

67. What impact will the Trump administration have / is the Trump administration having on BIT claims?