Diversity

1. Anecdotal evidence has it that arbitral institutions have made progress in ensuring more diversity in appointments but the same may not necessarily be the case for tribunal chair appointments by co-arbitrators. If so, what can be done to provide for more diverse appointments?

2. Do you think institutions should introduce and promote the redaction of names (sex and age) of arbitrators when proposing arbitrators for appointment thus only providing CVs/profiles?

3. How to convince Asian parties to have Asian arbitrators?

Arbitrators (appointments and challenges)

4. The very seasoned arbitrator: unfit for appointments by the institution?

5. “Frequent flyers” – How many appointments by a single party is too many? Should the practice differ for different sectors?

6. How important is the expertise in the subject matter in appointing an arbitrator? Is the governing law also important element in choosing an arbitrator?

7. Are interviews with prospective arbitrators common in Korea and throughout Asia?

8. How important is the clients possibility to appoint the arbitrators themselves when choosing between arbitration institutions?

9. Would corporates from civil law based Asian jurisdictions prefer to appoint (European) civil law trained arbitrators?

10. Do the parties increasingly ask to the institutions to perform appointments giving however detailed criteria for the potential candidates? Is this a trend that can be observed in LCIA cases? Are there more challenges with respect to party-appointed arbitrators than there are in case of institution-appointed arbitrators?
11. In Haliburton v Chubb [2018] 1 WLR 3361, what can we expect from the Supreme Court in the UK? Will there be any effect on international arbitrations seated elsewhere?

12. Are the IBA Guidelines on Conflict of Interest widely recognized in Korea and Asia Pacific?

13. Standards for disqualification: Is the experience among participants that some (or many or even most) arbitral institutions apply two different standards for disqualification depending on the stage of the arbitration?

14. Can an arbitrator’s non-disclosure on the basis of ‘privileged information’ be an excuse and a successful defense to a challenge?

15. We see more and more challenges of arbitrators nowadays. How does the increase of challenges affect the practice of appointment by institutions or the standard of challenges itself? Should arbitrators’ failure to disclose circumstances likely to give rise to doubts as to their independence and impartiality have consequences and if so what kind of consequences should be granted.

16. Is there a theoretical outer limit on the number (or proportion) of cases in which an arbitrator might be appointed on the same side of an investor-state case (sovereign or claimant) without leading to reasonable questions about partiality?

Experts

17. Is there a cost-effective way of using Tribunal Appointed Experts?

18. Is the CIArb Protocol for the Use of Party-Appointed Experts a more effective procedure for adducing expert evidence than the traditional exchange of first round reports, second round reports, meetings, and statements of agreement/disagreement?

19. What is the most effective procedure for witness conferencing with experts?

20. Is expert conferencing (hot-tubbing) common in Korean based arbitration proceedings?
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21. To what extent, if any, can arbitrators rely on unsupported expert opinions?

22. Are joint expert statements exceedingly becoming common?

23. Ethics of witness preparation

24. Does or should the Singapore Court of Appeal decision in Ernest Ferdinand Perez De La Sala v Compañía De Navegación Palomar, SA [2018], which lays down the Court’s views on how witness statements and oral testimony should be prepared, apply to arbitration conducted in Singapore?

25. What weight can be attached to evidence given in the form of written witness statements? Does this depend on the degree to which counsel is involved in their preparation?

26. What should arbitrators and parties do to avoid the situation of “ships passing in the night” by party appointed experts?

27. Independence of party appointed experts, is it a myth?

28. The US Federal Arbitration Act provides in Sect. 7 that arbitrators may “summon in writing any person to attend before them or any of them as a witness”. If a summoned person fails to obey, then the US District Court at the place of the arbitration may compel the attendance or punish the person for contempt. Does anyone have any experience with this or similar procedures in other countries? How often is this used? Was it successful in getting the witness to testify?

Practice and Procedure

29. Due process paranoia

30. Are arbitrators still infected by due process paranoia and timidity in not putting their foot down, insisting on quicker timetables, particularly bearing in mind the dearth of court decisions setting aside awards where arbitrators have been tough on procedures?
31. In an age of due process paranoia, how often do tribunals “gate” and find that the testimony of factual or expert witnesses is not necessary or should be curtailed? Although fairness concerns must be balanced, as a means of enhancing efficiency, should such rigor be encouraged and, if so, how? For instance, many arbitrators believe they can actually be “penalised” by institutions for their efficiency because their fees are reduced when the proceedings are simplified and time spent is shortened.

32. The standard (not burden) of proof – why do arbitrators shy away from (expressly) defining it, and why don't we force them to decide on the issue early in the proceedings?

33. Significantly different fees are charged by members of the panel (particularly wing members) for the reference. How should one approach this, particularly if you suspect one of the Tribunal has not spent the time on the reference that is being charged for?

34. Lately, in a number or arbitrations, there has been a significant difference between the parties’ respective legal fees with the successful party sometimes claiming almost twice as much as the losing party. The losing party in turn argues that the successful party should only be entitled to recover legal fees not exceeding the legal fees the losing party had incurred. What has been the experience of the attendants at this Symposium in deciding recovery of legal fees in such situation?

35. It is increasingly said that an arbitral process that facilitates settlement is the best resolution. What effects might hourly rates vs ad valorem have on this?

36. Should arbitrators be incentivised via their fees for reaching a settlement? In contrast to state court judges who may feel they "profit" from a settlement as they do not need to render and draft a judgment, arbitrators usually face a substantial if not disproportionate reduction of their fees in case of a settlement and the question is whether this should be changed and if so, how and when.

37. How to organise expedited procedures effectively?

38. Some institutions offer an arb-med-arb procedure. The parties’ dispute is referred to mediation immediately following the constitution of the tribunal with the arbitration commencing after a specified period of time (subject to the parties’ request to continue the mediation, or to a settlement, which may include a request for a consent award). Given the strong interest in mediation in Asia, and the advent of the Singapore Convention might the LCIA consider including such a protocol in its rules?
Would corporates from civil law based Asian jurisdictions prefer to have a civil law or common law based approach to arbitration procedure; e.g. discovery, testimony and cross examination, witness statements, (active) role of counsel?

How effective is the Singapore Mediation Convention really going to be, and will the usual tools and tactics be available and workable? In truth how often have internationally mediated settlements had to be enforced?

How, if at all, will the newly-signed Singapore Mediation Convention impact international arbitration?

Why is emergency arbitration so popular in Singapore under the SIAC Rules, but not in other jurisdictions?

Is Hong Kong losing its attractiveness as a place of arbitration? Are concerns about the independence of its judiciary legitimate and if so as well with respect to arbitration-related matters?

How will the Korean Arbitration Industry Promotion Act (2017) help position Seoul as a hub for international arbitration? Can foreign counsel prosecute cases seated in Korea?

Under the 2016 Amendments to the Korean Arbitration Act, ‘antitrust disputes’ are now arbitrable. Has there been any cases/precedents?

Is the Korean arbitration system heavily influenced by American practices despite having been originally influenced by Japanese law?

To what extent, if any, is the ‘group of companies’ doctrine recognized under Korean law for the joinder of third parties? Other recognized doctrines/principles under Korean law?

The “Proactive” Arbitrator: To what extent is it appropriate for the Tribunal proactively to try to uncover potentially relevant facts and evidence which the parties themselves have not produced? Is there a common law/civil law divide with regards to the seat of the arbitration and/or the nationality or qualification/training of the arbitrators?
Is it ever appropriate to conduct an “in camera review” of documents to resolve a specific dispute? If so, what is the best approach: full tribunal; chairperson only; or appoint a third party? Any other practice pointers?

Would corporates from civil law based Asian jurisdictions prefer to appoint counsel from “international law firms” i.e. mostly common law originating law firms?

Among other things, Rule 18.6 of the LCIA Rules allows tribunals to issue to counsel a “written reprimand” or a “written caution as to their future conduct in the arbitration” for violation of the General Guidelines for the Parties’ Legal Representatives. How often is this done? Should the more robust sanctions that were considered such as publicizing counsel’s misconduct, excluding the legal representatives or reporting them to their professional regulatory bodies be reconsidered?

PO No.1 is getting longer and longer. To what extent PO No.1 should set out the procedural issues at the outset of the proceedings? Who should take a lead in drafting PO No.1?

The determination of preliminary issues can often advance the arbitration effectively. Conventionally, this has included bifurcation, but it may also be possible to run these issues in tandem with the timetable for the remaining issues. What is the experience of others with the relative merits of each option?

Does unconscious bias affect choice of law issues? We read it affects most other aspects of our lives.

How useful have the Prague Rules been to date?

What can we learn from the Prague Rules? What are pros and cons of the Rules?

The Prague Rules, unveiled last December, seem unlikely to replace the IBA Rules as the preferred “soft law” instrument for handling evidence. However, do practitioners think the Prague Rules’ emphasis on avoiding document production altogether might prompt tribunals to apply the IBA Rules more carefully in this area? Do practitioners agree that many tribunals have moved away from honoring the narrow language in the IBA Rules that is supposed to limit document disclosure to “narrow and specific categories” of documents?

Is the use of Tribunal Secretaries common in Korea?
59. Why are some sectors (e.g. financial services) resistant to the charms of arbitration; what can be done to change this (if it is a) culture

60. Even with institutions adopting expedited procedures, and summary judgement, have we got it all wrong, as end users prefer quicker procedures at less cost eg statutory adjudication where arbitrations or appeals are rare? Justice delayed is justice denied.

61. Impact of the EU and other transnational legal systems on international arbitration (e.g. investor state dispute rules) and developments post-Achmea

62. Application of GDPR to international arbitration involving European parties

63. Should we be concerned about the impact of GDPR in Asia?

64. Almost 18 months after the coming into force of the EU General Data Protection Regulation: What do arbitral tribunals provide for in Terms of Reference or procedural rules?

65. Lately, we have seen several new best practise guidelines being introduced by different arbitration organizations, such as the Spanish Arbitration Club (CEA), the Indian Arbitration Forum and the Nordic Offshore and Maritime Arbitration Association – all from the last year. Is there a need for such guidelines and what will be the consequences?

66. Experience with proceedings in the US courts to order depositions in aid of arbitration under 28 U.S.C. Section 1782(a) There is a conflict in the U.S. Courts as to when this may be ordered. In some instances the panel may become involved in this issue.

67. Evidential effect of judicial or tribunal’s findings of criminal conduct in other proceedings

68. Will the new "international commercial courts" that are coming into existence in many places become a threat to international arbitration as they may be seen by potential users as the better alternative?

69. To what extent does award scrutiny help / hinder an institution’s attraction for contracting parties
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70. Do the IBA Rules have sufficient “teeth” to sanction a party for non-compliance?

71. To what extent does the LCIA support or dis-encourage the emergence of new Arbitration Centres and their Rules? Do new Arbitration Centres and Rules further the cause of raising standards in arbitration?

72. Emergency arbitrators seem to be going out of fashion, particularly due to concerns that either they are not required, or that an ability to obtain urgent relief from the courts may be diminished. Do emergency arbitrators have a future?

73. Many arbitral institutions have now adopted efficient and effective emergency arbitrator rules. In my experience both as an arbitrator and advocate, they can provide essential emergency relief, thereby preserving documents, assets and disputes until an arbitral tribunal may be constituted and ready to rule. The threat of an appointment within 48 hours has also added sharp focus for decision-makers, leading to settlements. It would be interesting to have a discussion of the strategic/tactical pros and cons of applying for emergency relief. I have seen instances where the temporary service of an emergency arbitrator proved to be advantageous (e.g., where a negative determination on the requested relief did not prejudice the eventual tribunal itself) and others where it was not (e.g., where the emergency relief required a substantial investment of time, which needed to be duplicated once the tribunal was formed). When is it better to ask not for an emergency arbitrator, but rather for an expedited appointment of the tribunal?

Orders and Awards

74. Advantages vs disadvantages of order vs multiple awards within the same proceedings. Why do some arbitrators prefer to issue multiple awards, especially in construction cases, instead of using orders and/or concentrating the issues in one or at most two awards?

75. Jura Novit Curia in International Arbitration: Do other participants ever include a provision regarding “Jura Novit Curia” in the procedural directions and how do parties react if/when such a provision is suggested? Does geography (parties, counsel or seat of arbitration) matter?

76. Interim Costs Orders: Do provisions for Interim costs orders work (i.e. deter frivolous applications)? If provisions for interim costs orders exist, do tribunals actually issue such orders, or do most tribunals defer dealing with costs to the final award?

77. Enforceable award. To what extent the tribunal shall make efforts to render enforceable award?

78. Enforcement of dispute outcomes – is arbitration a solution to enforcement problems associated with the UK / EU split
79. The US Supreme Court has recently granted cert in a case where it is being asked to rule on whether a non-signatory on a theory of equitable estoppel can compel arbitration against a signatory to an arbitration agreement governed by the NY Convention. At issue is whether the Art II(2) requirement of an “agreement in writing…signed by the parties” precludes invocation of the NY Convention. See GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC (Docket No. 18-1048). The issue has been addressed in other jurisdictions. Should Art. II(2) be a floor or a ceiling for enforcing an arbitration agreement? What law governs the question of compelling a non-signatory to arbitrate?

80. What are the best ways of “encouraging” (1) your Chair to produce the draft award within a reasonable time frame, and (2) your co-arbitrators to provide their comments?

81. Do Asian parties accept their arbitral awards to be published?

82. Why are arbitrators very reserved when considering claims for moral damages?

83. Do arbitrators need help to reason the reasoning of their awards?

84. Pros and cons of summary procedure / early dismissal of claims and defences on the merits. Experiences.

85. Comments on antisuit injunctions granted by arbitrators.

86. Can arbitrators grant interim relief that has been denied by courts in the seat of arbitration?

87. Are deliberations exceedingly taking place by email? Is that aligned with the Parties’ expectations?

88. Obtaining an arbitration award is one thing and successfully collecting money by enforcing an award is another. What should parties do to prepare for the enforcement during the arbitration proceedings?

89. Whether emergency arbitrators tend to feel more free to issue interim measures? If so how does it affect the EA practice?
Default publication of commercial arbitration awards – what purpose does it (really) serve? And should the parties' arbitral award really be the arbitrators' sales pitch?

Technology

Best practices in maintaining data security of information that the panel receives in the course of the arbitration.

The client’s use of technology is often highly developed. At the same time many arbitration institutions still use emails for sending case files between the involved parties and arbitrators. How important will a modern and secure technology be in, what seems to be, an increasingly competition between the arbitration institutions?

Are cryptocurrency disputes arbitrable under Korean law? Other laws?

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

Is there a way for institutions to encourage arbitrators not to ask for (A5 booklet) hardcopies of submissions, evidence and hearing bundles?